Legitimacy, Justice and Public International Law

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choose one's form of life is a basic principle of a society which guarantees basic liberties. Autonomy in the sense of having the (economic) means to pursue a plan of life is also considered by many cosmopolitans as the benchmark of a global conception of justice.[20]

To conclude: monism seems an implausible position facing several objections:

a) The way monism blurs the distinction between public and individual morality leads to implausible consequences.
b) The adoption of the difference principle as a principle of personal choice results in unclear, but probably also excessively demanding, requirements and burdens. Exactly what contributes to the advantage of the worst off person? What do we have to do in order to promote the advantage of the worst off?
c) Strengthening the moral requirements on the side of individuals might not have the desired effect – not because moral motivations are too weak or contingent as such, but because they might have no impact on underlying structures.[21]

The strategy of putting more weight on personal duties also proves unhelpful in the case of global inequalities. Nevertheless, there is a strong tendency among cosmopolitans to pursue that line. Given the pressure of a severe problem like world poverty, many are tempted to discharge the moral burden in terms of strong individual moral obligations. Pogge's work on world poverty is an example.

Global justice and individual moral duties

In his book *World Poverty and Human Rights* Pogge combines cosmopolitanism with an institutional account: the primary moral units are individuals; institutional reforms, however, are the prior means of fighting global inequalities and world poverty. Severe poverty is a violation of basic human rights. Human rights, including social and economic rights, are the basic normative parameter for developing a just world order. The main goal is not redistribution on a global level, but 'an economic order

[20] See, for example, Martha Nussbaum's position in M. C. Nussbaum, *Frontiers of Justice. Disability, Nationality, Species Membership* (Cambridge MA: Harvard University Press, 2006), ch. 5.

[21] See D. Jamieson, 'Duties to the Distant: Aid, Assistance, and Interventions in the Developing World', *The Journal of Ethics*, 9 (2005), 151–70, for striking examples of problematic consequences of direct transfers of aid and assistance.

under which each participant would be able to meet her basic social and economic needs'.[22] The normative aim of Pogge's position is to guarantee all humans a life beyond marginalisation, poverty, hunger and death due to malnutrition. The focus is on a threshold of a minimally decent life, not on redistribution as such.[23]

Pogge develops an 'institutionalist interpretation' of human rights according to which human rights are claims against those social orders that have the power of enforcing their regulations. Yet human rights also place demands in regard to personal choices and duties of citizens. If a social order does not meet its obligation to guarantee human rights, then individuals who profit from this system have a duty to engage in activities to reform it. As Pogge writes:

> The normative force of others' human rights for me is that I must not help uphold and impose upon them coercive social institutions under which they do not have secure access to the objects of their human rights. I would be violating this duty if, through my participation, I helped sustain a social order in which such access is not secure, in which blacks are enslaved, women disenfranchised, or servants mistreated, for example. Even if I owned no slaves or employed no servants myself, I would still share responsibility: by contributing my labour to the society's economy, my taxes to its governments, and so forth.[24]

Pogge considers two negative duties as crucial, namely, the duty not to violate and undermine just institutions, and the duty not to participate in the upholding of unjust institutions or to profit from them. Individuals do have a collective responsibility to ensure that the institutions they help sustain are just. If other persons die because of poverty, then this amounts to a violation of a negative duty, namely to respect the basic right to life and bodily integrity. To help poor people therefore cannot be a positive duty in the classical sense of a duty of beneficience or of assistance.

The reason why Pogge postulates the duty towards poor people as a negative one is clearly to emphasise the moral urgency at stake. His

[22] Pogge, *World Poverty and Human Rights*, 182.

[23] The basic parameters of global justice are human rights, more so: economic rights. On the global level it is important for Pogge 'to choose or design the economic ground rules that regulate property, cooperation, and exchange and thereby condition production and cooperation' (Pogge, *World Poverty and Human Rights*, 182). Pogge holds that this offers 'a standard for the moral assessment of alternative feasible schemes of economic institutions' which is independent of 'the idea of already owned resources to be *re*-distributed' (*ibid.*).

[24] Pogge, *World Poverty and Human Rights*, 70.

argument seems to be: if we consider the duties towards poor people as positive duties, then the injustice suffered by the global poor would not receive the moral attention it deserves.

Is Pogge's move to impose on individuals living in developed countries a negative duty towards people in poor countries convincing? Usually the distinction between negative and positive duties is drawn in the following way: negative duties are duties to refrain from doing something; positive duties are duties to do something: they involve positive action. On Pogge's account of negative duties, however, the distinction between active and passive collapses, since his negative duties do involve positive actions. The negative duty of individuals not to violate the human rights of people in poor countries by profiting from an unjust economic world order has to be discharged by certain positive actions, for example, by protesting against the unfair regime of international organisations, possibly also by moving to other places and leaving one's country. As Pogge writes:

> I might honor my negative duty, perhaps, through becoming a hermit or an emigrant, but I could honor it more plausibly by working with others toward shielding the victims of injustice from the harms I help produce or, if this is possible, toward establishing secure access through institutional reform.[25]

Two objections come to mind. First, one might be tempted to object that Pogge's position amounts to a confusion of negative and positive duties since negative duties are duties to refrain from doing something and not duties to take positive action. This criticism depends on the stringency of the active/passive distinction. However, this distinction is a notoriously fragile one. In specific circumstances, the negative duty not to endanger the life of others can be discharged only by a positive action: if someone is drowning, and we are in a position to help, we violate the negative duty towards the drowning person by not taking positive action. So the possible argument that Pogge mixes up negative and positive duties in an illegitimate way is not convincing.

A second objection is more to the point. In his analysis of the moral claims posed by world poverty Pogge tries, as already pointed out, to avoid the consequences of reading positive duties as being weaker than negative duties.[26] The way in which he spells out the claims of poor

[25] Pogge, *World Poverty and Human Rights*, 72.

[26] This quite common interpretation is often (erroneously) justified by referring to Kant's distinction between perfect and imperfect duties.

people apparently appeals only to negative duties. Pogge sees in the lack of help for poor people a much stronger violation of a duty than occurs when a person has not fulfilled her positive duty of assistance or beneficence. In order to escape the classical problem that positive duties allegedly do not have the moral weight of negative duties, he tries to avoid the appeal to positive duties altogether.

Pogge is certainly right to complain that the moral weight of the problem of world poverty is not recognised adequately. Yet the urgency of the issue of world poverty can also be emphasised if the classical distinction between negative and positive duties remains. In Kant's framework, for example, the moral strength of positive duties and negative duties is equal; positive duties are not weaker. Moreover, there is an important reason why Kant separated negative from positive duties, which we should take seriously. By ignoring this Kantian point, Pogge comes close to violating some fundamental liberal premises in regard to the scope of moral obligation.

Kantian duties of justice are different from duties of virtue in the following respect: duties of virtue are directed towards ends, i.e. ends which the individual recognises as right and appropriate according to practical reason. The ends are not set arbitrarily; they are normatively prescribed: one's own perfection and the happiness of others.[27] Duties of virtue are wide duties; duties of justice are strict or narrow duties. Duties of justice are of strict obligation because they demand or forbid a *specific action*. They are negative duties, so-called duties of omission (*Unterlassungspflichten*). A duty of omission can only be discharged by not doing a specific action.

Duties of virtue, however, demand the realisation of ends, whereby it is left to the judgment of the individual person in which way to fulfil these requirements. The reason why duties of virtue are classified as wide duties is that they express a broad moral obligation which need not be discharged by a specific action. The leeway in fulfilling positive duties of virtue is due to moral epistemology: individuals are, given their

[27] See I. Kant, 'Introduction to the Doctrine of Virtue', in Kant, *The Metaphysics of Morals. Part II: Metaphysical First Principles of the Doctrine of Virtue*, edited by M. Gregor (Cambridge University Press, 1996), 150f. (Academy edition: 6:387, 6:388). For a highly insightful discussion of Kant's account of virtues see C. M. Korsgaard, 'An Introduction to the Ethical, Political, and Religious Thought of Kant', in C. M. Korsgaard, *Creating the Kingdom of Ends* (Cambridge University Press, 1996), 18–22; cf. also Korsgaard, 'Kant's Formula of Universal Law', in Korsgaard, *Creating the Kingdom of Ends*, 82–4.

knowledge of the particular situation and circumstances they are in, better judges about how best to fulfil their moral obligation than a universal law procedure that generalises over cases could tell them.[28] The moral law establishes the obligation as such, while determining the details of how to live up to it must be left to individual judgment.

Positive duties differ from negative duties because the idea of universal moral legislation does not tell one in which way the normative obligation can and should be fulfilled in a specific context and situation. So the inevitable particularity of living up to such demands is the reason why duties of beneficence are a positive duty, i.e. an imperfect duty in Kant's terminology. The moral judgment of the person is necessary to determine in which form he or she can fulfil this obligation.

The Kantian specification of negative and positive duties is highly relevant for assessing which duties the problem of global justice implies. To defend an account of global justice that allows for positive duties does not amount to a weakening of normative force. It merely means that the obligation to take measures against global poverty creates on the side of individuals an obligation to do something, though in which way individual persons fulfil this requirement is a matter of their personal moral judgment. This is the case because individuals do have the competence to decide in which form they can best discharge the general moral obligation, given the particular context they are situated in. A universal prescription of justice as it is given in the case of negative duties would restrict the individuals' autonomy in pursuing their moral ends. The political conception of justice, which distinguishes clearly between principles of justice and individual moral duties (including positive duties), grants that autonomy; but a version of cosmopolitanism like the one Pogge defends – which recognises merely negative duties – limits this autonomy in a problematic way.

Negative duties are duties of justice. They drastically limit the freedom of individuals to set their own ends. This is justified if basic rights of others, for example their right to life and bodily integrity, would be violated directly by specific actions of individuals. Pogge claims that persons who profit from an unjust social and economic order do have a negative duty to protect the victims of this unjust order and to work towards a reform of it. The question is: what kind of duty is the negative duty appealed to here? It is certainly not a duty of justice in a juridical sense. We do not imprison people in rich countries if they neglect their

[28] Korsgaard, 'An Introduction to the Ethical, Political, and Religious Thought of Kant', 21f.

duty to work towards a reform of social institutions. Pogge concedes this point when he emphasises that he promotes a version of a moral, not a legal, cosmopolitanism.

In the sphere of morality – and global justice is a question of morality on Pogge's account – there is no recourse to the use of force. It is, however, a characteristic of negative rights and duties that there is strong reason to enforce them by state power. Positive duties cannot be enforced this way, at least not within a fairly liberal framework.

If people's individual choices in developed countries were normatively determined by the Rawlsian principles of justice, at least by the difference principle, then their way of living would have to be organised around the aim and end of reducing serious economic inequality. This might result, as pointed out, in excessively high demands and requirements on the side of individual persons. Why should persons have the duty to give up their form of life and accept a rather arduous way of living? Do they really have a conclusive reason to regard their form of life as wrong, especially if they do not have a luxurious lifestyle and could not afford it anyway? This sceptical question becomes even more urgent because many individual efforts to eliminate global inequalities are undermined by structural factors and disastrous political developments.

So two aspects of Pogge's account seem to me problematic. First, there is a conceptual difficulty in the way he defines and uses the notion of a negative duty. The duties he postulates as negative ones amount structurally to positive duties. Second, Pogge's inadequate use and application of the notion of a negative duty has the consequence that his account entails excessive requirements on the side of individuals.

People in economically well-off countries violate a negative duty, according to Pogge, by profiting from a social order that has unjust and harmful consequences for persons in other areas of the world. So they have a negative duty to protest against such an unjust economic order. However, individuals cannot be under an obligation to forego an action which they have not undertaken – namely to harm other persons directly by one of their actions. Though individuals are not directly responsible for global inequality, Pogge's account subjects them to heavy burdens which, I think, are unjustified.

Pogge's argument, for example, requires each person who profits from the currently unjust global economic order to take action against the unjust practices of global institutions. Pogge emphasises that there are several possibilities to fulfil the negative duty of not doing harm to poor people in poor countries. However, the possibilities he offers – organising political

action, protesting, and even emigrating to another country – are in their daily consequences harsh alternatives. Not everyone is in a situation that allows her to fight constantly against the WTO, the World Bank and the IMF. Many people could not live their lives in such a context of permanent protest. Those who have to care for children or for elderly or sick people cannot fulfil this programme. And the demand that one morally ought to emigrate to another country because one's own country is involved in possibly harmful practices seems absurd.

One might argue that Pogge allows leeway for individuals in judging how they best live up to the obligation. This is correct: Pogge mentions that there are several ways to fulfil the negative duty of not doing harm. However, to argue this way just amounts to saying that the duties at stake are positive duties. The characteristic element of positive duties is, as I have pointed out, that they admit of a contextual interpretation whereas negative duties require refraining from a specific action.

Pogge's construction of negative duties on the side of individuals profiting from an unjust economic order is implausible. A theory of global justice cannot require a negative duty on the side of individuals to engage in permanent resistance or civil disobedience against unjust international organisations. The right of having autonomy in choosing one's plan of life is not compatible with a position that demands permanent political struggle against social and political orders, especially when their responsibility seems to be not always clearly given.[29]

The result of my discussion of Pogge's position is that we should be careful in giving up the conceptual separation between principles of justice addressed to institutions and the moral duties of individuals. A monist account is, as I pointed out, not a satisfactory alternative. Therefore, a combination of the normative design of institutions with an account of the moral duties arising on the side of individuals is more promising. Such a normative conception would need to prescribe both the institutional measures to fight poverty and the individual moral duties that would further the effect of such institutional measures.

Pogge, in a way, keeps to the separation between principles of justice guiding institutions and principles guiding individual choices, but in his

[29] In which way can an unemployed factory worker whose previous employer transferred the production of the company to a country with cheap labour, be made responsible for the condition of the inhabitants of a developing country? Moreover, how can she be made collectively responsible for violating a negative duty, namely not to harm or kill other people?

account of negative duties he undermines it. In this respect the political conception of justice is more plausible as it distinguishes clearly between those normative principles which are guidelines for institutions and those principles which guide individual choices.

To conclude: a main feature of Pogge's account is his rejection of the classical understanding of duties to help other people as so-called positive duties.[30] The idea is that an interpretation of our duties to poor people as positive duties amounts to a status quo justification rather than a remedy to the problem of world poverty. However, understanding positive duties as being weaker than negative duties – an assumption Pogge shares – depends, as I tried to show, on a mistaken reading of Kant's account of positive duties. A political conception of justice need not be committed to the thesis that negative duties have more normative strength than positive duties. Once we concede that negative duties and positive duties have equal weight, one of the main objections Pogge raises against a political conception of justice loses force.

But in another respect the political conception (at least some versions of it) is not convincing: its tendency to limit justice and accountability to state borders is indeed highly problematic. In the next section I will argue that this deficiency can be corrected without giving up the basic framework of a political conception of justice.

Global justice and national boundaries

Recent political theory has questioned the legitimacy of the nation-state system. According to cosmopolitans, the nation-state is in many ways a hindrance to a just global normative order. National borders, so the criticism goes, are not compatible with a global moral outlook and the

[30] Pogge criticises, for example, Rawls's classification of the natural duty of justice, i.e. the duty of assistance, as a positive duty. Rawls, he argues, thereby gives our duty to help others in need insufficient normative weight. See T. Pogge, *World Poverty and Human Rights*, 140, 292 (n. 211, 212). This criticism of Rawls (which depends on Rawls's interpretation of positive duties in *A Theory of Justice*) is justified as far as Rawls's reading of individual positive duties is concerned. (Rawls assumes in *A Theory of Justice* that individual positive duties are weaker than negative duties.) But Pogge's objection does not touch on Rawls's position as he outlines it in *The Law of Peoples*. In *The Law of Peoples* Rawls claims that peoples do have a duty of assistance towards burdened societies. However, that duty of assistance is not a natural or 'weak' positive duty; it is simply a normative guideline for the way societies ought to shape their international relations. Pogge confounds what Rawls says in regard to institutions and institutional policies with what Rawls says in regard to individual morality.

inclusion of all the members of the world society.[31] Political and social rights – for example, citizenship, residency and the right to work – are not granted universally; they are granted to certain people, and the nation-state is the institution that has the authority to confer or withhold these privileges. The partiality nation-states show towards the wellbeing of their citizens does not sit well with the demand that all people have an equal moral standing and an equal right to moral consideration. These quite familiar cosmopolitan arguments raise the question as to whether the nation-state is a precarious institution from the point of view of justice.

A political conception of justice, as we find it in Rawls's work, does not question the nation-state order. Its main focus, namely to formulate the principles and conditions of the just basic structure, presupposes implicitly that societies are organised in state units. Rawls's extension of his political conception to the international sphere in *The Law of Peoples* does not challenge the nation-state system as such, either.

Some defenders of a political conception of justice, however, have made a stronger claim, namely, that a state order is a necessary framework for social justice. One philosopher who has recently defended a political conception of justice along this line against a cosmopolitan reading of global justice is Thomas Nagel. He proposes a coercion-based version of political justice: justice has to be backed by state authority and requires 'government as an enabling condition'.[32] Nagel justifies this assumption with the connection between sovereignty and justice:

> What creates the link between justice and sovereignty is something common to a wide range of conceptions of justice: they all depend on the coordinated conduct of large numbers of people, which cannot be achieved without law backed by a monopoly of force.[33]

Nagel links justice to the state structure because he assumes that justice can be realised only by state coercion. Accordingly he limits the scope of justice:

> The full standards of justice, though they can be known by moral reasoning, apply only within the boundaries of a sovereign state, however

[31] Pogge argues that from the standpoint of cosmopolitan morality national sovereignty in its classical form is no longer defensible. Pogge, *World Poverty and Human Rights*, 126–51. Seyla Benhabib equally takes a critical stance towards the nation-state; she diagnoses a 'disaggregation of citizenship' as a consequence of migration and a dissociation of citizenship and cultural identity. See S. Benhabib, 'Democratic Iterations. The Local, the National, and the Global', in Benhabib, *Another Cosmopolitanism* (Oxford University Press, 2006), 45–80.

[32] Nagel, 'The Problem of Global Justice', 114. [33] *Ibid.*, 115.

> arbitrary those boundaries may be. Internationally, there may well be standards, but they do not merit the full name of justice.[34]

Nagel holds that justice refers to the basic institutions of society; justice cannot apply to individuals outside the realm of the nation-state. Justice is, therefore, an 'associative obligation', only owed to those with whom we have strong political relations. We do not have a full obligation to those with whom we have not yet established political relations within a sovereign nation-state which subdues us to its coercive power. We can speak of egalitarian justice regarding the internal structure of the nation-state, but absent a global coercive power (which for Nagel clearly is not in place) there can be no global justice – neither in the sense of individual relations between persons nor between global institutions.

Nagel acknowledges, of course, the existence of institutions and organisations on a supranational level. He denies, however, that these new developments of global interaction do away with the significance and priority of the nation-state. International organisations are, as he points out, simply tools for establishing ways for nation-states to 'cooperate to better advance their separate aims' and he adds that 'they rely on the enforcement of the power of the separate sovereign states, and not on a supranational force that is responsible to all'.[35]

Nagel's argument goes against the line of much of current theorising, especially the global horizon and global governance rhetoric we often encounter in this field.[36] His standpoint looks stunningly conservative. The criticism of Nagel's coercion-based account has been sharp.[37]

[34] *Ibid*., 122. [35] *Ibid*., 140.

[36] For a good criticism of that rhetoric cf. Jean Cohen, 'Whose Sovereignty?: Empire versus International Law', in C. Barry and T. Pogge (eds.), *Global Institutions and Responsibilities: Achieving Global Justice* (Oxford: Blackwell, 2005), 159–89, here 164–70.

[37] One critic has argued that Nagel's coercion-based political theory of justice 'rests on a perverse normative principle'. See Abizadeh, 'Cooperation, Pervasive Impact, and Coercion', 351. The perverse normative premise is, according to Abizadeh, Nagel's claim that demands of justice arise only if a person is subjected to state coercion 'regulated by a system of law carried out in her name, i.e. actively engaging her will' (*ibid*., 351). This assumption entails, Abizadeh criticises, that a state can avoid accountability in terms of justice 'by denying to those whom it coerces any standing as putative authors of the system of coercion'; a consequence which seems 'perverse' in regard to the force states enact against foreigners and possible immigrants (*ibid*., 351). This criticism seems only justified if Nagel would hold that states can enact immigration regulations arbitrarily, without any need to account for them. Yet Nagel merely claims that states have the duty to enact those laws with an eye to the will and consent of the members of that state. One might criticise that such a conception inevitably leads to rather restrictive immigration laws, but the assumption as such certainly does not seem perverse.

However, I think Nagel's account offers, aside from the limited way Nagel himself understands it, a normative standard for the assessment of international organisations and relations.

A main objection against Nagel's coercion-based political conception of justice has been that Nagel completely ignores the existence of coercion on the global level: force is not exclusively an element of the nation-state structure. International organisations – for example, the IMF, the WTO – are coercive as well; agreement to their terms is not always voluntary.[38] For example, states often have no choice but to comply with the regulations and policies of those organisations, and they often have no exit option. Moreover, international organisations are, as critics point out, rule-generating bodies enacting norms and guidelines, and non-compliance with imposed trade and finance agreements entails often substantial sanctions. Transnational institutions have intergovernmental power since they have an impact on national decision-making and national normative standards. So Nagel's idea that states join these organisations only to pursue their individual self-interests, and that they remain completely sovereign actors controlling the enforcement of regulations by their national enforcement power, underestimates completely the inevitable transformations on the national level. As Joshua Cohen and Charles Sabel note:

> In joining the WTO in order to participate as fully as possible in the global economy, member states are not agreeing to substitute the domestic rules that they have settled on with the universal laws of efficient commerce. Rather, they are agreeing to remake their rules, in domain after domain, in light of the efforts, recorded in international standards regimes, of all the others to reconcile distinctive domestic regulations with general standards that are also attentive to the interests of others elsewhere.[39]

Some critics take this line of objection, pointing out the existence of coercion on the global level, to be sufficient to reject Nagel's coercion-based account.[40] But such a complete dismissal of Nagel's coercion-based account seems too quick. Nagel's argument, though he himself does not

[38] For a discussion of the no-choice situation of poor countries against IMF policies see J. E. Stiglitz, *Globlization and its Discontents* (New York, London: Norton & Company, 2002), chs. 2 and 3.

[39] Joshua Cohen and C. Sabel, 'Extra Republicam. Nulla Justitia?', *Philosophy and Public Affairs*, 34 (2006), 147–75, here 172.

[40] One example is A. Sangiovanni, 'Global Justice, Reciprocity, and the State', *Philosophy and Public Affairs*, 35 (2007), 3–39. Sangiovanni defends a relation-based version of a

pursue that line, can be extended to the international sphere and can be interpreted as providing a quite useful normative guideline for interactions on the global level.

Nagel's thesis about the connection between sovereignty and coercion entails that the state has a specific responsibility towards those persons who are subject to its coercive power: the state owes its subjects a justification for the way they are treated. As Nagel writes:

> A sovereign state is not just a cooperative enterprise for mutual advantage. The societal rules determining its basic structure are coercively imposed: it is not a voluntary association. I submit that it is this complex fact – that we are both putative joint authors of the coercively imposed system, and subject to its norms, i.e. expected to accept their authority even when the collective decision diverges from our personal preferences that creates the special presumption against arbitrary inequalities in our treatment by the system.[41]

Nagel emphasises that most people have no choice in that respect. But their being members of a political society is connected with 'a special involvement of agency or the will': they have the dual role of being subject to authority but also – ideally – giving their consent to the exercise of authority qua 'participants in the general will'.[42]

What Nagel formulates here is not merely an empirical premise about the connection between justice and coercion, but a normative standard of when coercion is legitimate. Coercion is justified if those who are subject to it could give their consent. Understood in this way, Nagel's coercion-based account has the potential for a normative standard in the international sphere. Are the terms on which states enter international organisations and treaties fair enough for them to give their consent? Are the agreements fair? Is their accountability and justification

political conception of justice: states provide basic collective goods; for example, protection from physical attack and maintenance of a system of property rights; therefore we have special obligations of egalitarian justice to fellow citizens and residents who support the system providing these goods. Sangiovanni's relation-based account seems to me not so different from a coercion-based version of the political conception; the distinction he draws up between the two positions seems artificial. The decisive point in Sangiovanni's defence of a relation-based political conception of justice can only be that the state provides *secure access* to certain goods that others living in this community contribute to create. The production of collective goods within a state-community, however, does not work exclusively on the basis of voluntary commitment, but includes enforcement. So a coercion-based account is at the basis of a relation-based version of the political conception.

[41] Nagel, 'The Problem of Global Justice', 128f. [42] *Ibid*., 128.

given towards those who are subject to sanctions if they do not comply with the agreements and rules?

The problem with Nagel's account is that he restricts coercion and therefore justice to the sovereign state. Cohen and Sabel rightly criticise Nagel for making no room for 'normatively motivated worries about whether global institutions are fair, or accountable and relatively transparent, or democratic, or about how to structure greater participation or representation in their decision making'.[43] That ignorance is not a necessary presupposition of a coercion-based account; it is rather due to Nagel's specifically limited reading of such a position. There seems to be no need to understand the connection between justice and coercion in such a narrow sense. Nagel's version of a political conception of justice associates 'justice' mainly with its realisation in the policies, institutional regulations, and the legislation of a nation-state. Justice is connected with state coercion and is bound to the law backed by a state order. However, a political conception of justice allows us to understand the concept of justice in a wider sense. Standards of justice like reciprocity and fair equality of opportunity are principles of public morality: they are guidelines not only for the design of nation-state institutions but also for the normative and moral assessment of institutions that we create on the global level.[44]

Nagel, we can conclude, is wrong about the site as well as the scope of justice. Issues of justice are not confined to the basic structure of nation-states but arise also in regard to the evolving global basic structure, i.e. those international organisations which do have substantial impact on the social and economic conditions in various countries. International institutions are powerful norm-generating bodies that equally must meet standards of justice, fairness and accountability.[45]

[43] Cohen and Sabel, 'Extra Republicam. Nulla Justitia?', 156.

[44] Nagel's worry seems to be that including problems of global inequality among problems of justice would make it possible to legally coerce individuals who are better off to help those worse off. And that might be objectionable. However, such a consequence might be objectionable also from the point of view of a political conception of justice that recognises problems of global justice and the existence of a global basic structure.

[45] One might argue that the concept of legitimacy which is weaker than the standard of justice might be more apt to assess the policies of international organisations. For such a proposal see F. Peter, 'Global Justice and Legitimacy', paper presented at the 'Absolute Poverty and Global Justice' conference, Erfurt, 18–20 July 2008.

An additional problem of Nagel's account seems to be that he presupposes also a quite restricted conception of legitimacy. See Nagel, 'The Problem of Global Justice', 140, 145. Nagel sees human rights as a part of a minimal humanitarian morality outside the realm of justice. This does not sit well with the standing that human rights as a convention of

Yet extending the limits of Nagel's account in that way does not mean that we have reason to do away with the institution of the nation-state as such. There are several arguments why there is no need to reject the nation-state system in order to reach more justice on the global level. A first argument appeals to the structural advantages of the nation-state. Nation-states are established orders. They are sometimes the result of a long history and difficult struggles. They have a stabilising function and their eruption or dissolution might come at a high cost. Nation-states are not necessarily bad actors and, especially if they incorporate a democratic order and system, they are a basis for culture and identity.[46] To break up such orders might be politically risky and might create less protection in terms of security, guarantees and rights.

A second argument is that there is simply no moral duty for an enlargement of state borders or an elimination of such borders. The requirement for global justice cannot entail the dissolution of the nation-state to be obligatory, since this dissolution does not necessarily lead to more justice. Extensions of state borders often create new injustices.[47] Greater economic equality, as Rawls's important axiom of lexical priority reminds us, might not be a justifying reason to upset existing normative orders, especially if these orders grant basic political rights on the basis of an 'equal freedom' standard.

international law actually possess. Human rights are the standard by which legal orders but also institutional structures and the work of international organisations are assessed. Human rights are connected with the idea of legitimacy in an important way. Human rights are, as Habermas puts it, a necessary component of the concept of legitimacy, because human rights 'ground an inherently legitimate rule of law' (J. Habermas, 'Remarks on Legitimation through Human Rights', in J. Habermas, *The Postnational Constellation. Political Essays* (Cambridge: Polity Press, 2001), 113–29). For an illuminating discussion of the relationship between legitimacy and human rights see also A. Buchanan, *Justice, Legitimacy, and Self-Determination. Moral Foundations for International Law* (Oxford University Press, 2004), chs. 3, 5, 6.

[46] There is a justification of the nation-state *on the grounds* of culture and identity. That is not the approach I put forward here. One can provide a neutral justification of the nation-state that does not rely on cultural arguments, which somehow create problems of exclusion. For a justification of the nation-state on the basis of cultural and national identity see D. Miller, *On Nationality* (Oxford: Clarendon Press, 1995) and D. Miller, *Citizenship and National Identity* (Cambridge: Polity Press, 2000).

[47] There has been, for example, serious criticism in the Maghreb countries (based on appeals to 'equal consideration') that the EU integration of Eastern European countries will diminish the EU support for structural reforms in North Africa. See R. Chennoufi, 'Kulturelle Differenz. Toleranz und Demokratie', in P. Koller (ed.), *Die Globale Frage. Empirische Befunde und ethische Herausforderungen* (Vienna: Passagen Verlag, 2006), 401–17.

A third argument is that the idea of nation-states as autonomous political entities freely consenting to the policies of international organisations – organisations set up as tools for international cooperation, coordination and a better global order – is a powerful normative criterion to assess the legitimacy of these global institutions. Certain nation-states, as has often been pointed out, are in such a weak political and economic position that they cannot display their sovereignty and autonomy in international negotiations and agreements. Therefore the way to go, it seems, is to confirm and secure their equal status and not take an additional step to undermine their autonomy by demanding their disaggregation and dissolution. The idea of equal sovereignty, as Jean Cohen argues, is a criterion for a rule of law regime on the global level:

> The concept of sovereignty is a reminder not only of the political context of law but also of the ultimate dependence of political power and political regimes on a valid, public, normative legal order for their authority.[48]

Should we really be so impressed by the idea of global governance that we would think its emerging possibility gives us a decisive reason to prefer it to the traditional form of state government? Would it bring more justice? The fancy and flattering way with which global governance is sometimes advocated should not deceive us about the possible lack of control, transparency or legitimacy in the decision-making processes of transnational institutions. Certainly, I do not want to raise objections against the existence of these international organisations per se. I also do not want to claim that nation-states as such are always legitimate. However, what I would like to argue is that a strong condition for the political legitimacy of transnational institutions is the free and voluntary agreement of the nation-states that created these institutions by consent. International organisations are accountable to states and their citizens.[49]

Institutions to promote justice are, as Hume tells us, artificial virtues, they are tools we invent and construct to help secure our wellbeing. And Hume adds that concern with the wellbeing of those affected, 'a sympathy *with public interest*', as he phrases it, '*is the source of the moral* approbation, *which attends that virtue*' of justice.[50] Considered that way, some of the controversies between cosmopolitans and philosophers

[48] Jean Cohen, 'Whose Sovereignty?', 173.

[49] For an explanation of accountability from the perspective of a global governance account see A.-M. Slaughter, *A New World Order* (Princeton University Press, 2004), 231–5.

[50] D. Hume, in L. A. Selby-Bigge and P. H. Nidditch (eds.), *A Treatise of Human Nature*. Second edition, edited by L. A. Selby-Bigge and P. H. Niddich (Oxford: Clarendon Press, 1978), 499f.

defending a political theory of justice – for example, the question whether individuals or institutions should be the relevant moral units of global justice – seem not as dividing as sometimes proposed.

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8

The responsibility to protect human rights

DAVID MILLER

I start from the assumption that the responsibility to protect human rights is an international responsibility. Protecting human rights is not just a matter of each state protecting the rights of its own citizens, even though this is one of its primary functions and (arguably) a condition of its legitimacy. For various reasons that I will come to shortly, making human rights protection purely an internal responsibility of states is not going to be effective in many cases. So the wider responsibility falls on that rather elusive entity 'the world community'. Now let me immediately specify, for purposes of the present discussion, the scope of the responsibility to protect. First, the human rights at stake are to be understood in a fairly narrow sense, as basic rights – rights to life, bodily integrity, basic nutrition and health, and so forth. When we invoke the international responsibility to protect, we are thinking about those all-too-familiar instances in which human beings are being placed in life-threatening situations, in which they are being starved, or terrorised, or evicted from their homes, or are dying from disease – in other words are caught up in what we have learnt to call humanitarian disasters. We are not primarily thinking in this context about rights that fall outside this core, such as rights to free speech or political participation, important though these may be in other respects.[1] Second, we are talking about cases in which human rights

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[1] There is some disagreement about whether this wider set of rights should be seen as human rights proper, or as something else – rights of citizenship, for example. My reasons

are being violated on a large scale, not about individual violations such as will, regrettably, occur on a daily basis in most states. It is only when the scale of rights violations crosses a certain threshold that the idea of an international responsibility to protect human rights comes into play.[2]

That idea, I believe, is fast gathering strength as part of what we might call positive international morality, if not yet international law.[3] One reason why it is not yet included as an international legal norm is that it appears to conflict directly with the idea of state sovereignty – in particular with the idea that intervention in the internal affairs of states is never legitimate unless the state in question itself authorises the intervention. Whether in any given case there is indeed a direct clash between the responsibility to protect and state sovereignty may depend on why it is that human rights are being violated: here it may be worth considering the various different scenarios in which the responsibility to protect human rights might be invoked. Without claiming to have produced an exhaustive catalogue, let me distinguish:

a) Natural disasters – earthquakes, floods, droughts etc. – that leave people without food, shelter and other necessities of life.
b) Deprivation that arises as the unintended consequence of government policies, for example disastrous economic policies that leave many people destitute.
c) Systematic rights violations on the part of governments, for example the incarceration of political opponents, punishment of their supporters, use of torture or other degrading modes of treatment.

for favouring the latter view can be found in D. Miller, *National Responsibility and Global Justice* (Oxford University Press, 2007), ch. 7. But for present purposes it is not essential to resolve this disagreement, so long as we are clear about the substance of the rights that generate the responsibility to protect.

[2] I shall not in this chapter investigate the source of this responsibility. I shall take it for granted that where large-scale violations of human rights are occurring, everyone who is able to do something to prevent that happening has a responsibility to do so: it would be morally wrong – a denial of equal human worth – simply to stand by and do nothing. This basic premise does not, however, settle either the extent of this responsibility or how it should be distributed among persons. For that reason I use the language of responsibility rather than obligation – obligations are concrete moral requirements that arise when the two issues just canvassed have been settled.

[3] For contrasting views on the question whether a right of humanitarian intervention now forms part of international law, see N. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford University Press, 2000) and S. Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (Oxford University Press, 2001). For discussion, see J. Welsh, 'From Right to Responsibility: Humanitarian Intervention and International Society', *Global Governance*, 8 (2002), 503–21.

d) Rights violations resulting from wars between states, of civilians caught up in the fighting, displaced by it, or unable to satisfy basic needs on account of it.
e) Rights violations arising in circumstances of state breakdown or civil war – massacres, ethnic cleansing and so forth.

As we work through this list, we see immediately that interventions to protect human rights would challenge state sovereignty most directly in cases b) and c). These are cases in which the state itself is responsible for the rights violations, either directly or indirectly, and in which intervention must therefore take the form of challenging and trying to reverse the policies in question – which might also mean a change of government or regime. In case a) intervention may be welcomed by the receiving state, so long as it retains some control over the way that it is carried out. In cases d) and e) the very existence of the state as a body having a monopoly of legitimate authority over a well-defined territory is being put in question by events on the ground; if the state is not, in fact, an effective sovereign, then intervention cannot be ruled out by an appeal to the norm of sovereignty.

But in any case, the idea that state sovereignty is a trump card that defeats all other moral and legal considerations has been challenged in recent years, and not only by political philosophers. Belief in the overriding importance of human rights was encapsulated in a semi-official document, *The Responsibility to Protect*, the title of a report issued by the International Commission on Intervention and State Sovereignty in 2001 in response to the debate over humanitarian intervention sparked by interventions that had happened in the previous decade, such as NATO's intervention in Kosovo, and others that had failed to happen, such as, notoriously, in Rwanda.[4]

The Commission's Report interprets intervention in quite a broad way, covering aspects of humanitarian action that go well beyond the military intervention that might halt a civil war or a genocide. Nevertheless its central focus is on cases of military intervention by outside bodies in the internal affairs of sovereign states, and for this reason the questions that chiefly concern it are questions of international law: first, under what

[4] *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001) and *The Responsibility to Protect, Research, Bibliography, Background: Supplementary Volume to the Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001).

circumstances may the normal presumption of the integrity of sovereign states be set aside by virtue of the human rights violations that are taking place within their borders, and, second, who is authorised to intervene? Is it a necessary condition that the intervention has been approved by the UN Security Council, for instance? These, one might say, are questions about the legitimacy of intervention. There is, however, another question that seems to me equally if not more important, and that prompts the present discussion, namely who has the *responsibility* to intervene. It is one thing to say that when large-scale violations of human rights are taking place, there is a diffused responsibility on the part of humanity as a whole to protect the victims; it is another to say more precisely where this responsibility falls and how it can be made effective. Such discussion of this question as the Report contains tends to focus on the question of whether states should be disqualified from intervening when they have some material interest in the outcome – on which it takes the realistic view that mixed motives are inevitable in international relations as elsewhere, and that it may be necessary for domestic reasons for intervening states to claim that their own national interests are served by their intervention. Elsewhere it laments the Security Council's past inability to mobilise UN member states to act in circumstances where intervention was clearly both legitimate and essential.

Yet despite this neglect, one might think that this problem of assigning responsibilities is central to establishing an effective international human rights regime. Intervening to protect human rights is typically costly, in material resources in every case, in human resources in many cases (when soldiers, peacekeepers or aid workers are killed or taken hostage), in political capital (when intervention is construed by third parties as motivated by self-interest or imperial ambitions, leading in some cases to reprisals against the intervening state or its citizens). So states have good reasons to avoid becoming involved if at all possible, particularly democratic states where the government will come under heavy domestic fire if the intervention goes wrong. The fact that there are often many agencies – states, coalitions of states, or other bodies – that might in principle discharge the responsibility to protect makes the problem worse. We might draw an analogy here with instances in which individuals are confronted with a situation in which they would have to perform a Good Samaritan act – say going to the rescue of somebody who collapses in the street. Empirical studies of situations like this reveal that the more potential rescuers are present, the less likely anybody is to intervene – so the victim stands a better chance of being picked up if

there is only one passer-by at the time he collapses than if there are, say, six people nearby.[5] Several factors may combine to produce this outcome: people interpret other people's inaction as a sign that the problem is less serious than it might appear; there is a parallel normative effect whereby each person takes the others' behaviour as defining what is expected or right under the circumstances; but perhaps most importantly, responsibility is diffused among the potential helpers: if the victim were to die, no one in particular could be held responsible for the death.

This problem of diffused responsibility leading to inaction can potentially be solved in two ways. One is the appearance of an authority with the capacity to single out agents and assign them particular tasks. In the street collapse case we might imagine a policeman arriving on the scene and asking bystanders to do specific things to help the victim. Obviously this can only work in cases where enough of those present recognise the authoritative status of the person who is doing the assigning. The second is the emergence of shared norms that identify one person in particular as having the responsibility to take the lead. These norms do not have to carry all of the justificatory load needed to support the intervention. After all we can probably assume that every bystander looking at the victim would agree that 'somebody should help that man'. What is needed is an additional norm that can tell us who that somebody is. If we return to the case of the international protection of human rights, there is, as we have seen, an emerging (though not yet complete) consensus on the principle that where systematic violations of human rights are taking place, some agency should step in to prevent them. The problem is to identify the particular agency.

In moving from cases which involve the responsibility to rescue a particular individual to collective interventions to protect human rights, we face an additional difficulty. Given the nature and scale of such interventions, they will in practice nearly always have to be undertaken by states, or by coalitions of states (I shall defend this assumption shortly). But these states are coercive bodies, at least in relation to their own citizens. When they intervene, they impose requirements on people – for example they send soldiers or aid workers to the areas where the rights violations are taking place, often at some considerable risk to the people who are sent. Even if there is no risk to persons,

[5] I have considered these studies, and their normative implications, in D. Miller '"Are they *my* Poor?": The Problem of Altruism in a World of Strangers', *Critical Review of International Social Philosophy and Policy*, 5 (2002), 106–27.

resources are required, and these of course are raised by compulsory taxation of the citizens. So the question arises whether interventions that impose requirements of this kind can ever be justified. It is one thing to say that as human beings we all share in a responsibility to protect the human rights of the rest of mankind; it is another to say that we can be forced to discharge this responsibility via the agency of the state.

Should we then leave states out of the picture and instead embrace a purely voluntary model of international rights protection, leaving such protection entirely in the hands of bodies staffed by volunteers and funded by voluntary contributions? We can find instances where something like this model already applies. Much human rights work is done by aid agencies like Oxfam and volunteer groups like Médecins sans Frontières. But without in any way diminishing the importance of such work, it is hard to see this voluntary model as the solution to all human rights disasters. Its limitations are fairly obvious. Where states themselves are the primary source of the human rights violations, as in our cases b) and c) above, no voluntary body is likely to have the capacity to stand up to the delinquent state; we know, for example, that aid agencies already face acute dilemmas when, in order to carry out their humanitarian work, they have to go along with government policies in the target state that they find objectionable. Furthermore, when the risks to human life rise above a certain threshold, voluntary agencies quite reasonably decide to pull their people out, so if anything is going to be done in cases of type e), involving state breakdown or civil war, it must involve intervention by outside agencies that are themselves able to wield coercive power sufficient to separate the warring parties and re-establish social order – in other words by states, or international bodies made up of states. Finally, intervention by voluntary bodies faces familiar problems of accountability: who is to say that a particular form of intervention is legitimate, if undertaken by a body that is not democratically accountable, except perhaps to its self-selected members? This issue becomes troubling whenever intervention is seen to have an impact on the outcome of an internal struggle in the society where the rights violations are occurring. Of course intervening states too can be, and often are, partisan in their actions, but at least they remain accountable for what they do, to their own citizens and to international organisations.

In response to such difficulties, we might propose an alternative version of the voluntary model. Suppose the United Nations, or some other international body of similar scope, were to create a taskforce for humanitarian intervention. Money raised by a global tax would be used

to recruit soldiers and others willing to act under UN authorisation. Because of the tax element, this model is not a purely voluntary one, but it could be argued that everyone would merely be contributing their fair share of the costs of discharging a universal obligation to protect human rights. Since the members of the taskforce would be recruited on a voluntary basis, no untoward coercion is involved.

Such a model is prima facie attractive, but we have to ask about the realism of its underlying assumptions. If a force is to be created with sufficient capacity to take on delinquent rights-violating states, as in scenarios b) and c), or to re-establish order in the event of state breakdown, it would require an enormous investment not only in manpower but in armaments, delivery systems and so forth – it would need in other words to replicate the armed forces of a mid-size contemporary state, at the very least. We must ask whether the UN, or its equivalent, is likely in the near future to command the resources and the authority to bring such a force into existence. We must also ask about the decision procedures that would allow it to be deployed. Would it, for example, require the universal consent of all member states bar the delinquents? Observing the present difficulties in obtaining UN authorisation for even relatively small-scale peacekeeping operations inevitably induces scepticism about this version of the voluntary model.

If such scepticism is justified, it follows that the responsibility to protect human rights must in practice be discharged primarily by states, or by international institutions like NATO that represent coalitions of like-minded states. How, then, can it be made legitimate from the point of view of those who are forced to bear the costs of intervention? We might envisage a *contractual* model of international responsibility as an alternative to the voluntary model. The model would look something like this. Citizens, understanding that they have a responsibility towards the human rights of people worldwide, agree to authorise their states to discharge this responsibility on their behalf, an agreement that involves consenting to be taxed for this purpose and/or being sent in some capacity to deal with human rights violations on the ground. Having themselves been authorised in this way, states would then contract with each other to distribute the responsibility – for example forming coalitions in order to create intervention taskforces of different kinds. If this model could be put in place, it would clearly resolve the problem that I identified earlier – the problem, namely, that each state is understandably reluctant to take on the responsibility to protect human rights itself, given the likely costs of discharging that responsibility. According to the

terms of the model, each state would be contractually bound to contribute, and if its citizens protested, they could be reminded that they had contracted to authorise the state to act on their behalf.

But does the model really provide a feasible solution to the problem? We need to look more closely at the reasons citizens might have for agreeing to the contract that is being proposed, given that *ex ante* they have no coercively enforceable obligation to protect the human rights of outsiders. Much depends here on which of the five scenarios outlined above we are contemplating. Consider scenario a) – cases in which human rights are put at risk by natural disasters such as floods and famines. Citizens might well sign up to an international contract of mutual aid in response to such situations, because, first, although the likelihood of falling victim to such disasters varies considerably from place to place, still in principle any region of any society might at some time find itself facing a natural disaster, so the contract appeals not only to altruism but also to risk aversion; second, the expected cost of the contract, for any individual or any society, remains moderate. When one society is hit by a natural disaster, other societies would be expected to supply relief funds whose cost can be spread widely across all members of the contributing states, while those who are sent to implement the relief effort are not, normally, in great personal danger themselves. Contrast this with the case of military intervention in response to civil war or genocide. For liberal societies especially, there is virtually no element of mutual aid here; their citizens cannot reasonably anticipate being rescued from civil war or genocide themselves under the terms of the contract. It is sometimes argued that they may benefit in other ways – for example by virtue of facing a lesser threat of terrorism if the conflict situation is resolved. But recent experience surely casts considerable doubt on this proposition. Intervention may benefit large numbers of people whose lives are currently being threatened by civil war or genocide, but at the same time it is likely to arouse hostility among those who lose out in the process, and their sympathisers in other countries – so there is a real risk that violent action may be taken by way of retribution against the intervening state. Moreover the cost of intervention may be high, and very unevenly distributed. Citizens might very reasonably wish to set limits to their future liability, and therefore decline to issue a general authorisation to their states of the kind proposed; they would want to retain the right to decide on each intervention case by case, taking account of the likely costs involved when set against gains to human rights that the intervention would bring. This in turn would prevent states signing up to any