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Universalist Rights and Particularist Duties: The Case of Refugees

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Abstract

The conflict between refugees' human right to be admitted to a safe country and the right of states to exercise sovereign control of their borders, including the right to deny refugees entry, can be understood in terms of a normative conflict between two ethical systems, namely those of ethical universalism and ethical particularism. Here it is suggested that this conflict can be resolved by combining a universalist comparable cost argument with a particularist fair share argument. The comparable cost argument affirms that a state receiving refugees should allow at least the most basic rights of refugees to override less important rights of its own citizens. The fair share argument modifies the comparable cost argument by affirming that no state is morally obligated to sacrifice any of its citizens' rights for the sake of protecting a larger share of refugees than what is fair, given its resources.

Keywords: refugees; ethical universalism; ethical particularism; comparable cost; fair share.

Introduction

Human rights seem to co-exist uneasily with the idea of sovereign territorial nation-states. At least at a first glance, as a doctrine of normative ethics, human rights would seem to imply a moral cosmopolitanism, according to which all human beings, regardless of their nationality and citizenship, have equal rights to certain basic goods generally needed for human agency and a decent human life, such as life, health, and freedom. And if human rights apply to all human beings, so do the corresponding duties and responsibilities. In the words of Kwame Anthony Appiah, "the one thought that cosmopolitans share is that no local loyalty can ever justify forgetting that each human being has responsibilities to every other" (Appiah, 2006: xvi). This would make state borders appear morally irrelevant. Whether you live in South Sudan or South Dakota, your rights should be the same.

However, as is well known from the history of refugees, this is not the reality of the world in which we find ourselves. Refugees may not only be denied protection of their human rights by the state of which they are citizens but may also find themselves denied such protection by any other state of which they are not citizens – even by states that recognise a moral duty to uphold human rights for their own citizens.

We can think of the conflict between the human right of refugees to be admitted to a safe country and the right of states to deny refugees entry on their territory as a conflict between two normative systems. According to *ethical universalism*, all humans are equal in their human rights regardless of their citizenship and hence states are not justified in ignoring the basic rights of non-citizen refugees for the sake of protecting less important rights of their own citizens: "There are few strong grounds for giving preference to the interests of one's fellow citizens, at least when subjected



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to the test of impartial assessment, and none that can override the obligation that arises whenever we can, at little cost to ourselves, make an absolutely crucial difference to the well-being of another person in real need" (Singer, 2016: 206). Likewise, ethical universalists would deny that fellow citizens could be justified in prioritizing each other's rights and interests over those of non-citizens:

People who are committed to standing in morally acceptable relations with other people would affirm the equal moral status and claims of persons generally, regardless of national identity and physical location. Associative obligations to our fellow citizens cannot override the more fundamental moral requirement that the impact of our conduct on other people be compatible with their most basic interests (Kelly, 2004: 178).

According to *ethical particularism*, on the other hand, although humans may be equal in their human rights, the primary duty of states is to uphold these rights for their own citizens, not for mankind in general. Now, ethical particularists may very well recognize that non-citizens have human rights and that one should not interfere with these rights. Hence, ethical particularists might accept a *negative* moral duty *not to harm* innocent human beings, whether or not they are fellow citizens. Such a negative duty figures in just war theory in the form of a prohibition against targeting noncombatants. For instance, the ethical particularist Michael Walzer, who holds that "[s]tates exist to defend the rights of their members" (Walzer, 2000: 136), also defends the idea that states at war must accept moral constraints of a non-particularist kind: "A legitimate act of war is one that does not violate the rights of the people against whom it is directed" (Walzer, 2000: 135).

However, when it comes to the *positive* moral duty of *actively assisting* people in need, ethical particularists are less likely to accept that their government should treat the rights of fellow citizens and the rights of non-citizens on an equal footing, not even when it is a matter of sacrificing less important rights of fellow nationals for the sake of securing more important rights of strangers. For ethical particularists, positive moral duties require a background of special relationships. According to Thomas Nagel, the very existence of sovereign states "is precisely what gives the value of justice its application, by putting the fellow citizens of a sovereign state into a relation that they do not have with the rest of humanity" (Nagel, 2005: 120). Moreover, "[j]ustice is something we owe through our shared institutions only to those with whom we stand in a strong political relation. It is ... an *associative* obligation" (Nagel, 2005: 121; emphasis in the original). According to Nagel, obligations concerning positive rights to democracy, equality, and welfare are "fully associative"; hence, we have such obligations only in relation to fellow citizens (Nagel, 2005: 127). As taxpayers, we may have a particular and civic duty to finance education and health care for our fellow citizens, but we have no similar duty regarding non-citizens.

The Positive Duties of States

In this paper, I intend to show that it is possible to combine universalist and particularist perspectives in a rational argument about the duty of states to assist non-citizen refugees. It is important to note that this argument is one of *normative ethics*, not a descriptive one about the contents of international law, the UN Declaration of Human Rights, the Geneva Convention, or any other similar political or legal document. This is an argument about what the international law *could* and *should* be, not about what it actually happens to be. Hence, my argument relies on certain philosophical assumptions about morally justified human rights and what they imply rather than on account of what this or that convention actually says. Conventions and declarations of human rights



are political documents, reflecting what states and governments at a certain point in time accept and recognise. However, as James Griffin has pointed out, "[i]t is a feature of the international declarations in general that they pay little attention to reasons or justifications" (Griffin, 2008: 192). This very lack of justificatory arguments in the existing declarations and conventions about human rights invite scepticism and criticism as to their validity and bindingness. As Amartya Sen has noted, "the basic idea of human rights, which people are supposed to have simply because they are human, is seen by many critics as entirely without any kind of a reasoned foundation. The questions that are recurrently asked are: do these rights exist? Where do they come from?" (Sen, 2010: 355).

The philosophically and intellectually more challenging task is to go beyond the mere exposition of existing human rights declarations and conventions, addressing more fundamental questions concerning what rights we *should* recognise. The kinds of questions asked about human rights by a philosopher are hence different from those asked by an international law scholar or a political scientist. Amy Gutmann has listed some of the philosophical questions:

What is the purpose of human rights? What should their content be? When do violations of human rights warrant intervention across national boundaries? Is there a single moral foundation for human rights that spans many cultures, or are there many culturally specific moral foundations, or none? In what sense, if any, are human rights universal? (Gutmann, 2001: viii)

Here I intend to develop a normative ethical argument that combines universalist human rights, applying to all human beings, with the particularist duties of nation states regarding their own citizens. As a first step, we should note that states themselves can be given a universalist moral justification as being instrumentally necessary to the local protection of the human rights of their citizens. According to this kind of justification, the state is "a means to protect the rights of individuals rather than an end or good in itself"; consequently, "the preservation of the state or of the nation is valuable and worthy only insofar as this is of benefit to its individual members" (Gewirth, 1982: 235). Even liberals who stress the importance of individual freedom find reasons to embrace the idea of states since "justice requires states; there is no way equal freedom could be attained without them" (Stilz, 2009: 103). Hence, although actually existing states do not always conform to the requirements of human rights, this should be considered as a reason to modify the ways in which these particular states function rather than to try to abolish states as such.

The next step involves outlining what duty states may have to assist non-citizen refugees. Now, in the words of George Kennan, a government's "primary obligation is to the *interests* of the national society it represents", namely, "those of its military security, the integrity of its political life and the well-being of its people" (Kennan, 1985: 206; emphasis in the original). However, even if a state's *primary* obligation is to protect its own citizens' rights, this is not necessarily the state's *only* obligation. Even Thomas Nagel, who argues that we have obligations of justice only to fellow citizens, admits that we may have an additional duty to assist non-citizens whose negative rights have been violated in their home country: "In extreme circumstances, denial of the right of immigration may constitute a failure to respect human rights or the universal duty of rescue" (Nagel, 2005: 130).

One way of illuminating and justifying the existence of certain positive duties to non-citizens is to point to the fact that we may harm others not only by what we do to them but also by our inaction. Hence, what might, at first sight, appear as a positive duty to assist might at least



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sometimes actually be a case of the negative duty not to harm. Inaction, as Alan Gewirth has pointed out, is not the same as non-action (Gewirth, 1978: 219). While non-action is simply the absence of any action (as when we are asleep), inaction is the deliberate and purposive refraining from action, which itself is a kind of action. If I choose to remain passive when a person in danger calls out for my help and when I could have intervened at little cost to myself, then I perform an action, namely, the action of refusing to help that person. And if the person in need of help, as a consequence of my inaction, dies or suffers an injury, I have at least some responsibility for this, as my inaction is causally related to her death or injury.

That the passivity of wealthy societies in the face of global inequality can be tantamount to harming the global poor has been argued by Thomas Pogge: "[T]he better-off – we – are *harming* the worse-off insofar as we are upholding a shared institutional order that is *unjust* by foreseeably and avoidably (re)producing radical inequality" (Pogge, 2005: 42). My argument, however, is not about whether or not wealthy political communities have a general duty to transfer resources to poor political communities (this, I believe, would depend on many other considerations, including previous exploitation of the poorer societies by the wealthier ones, the role played by undemocratic and corrupt leaders in the poorer societies, and so on). Instead, I will limit myself to the issue of what duties states and political communities have regarding non-citizen refugees.

To the extent that states have a negative duty not to inflict harm on non-citizens (which we have already assumed), and given that inaction can cause unjustified harm, it would follow logically that states have a positive duty to assist non-citizens, at least when not doing so would cause these non-citizens to suffer an unjustified harm and when assisting them would not inflict any comparable cost or harm on the assisting state and its citizens. The latter condition, about comparable cost, recognizes that states have a prior and permanent duty to protect their own citizens' rights. The condition would permit states to refuse to help refugees who can be expected to inflict harm on their citizens, such as terrorists and other militant extremists.

At one extreme, the positive duty to assist non-citizens could justify military intervention against a dictatorship that oppresses its own citizens, at least when there is no other way of relieving these people of their oppressors. This is, for instance, the line taken by Erin Kelly, when she argues that "it is hard to understand how states that form a global society through their complex interrelations could together affirm a conception of global justice that does not treat the systematic violation of human rights as morally urgent enough to warrant intervention" (Kelly, 2003: 133). However, for such an intervention to be morally justified, it must itself be carried out in a manner consistent with the human rights of the persons involved, including both the citizens and soldiers of the interventions but will instead focus on the more general topic about how the human rights of refugees can be reconciled with the particularism of individual states and their duties to their own citizens.

The argument developed so far lends some support to ethical universalism by recognising that states do indeed have a duty to assist refugees. But what is involved in this duty? Here we can expect that ethical universalists and ethical particularists will come to different conclusions, depending on their different outlooks. While ethical universalists are likely to hold that human rights override the rights of states and their citizens, ethical particularists are equally likely to defend the right of states to give priority to the protection of their own citizens.

Ethical Universalism

Ethical universalism, when applied to migrants and refugees and as outlined by Joseph Carens, claims that the international system of independent states is unjust, since it arbitrarily leaves some people – namely, those who are ruled by oppressive governments – deprived of their human rights and without any assurance that they will have their rights protected by any other government. This moral failure of the state system can, according to Carens, only be rectified by an open borders principle, making it a duty for all states to admit refugees who are escaping the oppressive politics of their own government: "Because the state system assigns people to states, states collectively have a responsibility to help those for whom this assignment is disastrous" (Carens, 2013: 196). According to Carens, the duty to admit refugees involves much more than just allowing them to cross the border to a safe country:

A rich democratic state cannot create camps where refugees are prevented from having contact with the rest of the population and are provided only with basic levels of food, clothing, and shelter, even if the provision of such basic levels of support would be equal to what the refugees could have expected if their membership rights had been respected in their country of origin. If a democratic state admits refugees, it must provide the refugees with most of the rights that others living in the society enjoy. Over time, it must accept them as members (Carens, 2013: 204).

According to Carens, given the urgent and basic needs of refugees, wealthy democratic states will in many cases be morally obligated to give priority to the interests of refugees over the interests of their own citizens: "When are we justified in turning away genuine refugees? ... My own answer is 'almost never.' ... If one takes the moral claims of refugees seriously, ... it is not clear why their claims to an admission which is necessary to protect their most basic rights should be subordinated to much less vital interests of members of the receiving state" (Carens, 2013: 218–219). This is the *comparable cost argument*, briefly referred to above in our account of why states may have positive duties regarding non-citizens. According to this argument, if the refugees' cost of not being admitted is higher than the receiving political community's cost of admitting them, then the right of the refugees to be admitted overrides the right of the receiving political community to deny them entry and subsequent protection of their well-being.

Now, this argument assumes that states should not discriminate between citizens and noncitizens when it comes to responding to people's need for protection of their human rights; only the importance of the need itself should guide their decisions. Of course, much depends here on what is meant by terms such as "most basic rights" and "much less vital interests". Even an ethical particularist might accept that saving refugees from being massacred is morally more important than spending resources on building a new motorway or a new airport (which might be bad for the environment anyway). But should a state also be morally obligated to forgo a reform that would provide free university education for all its citizens for the sake of spending these resources on sheltering non-citizen refugees instead? Granted, even if we accept that there is a human right to education, this right would seem to be less fundamental to human well-being than being alive and physically safe – but is this all that matters here? Does a state have a duty to sacrifice free higher education for its own citizens for the sake of rescuing refugees regardless of whether or not such a sacrifice is *necessary*, given the capacity of *other* states to admit refugees? This question points to



the need for combining the comparable cost argument with a fair share argument. We will return to comparable costs and fair shares below.

Ethical Particularism

Ethical particularism questions the assumption that a state is morally obligated to open its borders to all refugees who want to enter its territory and to provide them with the same rights as its own citizens have. According to an argument developed by Christopher Heath Wellman and based on the principle of freedom of association, a state should be free *not* to associate with people who want to be admitted to its territory. In Wellman's words, "legitimate political states are morally entitled to unilaterally design and enforce their own immigration policies, even if these policies exclude potential immigrants who desperately want to enter" (Wellman & Cole, 2011: 13). Now, Wellman recognises that the needs of refugees might call for urgent acts of assistance and he does not exclude that a state might be morally obligated to assist refugees in *other* ways than by admitting them on its territory, for instance by helping them in their home country. He also accepts that it might be at least temporarily necessary for a state to host refugees "until their protection against persecution can be guaranteed" (Wellman & Cole, 2011: 122). However, unlike Carens, he believes that the host state does not have the same kind of extensive duties to the refugees as it has to its own citizens. This is what Wellman calls the case of the baby on the doorstep: "Suppose ... that I open my front door in the dead of winter and find a new-born baby wrapped in blankets. Clearly, I must bring the infant in from the cold, but it does not follow that I must then adopt the child and raise her as my own" (Wellman & Cole, 2011: 122).

However, when it comes to the rights of refugees, things are not so straightforward. True, the receiving state might not be under any obligation to offer citizenship to newly arrived refugees (the equivalent of adopting the child on the doorstep). But this does not mean that the receiving state has no supportive responsibilities at all. Once the refugees are admitted, they will need shelter, food, and sometimes also medical care; likewise, their children will need at least some basic education. And the refugees will depend on the receiving state for these goods. Moreover, they might depend on the receiving state for these goods. Moreover, they might depend on the receiving state for quite a while, given that it will take some time before they have acquired sufficient linguistic and other skills to be able to support themselves by means of productive and remunerative employment.

Comparable Costs and Fair Shares

Now, an ethical particularist might accept that a state has indeed a duty to open its borders to refugees but instead qualify this duty by a *fair share argument*, briefly referred to above. The intuition behind the fair share argument has been captured by Liam Murphy: "We should do our fair share, which can amount to a great sacrifice in certain circumstances; what we cannot be required to do is other people's shares as well as our own" (Murphy, 1993: 278). This argument also forms a part of the assumptions underlying Appiah's ideal of cosmopolitanism: "[O]ur obligation is not to carry the whole burden alone. Each of us should do our fair share; but we cannot be required to do more" (Appiah, 2006: 164).

Applied to the case of refugees, the fair share argument suggests that the duty to admit refugees and to protect their rights should be fairly distributed among all states in proportion to their capacity to contribute and not only be assigned to the state that happens to be the nearest or most attractive for refugees to enter; moreover, no state would have a duty to contribute more than its fair share. Hence, David Miller argues that "the obligation to protect human rights extends only to doing what a fair distribution of responsibility demands; or at least that is all that a state can be required to do as a matter of justice" (Miller, 2016: 36). One practical implication of the fair share argument is that refugees could be distributed among different host states in accordance with the capabilities of these states to protect the refugees' rights rather than in accordance with the wishes of the refugees themselves: "the refugee's claim is to reside somewhere where her human rights are secure, and this need not be the place that she most prefers" (Miller, 2016: 86). Interestingly enough, the ethical universalist Joseph Carens agrees: "Refugees have a moral right to a safe place to live, but they do not have a moral entitlement to choose where that will be" (Carens, 2013: 216). In what follows, I intend to show that the fair share argument associated with ethical particularism can be combined with the comparable cost argument associated with ethical universalism into a moral principle regulating states' duties regarding refugees.

To begin with, we need to clarify the meaning of "fair shares". Fair shares in relation to what? Wealth, size of the population, previous capacity to absorb refugees, the degree of democracy? Here I intend to suggest one way of calculating fair shares (but without claiming that it is the only possible one), namely, by relating the share of refugees that a state has a duty to assume responsibility for to that state's share of the global gross domestic product (GDP). Now, the UNHCR estimates the global number of refugees (including asylum-seekers) to 28.5 million (UNHCR, 2018). According to the IMF, the value of the global GDP in 2017 was US \$79.87 trillion (IMF, 2018). At the same time, the GDP of the US was US \$19.39 trillion, or 24.28 per cent of the global GDP. According to the UNHCR, the US has admitted 929,850 refugees or 3.26 per cent of the world's refugees. Likewise, China with a GDP of US \$12.01 trillion or 15.04 per cent of the global GDP has admitted 322,439 refugees, which is equivalent to 1.13 per cent of the total number of refugees in the world. In absolute numbers, it is slightly less than the number of refugees admitted by Sweden (327,709 or 1.15 per cent of the global refugee population) with a GDP of US \$0.54 trillion or 0.68 per cent of the global GDP. Turkey, on the other hand, with a GDP of US \$0.85 trillion (1.06 per cent of the global GDP), has admitted 3,789,320 refugees (13.3 per cent of the global refugee population). Relying on figures like these, we have reason to assume that some states do more and other states do much less than their fair share as regards protecting the human rights of refugees.

Of course, a state could assist refugees in other ways than by admitting them on its territory, for instance, by contributing to other states that receive refugees or to organisations like the UNHCR or by trying to improve conditions in the refugees' home country so that they might be able to return. Hence, it would be misleading to accuse a state of not doing its fair share based only on how many refugees it admits on its territory. However, given that we include both direct and indirect forms of protection, relating the share of refugees that a state assists in one way or another to its share of the global GDP would still work as a way of assessing how well it fulfils its moral duties regarding refugees. A state with *x* per cent of the global GDP should assist *x* per cent of the world's refugees, either directly, by admitting them on its territory, or indirectly, by helping other states or organisations to protect them, or by enabling them to return to their home country.

From a fair share point of view, we should expect every state to accept responsibility for a share of the global refugee population that is at least equivalent to its share of the global GDP. However, if a state is capable of accepting a larger share of refugees *without* having to sacrifice any of its own citizens' rights, then it has a moral duty to do so. Here we depart from ethical particularism and its fair share argument, which holds that no state has a duty to do more than its fair share. On the other hand, we depart from ethical universalism and its comparable cost argument by assuming that no state would have a duty to sacrifice *any* rights of its own citizens (including



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rights that are of less importance than the rights of the refugees) for the sake of assisting a larger share of refugees than is equivalent to its share of the global GDP. Hence, our argument can best be described as a *combined comparable cost and fair share argument*.

The outcome of the reasoning presented here is a morally legitimate and workable policy for states concerning their duties regarding refugees. We should retain the universalist idea that the justification of the duty of states to admit and protect refugees is to be found in human rights and in the fact that refugees stand to lose much more in terms of rights if they are not admitted than do the receiving states if they are admitted – that is, the comparable cost argument. We should also recognize that the particularist fair share argument sets limits to this duty, by stating that no state is morally obligated to do more than its fair share if doing so would impair its capacity to uphold the rights of its own citizens, regardless of whether or not these rights are more important than the rights of the refugees. (Hence, a state would *not* be morally obligated to forgo its own citizens' right to free university education for the sake of admitting more than its fair share of refugees.) However, if it turns out that a particular state can indeed do more than its fair share to protect refugees *without* risking any rights of its own citizens, then it would indeed have a duty to do so. In this way, the comparable cost principle remains in force, admitting of exceptions only when it is true *both* that a state has done its fair share *and* that further contributions would endanger the rights of its own citizens.

Now, if only some states fulfil their positive duties to non-citizen refugees in accordance with the combined comparable cost and fair share argument while other states do not, this would leave a certain number of refugees without any protection of their human rights. In such a case, it is not the states that have done their fair share that should be blamed for the fate of the refugees who are left without sufficient protection, but rather the states that have *not* done their fair share.

Here we should note the complication that some states both receive and produce refugees (Sirkeci, 2017). That is, while they fulfil the positive duty of assisting non-citizen refugees, they also violate the negative duty of not forcing their own citizens to become refugees. Obviously such states, in spite of what they do for non-citizen refugees, are morally deficient, as they fail in their primary duty to maintain and protect their own citizens' human rights.

To sum up, the solution to the problem of how to accommodate the duties of states and the human rights of refugees lies not in choosing either ethical universalism or ethical particularism, but rather in combining these two strands of ethical reasoning. By combining the universalist comparable cost argument and the particularist fair share argument, we can provide ourselves with a normative instrument for the ethical assessment of states and their duties regarding non-citizen refugees.

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