Looking Behind ‘Protection Gap’: The Moral Obligation of the State to Necessitous Immigrants

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LOOKING BEHIND “PROTECTION GAP”: THE MORAL OBLIGATION OF THE STATE TO NECESSITOUS IMMIGRANTS

Tally Kritzman-Amir*

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ABSTRACT
Do states have a moral obligation towards immigrants whose immigration is a result of necessity? While some types of necessitous immigrants receive international protection because states hold legal duties towards them, many others are left unprotected. This article looks into this “protection gap” and examines that moral justification for eliminating it by imposing additional obligations on states towards additional immigrants. Part I examines the international law foundations of this dilemma. Part II offers a typology of the different moral obligations that states might owe to different immigrants. Parts III, IV and V suggest a theoretical moralistic argument on the scope and the nature of the duty of states towards the immigrants of Elbonia. Part III discusses this duty in light of various approaches in distributive justice theory. Part IV explains the utilitarianism analysis of this issue. Part V describes the ethics of care feminist approach and the insights it could contribute to this dilemma. Each of these three Parts also includes a critique of the theoretical conceptualization of the duty by each of these schools of thought. Part VI characterizes the moral obligation as a relative one, rather than an absolute one, depending on the particular traits of the hosting state and of the immigrant. I conclude by summarizing the different views presented and suggesting further research.

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INTRODUCTION

Imagine the following situation: the State of Elbonia\(^1\) is based on an island. One day, the citizens and residents of the State of Elbonia are informed that their island will be permanently covered in water from now on, destroying all of their property and making it impossible for them to live there. This could be the result of shifting tides, tsunami waves, earthquakes, volcano eruptions, or other major natural catastrophes that occasionally occur in our world.\(^2\) As the water slowly washes away their homes, towns, road, and fields, it kills a handful of citizens of the State of Elbonia. The others all quickly understand that, in order to survive, they must emigrate. In actual fact, they must seek shelter in a different country. While these people would not be considered to be refugees in the legal sense, they are also very different from the average immigrant.

The citizens of the State of Elbonia are not refugees since the 1951 Convention Relating to the Status of Refugees\(^3\) defines a refugee as a person who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality.” The citizens of the State of Elbonia have not been persecuted and their flight is not related to any of the five grounds mentioned in the Convention. Nonetheless, these people are also not “ordinary” immigrants, since

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\(^1\) The State of Elbonia is a fictional country from Scott Adams’ comic strips *Dilbert*. It is an extremely poor, “fourth-world” country, which is mostly covered with waist-deep mud. Elbonia is also undergoing a civil war. As such, it serves as a good prototypical state for the purpose of this dissertation. For more on Elbonia see: http://en.wikipedia.org/wiki/Elbonia (last visited June 20th, 2008).

\(^2\) Indeed, this is not an imaginary scenario, but rather a scenario that is predicted by scientists as a result of global warming. See e.g., http://www.climatecrisis.net/thescience/ (last visited Sept. 1, 2007). For instance, this seems to be the case of the Pacific Island Nation of Tuvalu, which is gradually covered with water, causing its citizens to seek asylum in New Zealand. See: Anwen Roberts, “What Will Become of Tuvalu’s Climate Refugees”, Spiegel Online International” (September 14, 2007) http://www.spiegel.de/international/world/0,1518,505819,00.html. (last visited June 20, 2008).

\(^3\) 189 U.N.T.S. 150, *entered into force* April 22, 1954 [hereinafter “Convention”].
their emigration is indeed a necessitous flight, rather than a choice.\textsuperscript{4} Nor are they stateless persons,\textsuperscript{5} since, formally speaking, they still possess citizenship status in their country, Elbonia. This is even though de-facto, Elbonia was rendered completely unable to protect them.

Therefore, in order for these persons whose state was washed off the face of the Earth to survive, each of them must impose on some other state and ask to be accepted into it and to receive assistance from it. Nevertheless, they are not eligible for protection under international law. This is despite of the fact that their case does seem morally distinguishable from that of other immigrants, because their immigration was driven by necessity.\textsuperscript{6} I will refer to the lack of international protection to the people of Elbonia as “the protection gap”, hinting to the fact that international law’s protection mechanism is incomplete, and refrains from protecting all of those whose immigration is a result of necessity. I wish to contribute a moral angle to this discussion of the lack of justification of the “protection gap”, which several scholars conducted from an abstract or a legal point of view.\textsuperscript{7}

In an attempt to examine this “protection gap”, the question we thus must clarify is whether this other state has a moral obligation to these people, who want to immigrate to its territories. In this article, I will provide different moral perspectives through which one can

\textsuperscript{4} I use the term “immigrants” to refer to the large group of persons who leave their countries of residence. Most commonly, the movements of immigrants, as opposed to that of refugees, is a result of some degree of choice, and it is connected to a desire to improve quality of life or economic abilities.


\textsuperscript{6} On the concept of necessity in immigration see: NIRAJ NATHWANI, RETHINKING REFUGEE LAW 27-30 (2003). Nathwani acknowledges the fact that often people cannot realistically be expected to stay in their country of origin, and offers the necessity principle (which is used in many criminal systems) as a distinguishing factor. According to this principle, immigration is justified when it is the “lesser of two evils”, and it seeks to prevent an “evil” such as an imminent risk to one’s life or health.

evaluate the moral basis of this duty and discuss its scope. As I aim to focus the discussion on the duty, I ask that you imagine, if you will, a world in which only the State of Elbonia and another state (State B) exist.\(^8\) I chose to illustrate my point with this imaginary example since this way I am not forced to deal with some complex questions that might arise in a real-life situation, such as how this duty should be shared internationally. These are questions which I have addressed elsewhere.\(^9\)

Part I examines the international law foundations of this dilemma. Part II offers a typology of the different moral obligations that states might owe to different immigrants. Parts III, IV and V suggest a theoretical moralistic argument on the scope and the nature of the duty of states towards the immigrants of Elbonia. Part III discusses this duty in light of various approaches in distributive justice theory. Part IV explains the utilitarianism analysis of this issue. Part V describes the ethics of care feminist approach and the insights it could contribute to this dilemma. Each of these three Parts also includes a critique of the theoretical conceptualization of the duty by each of these schools of thought. Part VI characterizes the moral obligation as a relative one, rather than an absolute one, depending on the particular traits of the hosting state and of the immigrant. I conclude by summarizing the different views presented and suggesting further research.

I. INTERNATIONAL LAW, SOVEREIGNTY, AND THE OBLIGATIONS OF STATES TO IMMIGRANTS

It is important to discuss the morality of the obligations of states to immigrants, although – and perhaps even because – international law does not provide us with an adequate answer to the question of the scope of these obligations. While the basic notions of international law would traditionally justify a conclusion according to which states have no such obligations, this does not seem to be the approach that most states currently hold. Therefore, we are justified in


both examining both the legal and the moral aspects of the obligations of states to immigrants.

International law in its classic form claims that the primary and sole responsibility of the state is to manage occurrences within its borders. The state is not obligated to attend to any problems that occur outside its borders in foreign states. Its main obligation is towards its citizens and residents. The state should protect the human rights of those people who reside in its territories. It is a social unit in which resources are divided through various means, such as taxation. It is also a unit in which notions of national identity and solidarity are formed and sustained. The state has no such obligation to citizens of other states. According to this notion, states are autocratic, independent, self-managed, and autonomous. This notion values the sovereignty of the state over all contradicting principles. The byproduct of sovereignty – the ability of the state to run itself and to decide who should be included and excluded as members – is a lack of similar responsibility to the decision-making processes that takes place outside its territory. Another byproduct is that states have the ability to make decisions regarding who is allowed to cross their borders, and those decisions are regarded as their private matter. From this classic international law perspective, we arrive at the conclusion that the state bears no duty towards immigrants who want to enter it.

While the concept of sovereignty is still very influential in international law, it has been somewhat challenged in the past few

10 The rights, immunities, and responsibilities that come with sovereign power are comparable to the rights, immunities, and responsibilities that comprise the right to property. For example, the right to prevent persons from entering the state is comparable to the right to prevent trespassing and to administer the property. See Wesley Hohfeld, Some Fundamental Legal Conceptions As Applied in Judicial Reasoning, 23 YALE L.J. 16 (1913). It was later applied extensively by legal realists, see e.g., Felix Cohen, Dialogue on Private Property, 9 RUTGERS L. REV. 357 (1954). See also Thomas C. Grey, The Disintegration of Property, in PROPERTY, NOMOS XXII 69 (J. Roland Pennock & John W. Chapman eds., 1980).


12 Regarding the relationship between state sovereignty, membership in states, and practices of inclusion or exclusions of members in states, see e.g., Linda Bosniak, Citizenship Denationalized, 7 IND. J. GLOBAL LEG. STUD. 447 (2000).

13 David Held, Law of States, Law of Peoples, 8 LEG. THEORY 1, 4-6 (2002).
decades.\textsuperscript{14} Most significantly, it has been challenged by the recent rise of the humanitarian intervention doctrine.\textsuperscript{15} According to this doctrine, states are no longer responsible only for activity within their territory, but rather they are also somewhat responsible for the prevention of severe human rights violations that occur in other countries. In other words, under the humanitarian intervention doctrine, the intervention of states in the human rights-violating policies of other states is sometimes morally justifiable, and perhaps even morally (though not legally\textsuperscript{16}) required. This doctrine, although severely criticized and often perceived as misused, has led to states intervening (either by military measures or by sending aid) in civil wars and large-scale massacres for the purpose of preventing crimes against humanity and other human rights violations.\textsuperscript{17}

However, the humanitarian intervention doctrine is not the only exception to the classic perception of states as self-managed and autonomous. States have taken upon themselves several other obligations that contradict the notion of sovereignty or do not derive

\textsuperscript{14} As former UN Secretary General Kofi Annan has expressed it, “[s]tate sovereignty, in its most basic sense, is being redefined…. States are now widely understood to be instruments at the service of their peoples, and not vice versa.” Kofi A. Annan, \textit{Two Concepts of Sovereignty}, \textit{The Economist}, Sept. 18, 1999, at 493. Michael Reisman refers to the modern concept of sovereignty as “simply the demand of each territorial community however small and weak and however organized, to be permitted to govern itself without interference by larger and more powerful states and, at least in 1945, without interference by the entire organized international community. Our international legal system is scarcely imaginable without such a concept of sovereignty…” Michael W. Reisman, \textit{Why Regime Change Is (Almost Always) A Bad Idea}, 98 \textit{American Journal of International Law} 516, 516-525 (2004).

\textsuperscript{15} On the effect that humanitarian intervention has had on the concept of sovereignty, see Seyla Benhabib, \textit{The Rights of Others: Aliens, Residents and Citizens} 9-10 (2004).

\textsuperscript{16} In a different context, the ICJ imposed a legal duty to prevent genocide outside the country in the case of \textit{Bosnia and Herzegovina v. Serbia and Montenegro}, judgment available at http://www.icj-cij.org/docket/files/91/13685.pdf?PHPSESSID=8d1d1d86f68418930a7927f92212017 at paras. 430-438.

\textsuperscript{17} The doctrine of humanitarian intervention is often criticized as too offensive to the sovereignty of states and too politicized. See e.g., J. L. Charney, \textit{NATO’s Kosovo Intervention: Anticipatory Humanitarian Intervention in Kosovo}, 93 Am. J. Int’l L. 834 (1999).
In fact, international practice indicates that many states do see themselves as de facto obligated to help other nationals of other states, even in the absence of legal obligations. States are taking an increasing interest in the trials and tribulations that are occurring in other states, and, as a result, they are taking practical steps like providing financial aid, offering military assistance, and protection to immigrants. All of these measures are taken by states as a means of preventing human rights violations or of improving the human rights situations of persons from other countries, whether within or outside their effective control. It seems that although not legally bound to intervene or attempt to assist other states or their nationals, many states feel morally bound to do so.

Consequently, it is worthwhile to examine the philosophical question of the nature and extent of these moral duties. This examination might shed some new light on the tendency of states to deviate from the original notions of international law, and it also might help rationalize and define the extent of the political and legal obligations in the future.

As such, the morality of sovereignty should

18 E.g., the sovereignty of states has also been affected in a similar manner by the different means of international criminal law; self interest has also led states to intervene in the policies of other states with regards to matters from environmental issues to workers’ rights.
19 For example, on the provision of financial aid to support countries of origin and prevent the need for immigration see: AID IN PLACE OF MIGRATION? SELECTED CONTRIBUTIONS TO AN ILO-UNHCR MEETING 73, 91 (W.R. Bohning & M.L. Schloeter Paredes eds., 1994).

22 Rudiger Bittner claims that global justice is falling behind since people are slow to react to the global economy, and finds that “[m]oralists, thus, should be patient, and in
be explored and discussed to the extent that it serves as a shield of protecting the human rights of immigrants.  

II. THE DIFFERENT TYPES OF MORAL OBLIGATIONS OF STATES TO DIFFERENT KINDS OF IMMIGRANTS AND REFUGEES

When discussing the moral obligation of the state towards immigrants, we should not limit the discussion to the obvious negative duties a state holds, such as the duty to see that its citizens do not kill, rob, or defraud immigrants.  

Instead, we should extend this discussion to some of the less obvious positive duties and determine whether a state also holds these duties to immigrants.  

Moreover, it should be noted that we want to discuss the moral obligation of a state to immigrants. This obligation differs from other types of obligations – legal or otherwise – that a state may have to immigrants. For example, a state may hold different duties to immigrants due to some prior agreements or relationships it has with these immigrants or with their homeland or due to some harm it caused the immigrants to which it must offer compensation.  

We will not focus on such historical duties, which are more easily accounted for. We will deal with the more difficult task of determining whether a state has any moral duties that are independent of any pre-existing historical

the meantime do their best in spreading the word.” It seems that discussion of the moral implications of the global situation is believed to have a long-term effect on behaviors and political decisions. See Rudiger Bittner, Morality and World Hunger, in GLOBAL JUSTICE, 24, 25 (Thomas W. Pogee ed., 2001).  

Benhabib, supra note 15 at 4.  


Compare with the discussion of the difference between positive and negative freedoms see ISAIAH BERLIN, Two Concepts of Liberty, in: FOUR ESSAYS ON LIBERTY, 121-54, 169-72 (1969).  

See Jurgen Habermas, Struggles for Recognition in the Democratic and Constitutional State in MULTICULTURALISM 107, 141 (A. Gutmann ed., 1997). Habermas argues that First World countries have an obligation to absorb Third World immigrants as a way of making up for the evils of colonialism.
However, it should be noted that states have relatively few legal obligations towards immigrants. These legal obligations include the right to leave the country, but not the right to enter another country, the right to enjoy asylum under specific conditions, and the right to nationality. The moral duty could encompass much more than that.

Let us turn now to an analysis of this moral duty. I will examine it through the lens of three different schools of thoughts: distributive justice theory, utilitarianism, and the feminist "ethics of care" approach.

III. DISTRIBUTIVE JUSTICE

It is clear that if those wanting to emigrate from the State of Elbonia to State B were citizens of State B, the better-off State B and its citizens would have a moral obligation to help them. This is clear under the principle of distributive justice.

Distributive Justice is one form or perception of justice that, according to Aristotle, is derived from the idea of equality. To Aristotle, inequality is, in fact, injustice. Aristotle frames “justice in distribution” as having to do with fitting the share each recipient gets to her rights. In other words, distributive justice is related to dividing goods – or

29 Article 14 of the Universal Declaration on Human Rights, 1948; the Convention Relating to the Status of Refugees, 1951.
30 Articles 1 and 15 of the Universal Declaration on Human Rights, 1948.
31 Aristotle distinguishes distributive justice from retributive justice, and these are the two basic forms of justice we recognize today. But it is common to discuss a third form of justice today – corrective justice. For a short description of these three forms of justice, see Menachem Mautner, The Eternal Triangles of the Law: Towards a Theory of Priorities in Conflicts Involving Remote Parties, 90 Mich. L. Rev. 95, 103-107 (1991).
burdens – among persons\textsuperscript{32} according to a certain criterion – their rights. There are several criteria according to which the division could be carried out. Distributive justice is a formal concept which could be applied in several ways, through a large number of criteria. The distribution, according to Aristotle, needs to be proportional.\textsuperscript{33} Aristotle’s ideas were refined and elaborated on by many later philosophers, one of the most notable being Rawls, whose applications of the theory of distributive justice will be discussed below.\textsuperscript{34}

Therefore, distributive justice is concerned with equally allocating goods and burdens among a group of persons. In the political context, distributive justice has to do, among other things, with the way that the state participates in the allocation of goods and burdens. The criteria for distribution that are mentioned in the writing on distributive justice are numerous: equality; need; ability, merit or achievement; efforts or sacrifices; productive contribution; public utility; and supply and demand. Rescher offers another criterion, “the claim criterion”, which is more pluralistic and heterogeneous and according to which distributive justice consists of the treatment of people according to their legitimate claims.\textsuperscript{35}

It seems that the moral justification of the allocation of goods and burdens is some form of relationship of mutuality or bond between those people in the group in which the allocation takes place. An arena for the application of distributive justice can be found in its most obvious form in a close-knit community, which is committed to

\textsuperscript{32} Naturally, distribution can occur not only among persons, but also among other sorts of parties, such as animals, corporations, administrative agencies, and so on. For the purposes of this discussion, we will focus on distribution among persons.

\textsuperscript{33} If A and B represent the persons, and C and D represent their matching shares, Aristotle argues that, “Proportion is equality of ratios and involves at least four terms. The just, too, involves at least four terms and the ratio [between the terms of one pair] is equal [to the ratio between the terms of the other pair], for persons and things are similarly distributed. Therefore, A:B= C:D and, by alteration A:C=B:D [...]. Consequently, the combination of term [person] A with term [share] C and of term [person] B with term [share] D id just.” \textsc{Aristotle, Nicomachean Ethics} 1131a29-1131b10.

\textsuperscript{34} See Section III.4, text after footnote 60.

\textsuperscript{35} \textsc{Nicholas Rescher, Distributive Justice: A Constructive Critique of the Utilitarian Theory of Distribution} 73-83 (1966).
dividing, exchanging, and sharing among itself. This bond has also
been applied within the framework of the state. Aristotle’s writings
about the principle of distributive justice have been interpreted to apply
to justice within the state, although Aristotle obviously could not have
been referring to the modern nation state. The question therefore
remains: Does the principle of distributive justice persist outside the
borders of the nation state? Or, for the purposes of this discussion, can
the principles of distributive justice stretch across national borders and
apply to non-members of a state?

The question of whether foreigners and immigrants have a right
to distributive justice is an issue of secondary or remedial rights. The
primary rights that are implied in this discussion are the right to belong,
as well as the rights to life, welfare, dignity, and so on. If the answer to
this question is affirmative, then we can base the moral duty of State B
to allow immigration from the State of Elbonia on the principle of
distributive justice. In other words, this question regards the right to
have access to rights.

I will begin the process of determining whether foreigners and
immigrants have a right to distributive justice by describing how the
principle has been applied in the global sphere by different authors.
Each author has applied the concept of distributive justice differently –
some in a narrower manner and others in a broader manner – according
to his perceptions of what are and what should be political
communities, global justice, and equality. As a result, each author
shapes the questions he confronts with differently. Let us start with
some of the narrower answers to our question, working our way up to
those who applied distributive justice on the global level in a more
categorical fashion. The description of each author will include his
basic assumptions as to the nature of the state and its importance, the
value of equality, and so on. After describing the main ideas of each
author, I will offer a critical review of her writing.

36 Walzer, supra note 24 at 1. Nozick argues that distributive justice should not be
viewed solely as a merit of a cooperative institution, but rather it has significance
regardless of a cooperative framework. See ROBERT NOZICK, ANARCHY, STATE AND
37 By no means do I claim that the following pages are an exhaustive survey of
everything that has been written on the topic of distributive justice. I will mention
several of the main authors on the subject, trying to highlight a few of the main
questions that are of interest to my project.
1: Walzer’s “Mutual Aid” Principle

Michael Walzer discusses distributive justice theory from a communitarian position. He attributes a value to belonging to a specific community as a source of rights. To Walzer, aliens at least potentially pose a threat or dilute the *demos*, the bonds of the community of solidarity. He describes political communities as analogous to neighborhoods, clubs, or families, which are all complex human associations. If included in any of these forms of association, we gain some kind of affinity: a strong feeling of belonging; an understanding of the basic norms; or a comprehension about each association’s unique features of exclusion and inclusion. All of these social institutions favor their members over non-members and grant their members rights or privileges that are not granted to non-members. Just as these associations apply certain criteria so as to determine who may become members, political communities screen candidates who want to acquire citizenship. However, political communities in the form of states also possess territory, which the other forms of associations do not possess. Territory supplies the political community with a living space, water, and minerals, as well as with a protected area of its own, guarded by borders and police forces. Furthermore, since political communities both possess territory and have the ability to include or exclude those who want to enter and use their territory, Walzer examines in detail the admission policies of states to determine whether it befits the principles of distributive justice.

Walzer offers a very narrow interpretation of the principles of distributive justice, which he calls the “mutual aid” or the “good Samaritan” notion. In his view, this is the extent to which states hold an obligation to distribute the good of membership in a just manner. He

38 Benhabib, *supra* note 15 at 173.
39 David Miller, who is also a communitarian, also made this comparison to clubs to justify restrictive immigration policies. See David Miller, *Immigration: The Case for Limits*, in *CONTEMPORARY DEBATES IN APPLIED ETHICS* 193, 199 (Andrew I. Cohen & Christopher Heath Wellman eds., 2005).
41 *Id.* at 42-46.
compares the moral obligation of states towards immigrants with the obligation of a person towards a stranger she meets in the desert who asks her for a share of her water or of a person towards an injured stranger when she is faced with the dilemma of whether to take him into her house. The duty in these scenarios extends to those cases in which positive assistance is urgently needed by a party, if the risks and costs (or burdens) of offering such assistance are relatively low for the other party. Walzer sees the mutual aid principle as extending “across political (and also cultural, religious, and linguistic) frontiers.” In his view, this is the one form of distributive justice that applies in the international arena. Even though not clearly stated, it seems that, according to Walzer, the moral obligation derives from the random encounter, from the relationship that was formed between strangers in the middle of the desert, which creates an exposure to the immediate need of the immigration. It is not clear whether such a duty also exists with respect to destitute persons who had not left their country of origin.

With respect to the above-mentioned example of the State of Elbonia, Walzer would therefore argue that State B is obliged to assist the Elbonian immigrants only when this assistance is urgently needed, and as long as the burden is not too great.

Walzer does, however, recognize that there is one type of immigrant towards which the state holds a greater duty: the refugee. Walzer seems to believe that states should grant asylum to refugees who have been deprived of the protection of their countries. He claims that if states are not willing to grant asylum, then they would be required to use force against helpless and desperate people. Besides, Walzer argues, in most cases the number of refugees seeking asylum is relatively small and the refugees tend to be easily absorbed, so the expense of granting asylum is not great.

Walzer’s philosophical argument is susceptible to critique. His communitarian starting point of referring to states as similar to clubs, families, or neighborhoods with the one difference being possession of

42 Seyla Benhabib mentions that since the duty to assist foreigners is not absolute, but rather it is contingent on not being overtly disruptive to the life and welfare of a society, it is an “imperfect” or “conditional” duty of the state. See Benhabib, supra note 15 at 36-37.

43 Walzer, supra note 40 at 32-35.
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territory seems, at the very least, inaccurate. Unlike clubs, families, and neighborhoods, states have a much stronger grasp on us. Our belonging to a state defines our being, our identity, and—most importantly—the rights and privileges we are entitled to enjoy. Therefore, patterns of inclusion or exclusion have a much more coercive impact when applied by states than by clubs or other forms of social institutions. The difference between states and clubs, families, or neighborhoods is not just quantitative, but rather it is also qualitative.

Chaney criticizes this analogy, stating that states are de facto limited in their ability to exclude and include in ways that other social institutions are not. In her critique of Walzer’s work, Chaney mentions that unlike clubs, states are unable to apply an effective process of exclusion or inclusion, as they are entered by masses of undocumented immigrants whom they are unable to stop at the border, who challenge their policies and are subject to restraints in international law.

Carens offers a more moralistic critique of the right of a state to favor its own members. He compares states with families and claims that although families care about their members more than non-members, they do not favor them no matter what. In many contexts, we believe that favoring family members (or, for the sake of this discussion, club members) is morally wrong or at least morally arbitrary. Similarly, we may find that there are circumstances in which favoring members of a state is morally dubious. Other authors write that states do not share the affinity of families, and that this affinity

44 On the ability to limit membership in organizations that is related to the protection of human rights, see Alan Gewirth, Ethical Universalism and Particularism, The Journal of Philosophy XXXV(6) 283, 292-293 (1988).

45 John Rawls, Political Liberalism 41 (1993). Rawls argues that, “we are not seen as joining society at the age of reason, as we might join an association, but as being born into a society where we will lead a complete life.” Thus, when abandoning the association analogy, Rawls neglected to treat immigration as a phenomenon of social and normative importance. For a discussion of Rawls’ above-mentioned statement, see Benhabib, supra note 15 at 74ff.

46 It should be noted, however, that Chaney does not establish a claim according to which states are by definition unable to exclude. Eliza M. Chaney, Migrant Workers and National Boundaries: The Basis for Rights and Protections, in Boundaries: National Autonomy and Its Limits 37, 41-44 (P.G. Brown & Henry Shue eds., 1981).

should not be the basis for rights. Rather, everyone should receive basic rights in a liberal democracy.48

Another issue with Walzer’s principle of “mutual aid” is that it seems too minimal and abstract. It seems that Walzer sees the responsibility of the state to admit immigrants as the equivalent of charity. He does not hold the position that “hospitality” is the right of the immigrant.49 Therefore, it is not clear that the “mutual aid” principle necessarily means that the immigrant needs to be admitted to a hosting society, but rather it might serve as a justification for assisting her in her state of origin, to the extent to which this is possible.50 Walzer’s perception of distributive justice fails to take into consideration the extent of the hardship experienced by the immigrant and her desperation as a criterion for determining the scope of the duty of the state towards her. Additionally, the position that the mutual aid principle is only valid when positive assistance is urgently needed by a party in a situation in which the risks and costs (or burdens) of offering such assistance are relatively low for the other party is very much open to politicization and manipulation. It seems relatively easy for a state to renounce any obligation to immigrants arriving at its borders by claiming that the costs of assisting them are too high or that their need for assistance is not urgent enough. Walzer himself claims that the force of this principle is unclear because of “its own vagueness” and because it may come up against “internal force of social meanings.”

Although it might not have been the intention of Walzer to claim that the mutual aid principle should not be applied narrowly (in other words, it applies only between states with mutual cooperation and ties), it is possible to misinterpret his theory in this way. This


49 The term “hospitality” is used by EMMANUEL KANT in his book PERPETUAL PEACE (1795). Kant, unlike Walzer, perceives “hospitality” not “as a virtue of sociability, as the kindness and generosity one may show to strangers who come to one’s land or who become dependent upon one’s acts of kindness through circumstances of nature or history; hospitality is a ‘right’ which belongs to all human beings insofar as we view them as potential participants in a world republic.” Benhabib, supra note 15 at 26.

50 It is not possible, of course, in the above-mentioned scenario of the State of Elbonia, which is about to disappear of the face of the earth.
interpretation derives from the usage of the term “mutuality,” which refers us to the concept of justice as reciprocity, meaning that “an individual has a right to a share of social resources… only if the individual contributes or at least can contribute to the cooperative surplus.” But what happens if the state from which the immigrants come will be unable to compensate in the foreseeable future the state that allowed the immigrants to enter its borders? And what about cases involving immigrants who we cannot genuinely expect to contribute to the production of common goods? It seems that in such cases the idea of “mutuality” does not hold much promise to the immigrants. A subject-centered approach to justice, which focuses on the immigrant as a person who is entitled to rights, seems more adequate and morally well-founded in the liberal human rights theory than the “justice as reciprocity” approach.

Most importantly, the promise encompassed in the idea of mutual aid is a minimal one. According to the mutual aid principle, states need not grant immigrants the same treatment granted to their citizens, nor need they grant them those benefits and rights that are reasonably required for a minimal or optimal life. The obligation of states is much narrower: to supply immigrants with what they urgently need, provided that doing so will not cause too much harm to the states and their citizens. As such, Walzer’s view would seem appealing to countries interested to grant fewer rights to necessitous immigrants.

Finally, it is unclear why Walzer sees refugees as an exception to his general principle of mutual aid. In fact, even Walzer himself does not offer a sufficient explanation for his making an exception where refugees are concerned. On the one hand, it seems like refugees are one of the classic forms of immigrants to which the notion of mutual aid applies, due to the fact that they have urgent needs that need to be met by the state. Therefore, it appears as though refugees should not be considered to be an exception to the general rule, but rather a typical application of the general rule. On the other hand, if Walzer is correct in his belief that states have a stronger obligation to refugees than to immigrants and that refugees are an exception to the general idea of mutual aid, then it is not clear why he stops at refugees, as they are

legally defined, and fails to go on to other categories of immigrants that also undergo extreme hardship, such as immigrants due to economic constraint. Clearly, Walzer does not challenge – or closely examine – the exact boundaries of the category of “refugee.”

In sum, Walzer’s idea of mutual aid seems to offer little hope to immigrants and to impose minimal duties on states. Even in those cases in which the mutual aid principle dictates an obligation to allow an immigrant into a state, the immigrant may find herself entitled to only minimal and emergency-related assistance. In most cases, it seems that states will not be obliged to offer immigrants more than temporary and partial membership due to an urgent need. In other words, in his writing Walzer maintains the importance of the nation state and its sovereignty, and as a result offers immigrants relatively little. In his eyes, political boundaries have moral significance, and beyond these boundaries, the duty of a state is almost a charitable duty.

2: Expanding Walzer’s Notion: Miller’s Criteria of Basic Rights and Exploitation

Some of the authors mentioned in this article discuss the issue of global inequality and its derivative duties in a rather abstract manner, without asking who is to blame for the inequality. It is well known that in many cases inequality between states (and, accordingly, between members of states) is a result of morally arbitrary factors, such as the amount of natural resources a state has or the natural disasters it has experienced. However, in other cases, and perhaps in most cases, inequality between states is simply a result of the fact that one of the states is run in a more efficient manner than the other; that one state preserves its resources while the other wastes or pollutes them; that one state may enjoy more economic prosperity whereas the other may suffer from depression due to war, internal instability, or other causes.

David Miller offers a different perspective. Although Miller does not only focus on immigration, his conclusions could be applicable to the issue discussed here. While Miller does not defend the status quo, he also does not want to explore inequality as such, but
rather to emphasize the reasons behind it. The aspiration for global equality is too abstract for Miller. He sees moral significance in issues such as the state’s own contribution to its poverty and the support – or dissent - given to the regime by its citizens. Miller does not directly deal with the matter of the duty of a state to immigrants, but we can follow his path and question why a state should be held responsible to care for the members of other states who are in distress due to the poor management of resources by their countries of origin. Imposing such a duty on a state would also create problematic ex-ante incentives on other states to manage themselves efficiently. In light of these notions, Miller offers his own criteria for just distribution based on the ideas of basic rights and exploitation, which are applicable even when the other states are required to intervene due to occurrences to which the state is at fault.

The first criterion for just distribution is the idea of basic rights. The idea of basic rights is the idea that “there are certain conditions that are universally necessary for human beings to lead minimally adequate conditions.” States are responsible for ensuring that these basic rights are enjoyed by every person, regardless of her nationality. Although Miller does not argue this specifically, the basic rights idea could serve as a justification for imposing a duty on states towards immigrants whose basic rights have been violated.

In a sense, Miller joins Walzer in maintaining that there is “a cross-cultural minimum” to which every person is entitled. As such, both Miller and Walzer are exposed to the moral relativism critique. However, their beliefs can be distinguished from those of global egalitarianism since both Miller and Walzer demand that the state give the immigrant a minimal right, rather than an optimal or equal right.

In the particular case of the immigrants from the State of Elbonia, it seems that Miller would consider it the moral duty of State B to assist the members of the State of Elbonia, even if their own state is responsible for the ecological disaster, since otherwise their basic rights, namely their right to life, would be infringed.

In a different context, Miller discusses the duty towards refugees, which is perhaps related to the subject of the human rights

52 David Miller, Justice and Global Inequality, in INEQUALITY, GLOBALIZATION AND WORLD POLITICS 187, 188 (Andrew Hurrell and Ngaire Woods eds., 1999).
53 Id. at 198-204.
exception. Miller maintains that they “as people whose basic rights are being threatened or violated in their current place of residence clearly have the right to move to somewhere that offers them greater security.” Accordingly “states have an obligation to admit refugees.” Interestingly, Miller thinks that states should define refugees “more broadly than is often the case to include people who are being deprived of rights to subsistence, basic healthcare etc.” However, Miller does not see the deprivation of the human rights of refugees as necessarily entailing long-term immigration, but rather as a problem that may be dealt with through short-term protection solutions.

The second criterion for just distribution is the idea of exploitation. An exploitive transaction takes place when two parties that have some degree of freedom but are unequal in power transact in a manner that seems unfair when measured against a suitable benchmark. Miller respectfully disagrees with the Marxist claim that every transaction is exploitive as such. He sees transactions as exploitive only when the inequality of power is so drastic as to lead one party to total vulnerability. It seems that, in our context, a “Millerian” claim would be that it is just to presume that a state has a duty to allow immigrants from exploited states to enter. However, Miller fails to fulfill the extremely difficult task of offering an accurate criterion for exploitation, and he is satisfied with simply giving examples of it. Also, it is not clear if this duty is only to immigrants from countries that have been exploited by the state itself or whether there is a general duty of the state towards all members of exploited states.

Although Miller is right to note that there is something unfair about a state being obliged to help the members of another state that has inefficiently used its resources, it seems that there is almost always a strong correlation between the inefficient use of resources and morally neutral facts, such as the economic situation of the state. Thomas Pogge notes that there is a strong link between the inefficient use of resources in a state and its general situation in terms of education, poverty, disease, and so on. He claims that states that are suffering from pre-

54 Miller, supra note 52 at 202.
55 Miller does recognize the risk that the temporary solution will become “semi-permanent,” as he puts it, but he does not think that this needs to be the case. Id. at 202-203.
56 Miller, supra note 52 at 204-209.
existing poverty will tend to not be as efficient in using their resources as wealthier states. In other words, it seems improper to treat the inefficient use of resources as a matter of “blame,” since it is derived from pre-existing conditions. In a way, Pogge’s argument makes it apparent that Miller’s focus on the state’s “blame” can easily be misused to justify the status quo. Additionally, there is something discriminating in Miller’s perception: the question of how much a state is to blame for its impoverished situation might be a good criterion for distinguishing between states, but it is hardly an adequate criterion for distinguishing between persons, or, in our case, immigrants. In other words, in many cases it seems difficult to have people bear the consequences of the actions of their state. Since often people do not have an ability to change their state’s policies, it could be problematic to derive their rights from this criterion. Accordingly, it is problematic to form an immigration policy using this criterion. Moreover, it seems that Miller’s conclusions do not provide an answer to the question of whether we should correct economic inequalities through immigration or through financial aid to poor countries.

In conclusion, Miller adds an important factor to the considerations that must be taken into account when discussing the global scope of distributive justice, as he identifies some reasons leading to inequality. Miller sees national borders as morally significant, and he believes that the obligations of states beyond their borders are very limited compared to their obligations to their own citizens. However, it seems that Miller’s criteria for just distribution offer a relatively modest form of protection to immigrants and consciously chooses not to go as far as global egalitarianism. In the following sections, I will review the works of other researchers whose writing does support applying distributive justice principles across borders in a more extensive and categorical manner.


58 On the issue of allocating responsibility for the actions of groups or states on individuals and vice versa, see George P. Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 111 YALE L.J. 1499 (2002).
3: Towards Cosmopolitan Egalitarianism: Coleman and Harding Correction to the Original Allocation of Resources Between States

Unlike Miller, Coleman and Harding conduct a very brief abstract discussion on distributive justice without focusing on whether or not states or their citizens can be held responsible for their situation. Also unlike Miller, they deal directly with the question of the place of distributive justice in the international sphere only with respect to immigration. Coleman and Harding support the premise put forth by Walzer that political boundaries have a moral significance from the point of view of distributive justice, although they see borders as “conventionally or arbitrarily set.” According to Coleman and Harding, borders “mark out first approximations of optimal units for allocating and producing the world’s resources,” yet they are “bound to be imperfect.” Therefore,

The immigration policies of nation-states would then be understood as a dimension of the initial agreement to produce and distribute the world’s resources according to the principle of distributive justice. Immigration policies provide a corrective to the “initial” allocation and production arrangements, responding thereby to the imperfect but administratively convenient production and distribution mechanism of nation states. Foreign aid policies might also be evaluated from the same perspective, as rectifying distributive inequities on the global scale.59

Coleman and Harding offer a more cosmopolitan perspective on distributive justice than Walzer. Their view is more consistent with the liberal view, according to which traits like nationality are morally arbitrary, and should not determine access to resources.60 Moreover, Coleman and Harding do not take the status quo as a morally neutral fact, but rather they imply that the borders might not have been placed

in good faith or in a way that reflects the interests of the states that were responsible for drawing them. Therefore, it might be justified to deviate from the existing allocation of responsibilities and resources. However, Coleman and Harding’s view, which does not go as far as a totally cosmopolitan egalitarianism view, seems morally risky. For example, it seems that, in theory, this position could well serve as a justification for poor states occupying territories in richer countries.

Since Coleman and Harding’s discussion of this point is very brief, they leave many questions unanswered. Firstly, they do not offer a comprehensive solution to the current unjust distribution in the world. Coleman and Harding only refer to inequalities that are a result of how resources were allocated as borders were drawn between states and not to any other inequalities. For example, they would call for State B to accept immigrants from the State of Elbonia if the borders between the State of Elbonia and State B are the cause of inequality between members of the two states. It is not clear what Coleman and Harding’s position would be if the State of Elbonia itself were responsible for its own extinction. In addition, although their discussion provides us with one mechanism to evaluate the effectiveness of immigration policies and foreign aid policies, it lacks in the sense that it does not clarify when inequalities in the initial allocation of resources should be corrected through immigration policies and when they should be corrected through foreign aid.

4: Pogge and Beitz: The Cosmopolitan View of Distributive Justice and The Expansion of Rawls Ideas

None of the above-mentioned approaches claims that there is a moral basis to fully enforce distributive justice globally, beyond borders. I will now turn my examination to those scholars who argue for cosmopolitan egalitarianism and who believe that the principles of distributive justice should be applied regardless of national borders.

The roots of cosmopolitan egalitarianism can be traced back to the writings of John Rawls, one of the most prominent philosophers of the twentieth century. Rawls discusses justice as a virtue of social institutions, namely, as a virtue of the social need for cooperation. Rawls puts forth an original position in which the foundations of just social institutions are formed. These social institutions are characterized
by the fact that their decisions are made in “a fair procedure so that any principles agreed to will be just.” According to Rawls, parties should be situated behind “the veil of ignorance,” unaware of their own traits, so that they cannot be biased by self-interest when deciding which option is more just. The parties have no knowledge of morally arbitrary factors, such as class, status, ability, political situation, and so on. However, they do have a basic knowledge about the key characteristics of the society and culture (but no knowledge about the implications of those on themselves). Rawls claims that these conditions would guarantee just resolutions as they screen out all the morally arbitrary elements from the decision-making process. When choosing between alternatives in the original position, parties that are behind the veil of ignorance are expected to apply the “maximin rule for choice under uncertainty.” In other words, parties will “adopt the alternative the worst outcome of which is superior to the worst outcome of others.”

In this original position put forth by Rawls, two principles of justice are bound to be constituted. The first position is that “each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.” The second position is that “social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone’s advantage, and (b) attached to positions and offices open to all.”

This notion of justice, if applied internationally, can serve as the basis for a claim that since nationality is a morally arbitrary trait, states have the same compelling duty towards non-citizens as they have towards their own citizens. This theoretical paradigm can also serve as the basis for a claim for open borders and cosmopolitan egalitarianism. However, when we carefully examine Rawls’ position, we understand that he applied the above-mentioned principles only within the framework of the nation. Rawls does not see a need for overcoming arbitrary disadvantages and inequalities outside the context of a society. In his view, the two principles of justice are contingent on an ongoing scheme of social cooperation. They apply in “a self-contained

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62 Id. at 152 ff.
63 Id. at 60 ff.
64 Thomas Nagel, The Problem of Global Justice, 33 PHIL. & PUB. AFF. 113, 128 (2005). This is so even though belonging to a specific society is in itself arbitrary.
national community,” meaning in national communities, which are territorially defined by borders and essentially self-sufficient. However, according to Rawls, the two principles of justice do not apply internationally. The only universal duty for Rawls is a non-egalitarian one, which is mentioned in his recent writings and is somewhat similar to the duty Walzer writes about. Rawls seems to think that “peoples have a duty to assist other peoples living under unfavorable conditions that prevent their having a just or decent political and social regime.”

Thus, well-ordered societies have the duty to help burdened societies in their attempt to become well ordered. However, it does not appear as though Rawls believes that a transfer of wealth from wealthier societies to poorer societies should take place.

Other philosophers support the above-mentioned conclusion that there is no justification for applying standards of justice in the global sphere given the absence of global governance. Nevertheless, much like Rawls, they maintain that this should not be interpreted as supporting “ethical egoism,” and they do support offering some form of humanitarian assistance (whether provided by governments or by international NGOs) to minimize global poverty, regardless of questions of our conception of justice.

Rawls, supra note 61 at 457 ff. Rawls tries to distinguish states from peoples in a manner that I find rather unconvincing, which I do not want to dwell upon.


For a detailed critique of Rawls’ position, see e.g., Wilfried Hinsch, Global Distributive Justice in Global Justice 54, 62 (Thomas W. Pogge ed., 2001).

See e.g., Nagel, supra note 64 at 113; Michael Blake, Distributive Justice, State Coercion, and Autonomy, 30 Phil. & Pub. Aff. 257 (2002); Stephen Macedo, What Self-Governing Peoples Owe to One Another: Universalism, Diversity and The Law of Peoples, 72 Fordham L. Rev. 1721 (2004).

Under this approach, it is not clear that such humanitarian assistance should be provided through states, and it is possible to imagine it being provided through international NGOs. Nagel, supra note 64 at 132.

Thomas Nagel is explicit about this, and says that, “[w]hatever view one takes of the applicability or inapplicability of standards of justice to such a situation, it is clearly a disaster from a more broadly humanitarian point of view. I assume there is some minimal concern we owe to fellow human beings threatened with starvation or severe malnutrition and early death from easily preventable diseases, as all these people in dire poverty are. Although there is plenty of room for disagreement about the most effective methods, some form of humane assistance from the well-off to those in extremis is clearly called for quite apart from any demand of justice, if we are not simply ethical egoists. The urgent current issue is what can be done in the world economy to reduce
those scholars, it would be hard or even impossible to justify a situation in which State B rejects the Elbonian immigrants. Rawls, however, does not discuss immigration extensively, as he views it as unessential to human existence and therefore not a part of his ideal theory. 71

Nevertheless, later authors who further developed Rawls’ ideas have applied his notions internationally, while altogether rejecting the claim that they apply in “a self-contained” state. Many authors have further developed Rawls’ theory, thus applying the principles of distributive justice globally. I will focus on scholarship of two of the most prominent of these authors; Charles Beitz and Thomas W. Pogge. 72

Charles Beitz argues that Rawls’ perception of states as “self-contained” is wrong. Firstly, he claims that if states are really “self-contained” rather than interconnected, then there is no point in considering global justice, since there is no international conduct to regulate by the criteria of justice. Since justice, according to Rawls, is a characteristic of cooperative social institutions, it is worthwhile discussing it in the international sphere, which can also be characterized extreme global poverty.” Still, Nagel believes that, “[j]ustice as ordinarily understood requires more than mere humanitarian assistance to those in desperate need, and injustice can exist without anyone being on the verge of starvation.” Thus, Nagel believes that this requirement of refraining from “ethical egoism” does not solve the fundamental dilemma on the scope of the principles of justice. Nagel, supra note 64 at 118-119.

71 Rawls does find immigration concerning to some extent, as he analyses the phenomenon of immigration as an externality and a risk to the cultural and constitutional principles of a state. Societies are not obliged to apply distributive justice outside their “self-contained” selves, and therefore they have no duty to allow immigration. If they do allow immigrants in, then those immigrants have a right to distributive justice just as any other member of the society. This means they are not to be treated differently than the locals. This creates an incentive for states not to allow immigration to begin with. For an overview of Rawls’ writing on immigration in his book THE LAW OF PEOPLES, see Seyla Benhabib, The Law of Peoples: The Law of Peoples, Distributive Justice, and migrations, 72 FORDHAM L. REV. 1761 (2004). See also: Howard F. Chang, Beyond Belonging: Challenging the Boundaries of Nationality; The Immigration Paradox: Poverty, Distributive Justice and Liberal Egalitarianism, 52 DEPAUL L. REV. 759, 769-772 (2003).

72 For others who deal in their writing with the application of distributive justice in the global sphere, see e.g., Joseph Carens, Immigration, Welfare and Justice, in Justice in Immigration 1 (1995); Joseph Carens, Aliens and Citizens: The Case for Open Borders, 49 REVIEW OF POLITICS 2.
by cooperative ties. Consequently, it seems that Rawls’ perception of states as “self contained” is unrealistic or obsolete. Even Rawls himself admits in his later writing that “the relatively narrow circle of mutually caring peoples in the world may expand over time and must never be viewed as fixed.”

States interact in the most significant ways, especially in terms of economy and commerce. If states are not perceived as “self-contained,” then there is some justification for thinking of an international original position, which is similar to the one described by Rawls above in which the same principles of justice apply.

In general, Beitz claims that national boundaries have no moral significance. In other words, there is a justification to an international principle of distributive justice. The result is that Beitz claims that everyone should be included in the hypothetical original position – behind the veil of ignorance – and their nationalities should be disregarded.

Pogge agrees with Beitz that Rawls is mistaken in rejecting the idea of enforcing distributive justice at the international level. He stresses above all else that Rawls fails not only in not applying the idea of distributive justice universally, but also in not proving that if we do not apply this idea universally, then there are still reasons for applying it within states. Pogge ponders Rawls’ methodology, wondering why he focuses on persons only in his discussion of national justice and on states in his discussion of international justice. He argues that Rawls’ theory suffers from a double standard, since it sets different standards for the national sphere and the international sphere without proper justification.

Furthermore, Pogge asserts that the idea of distributive justice derives directly from the fact that each person is entitled to welfare rights. He sees distributive justice as an institutional principle, having to do with the just distribution of resources in an institution. Due to the

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73 Rawls, supra note 66 at 113.
74 Otherwise, according to Beitz, there isn’t any justification for a national application of the principle. Simon Caney, International Distributive Justice, 49 Political Studies 974, 975-976 (2001).
75 See e.g., Thomas Pogge, World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms 104 ff. (2002).
76 Id. at 108-109.
extent of global economic interdependence, there is a global basic structure on which the principle of distributive justice should be applied. It is noteworthy that some (though not all) of the other authors believe that the obligation to help others, which is derived from the idea of distributive justice, is compelling and exists even if those others do not belong to the same institution.

Both Beitz and Pogge reach the conclusion that wealth should be distributed in the international sphere in a manner that maximizes the benefit of the least well-off persons. As such, this point of view is a sophisticated twist on egalitarianism, protecting substantial, rather than formal, equality. On the issue of the duty to necessitous immigrants, it seems that those who side with the cosmopolitan view of distributive justice will argue that such immigrants should be offered assistance by all states in the form of membership and protection of their rights. The duty of distributive justice applies to the individual and, therefore, the individual has the right to claim just distribution. This conclusion is supported by the notion of the universal nature of human rights as something that every person is entitled to enjoy, and it is also reaffirmed by the natural law tradition according to which rights arise through recognition of the inherent dignity of a person.

In the specific context of the virtually-extinct State of Elbonia, the cosmopolitan approach would undoubtedly find that State B holds a duty to assist the fleeing members of the State of Elbonia.

However, the cosmopolitan point of view of distributive justice is subject to several types of critiques. The first type of critique is the nationalist critique. In essence, the nationalist critique argues that the

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78 Thomas W. Pogge, REALIZING RAWLS 192 (1988).
79 Peter Singer, Famine Affluence and Morality, 1(3) PHILOSOPHY AND PUBLIC AFFAIRS 229 (1972).
81 Id. at 152-153; Thomas W. Pogge, An Egalitarian Law of Peoples, 23(3) PHILOSOPHY AND PUBLIC AFFAIRS 195, 202 (1994).
82 Bo, supra note 48 at 404-405.
84 For a more detailed description of the nationalist critique and the responses to it, see Kok-Chor Tan, JUSTICE WITHOUT BORDERS COSMOPOLITANISM, NATIONALISM, AND PATRIOTISM (2004). See also an interesting angle of the nationalist critique developed by Seyla Benhabib. Benhabib, supra note 15 at 110-114.
cosmopolitan egalitarianism approach overlooks the special obligations of distributive justice that people have towards members of their national group. However, this claim should not necessarily be considered to contradict the cosmopolitan claim. Cosmopolitans simply argue that there is also a moral basis to a cosmopolitan distributive justice principle. Some nationalists claim that the cosmopolitan egalitarianism approach is not viable, since systems of distributive justice need to be compatible with nation states. This, of course, is a descriptive argument, rather than a normative one, and as such it does not undermine the mere moral claim of the cosmopolitan egalitarians. Other nationalists agree with the notion that people have entitlements, but disagree with the cosmopolitan point of view that states are primarily responsible for granting these entitlements. This critique, however, fails to deal with the extreme cases in which the state does not or cannot grant the required entitlements.

Another type of critique of cosmopolitan egalitarianism is that this approach is offensive to the idea of state sovereignty, as it indicates that states should enforce an egalitarian distribution of resources on other states that want to distribute resources in another manner. This critique is not only related to state sovereignty, but it is also related to a relative approach to the principles of justice. It appears as though this critique is indeed of great significance and may bring up an important point. However, realistically speaking, the problem in most of the cases is not that of individuals or states being forced to receive benefits and resources from intervening countries. Rather, the opposite is true: individuals and states who want to get more resources and benefits through redistribution are encountering the problem of a lack of willingness on the part of other states to grant them the needed resources. It seems, therefore, that this critique does not rule out the cosmopolitan view altogether, but rather suggests that cosmopolitan redistributive notions should not be misapplied to abolish cultural differences or otherwise forcefully misused.

The third type of critique is the realistic critique. This critique claims that states should – and would – advance their own national

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86 Caney, supra note 74 at 980 ff.
87 Id. at 983-986.
interests rather than take care of the wealth of those living abroad. This argument is supported by those scholars who express this critique through their understanding of human nature, the nature of international relations, and utilitarian arguments.\(^{88}\) According this line of thought, those who seek to promote the rights of immigrants to the same extent as the rights of locals are politically naïve.\(^{89}\) Once again, these arguments seem to be more descriptive than normative, and seem therefore unconvincing.

Seyla Benhabib offers an additional critique to the cosmopolitan egalitarianism position. First, Benhabib offers an “epistemic objection.” She claims that economic research has been inconclusive with respect to the effects of redistribution on welfare parameters and immigration patterns. Therefore, she suggests a reevaluation of the redistribution idea in order to develop a specific distribution mechanism to achieve the best results. Ultimately, Benhabib claims that it is possible that redistribution should take a different form than that of a distribution that favors “the least advantaged one.”\(^{90}\) Yet while Benhabib justly points out the possibility that other mechanisms of redistribution might be more effective, her argument does not undermine the notion of redistribution as an unavoidable means of reducing global inequality.

Second, Benhabib offers an “hermeneutic objection” in which she maintains that it is not clear how the redistribution of wealth should occur because “it is not clear who is to count as ‘the least advantaged’” in order for the redistribution to work in her favor. The determination of who is “the least advantaged” is not a purely economic decision, but rather a political-economic one.\(^{91}\) While objection holds true, the same argument can be made with respect to the determination of who is “the least advantaged” within a state. Although determining who is “the least advantaged” in a state may be somewhat less complex than making the same determination in the global sphere, it may still be rather complicated and difficult at times.

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\(^{88}\) Caney, supra note 74 at 986-988.  
\(^{89}\) Boswell, supra note 85 at 7.  
\(^{90}\) Benhabib, supra note 15 at 106-108.  
\(^{91}\) Id. at 108-109.
To conclude, distributive justice theory literature offers various perspectives to the morality of the protection gap, according to them it is justifiable to protect the Elbonians.

IV. UTILITARIANISM

While the distributive justice analysis of the moral duty of a state to necessitous immigrants is probably the most prominent in the philosophical literature, I will now examine some other conceptions of justice and their position with respect to the question at hand.

The utilitarian point of view measures the moral value according to whether it increases – or decreases – the total amount of utility. From a simple utilitarian point of view, therefore, it is clear that State B must admit the citizens of the State of Elbonia to the extent that their immigration will improve the utility of the citizens of the State of Elbonia more than it will decrease the utility of the citizens of State B. In our case, since the utility of the citizens of the State of Elbonia will likely increase dramatically, it seems that State B must assist them by allowing their entry. However, generally speaking, due to the cost diminishing marginal utility principle, accumulative utility will, in fact, increase due to immigration. This is mainly because political borders are not determinative in utilitarianism with regards to the allocation of resources between persons. This is also, as Joseph Carens puts it, due to “the utilitarian commitment to moral equality is reflected in the assumption that everyone is to count for one and no one for more than one when utility is calculated.”

92 Economic research has been inconclusive regarding the economic effects of immigration. See George J. Borjas, Issues in the Economics of Immigration 2 ff. (2000). It seems that if we take other factors that are not strictly economic in nature into account, then we will reach the same inconclusive results.

93 This is true if we assume that there is no particular utility in the mere sense of belonging to a certain nationality. Charles R. Beitz, Justice and International Relations, in International Ethics: A Philosophy and Public Affairs Reader 282-283 (C.R. Beitz, M. Cohen, T. Scanlon & A.J. Simmons eds., 1985). It is worth mentioning that, in some cases, utilitarianist thought coincides with notions of distributive justice, although this happens randomly and for reasons that are arbitrarily connected to justice as such. See e.g., Peter Singer, Practical Ethics 14-23 (1979).

94 Carens, Aliens and Citizens, supra note 72 at 263. This commitment to principles of equality leads Howard F. Chang to the conclusion that discrimination between non-citizens and citizens is as morally unjust as, for example, discrimination between
Recent findings also generally support this notion by finding that the liberalization of immigration control increases efficiency gains over time, first of all, by saving the expenses of immigration control. In addition, the liberalization of immigration control increases efficiency by increasing the real income of the world. This increase is estimated to be somewhere between doubling the real income of the world and increasing it by thirteen percent, according to the more modest estimates. In addition to the increase in real income, liberalizing immigration control decreases inequality in income distribution.\(^9\) While Utility should not be confused with efficiency gains, there is a connection between the two in many cases.

However, when the total amount of utility is measured, it is generally not in terms of the amount of utility in the world. Instead, when a country calculates the effect of an immigration policy, to the extent that it practices a utilitarian approach, it calculates the utility of its own persons.\(^9\) From a utilitarian point of view, one potential problem with immigration is “the tragedy of the commons” problem. If immigration is allowed, then the people who bear responsibility for a specific country are not the only ones who benefit from its assets and suffer its losses. Rather, immigrants share the assets and losses even though they have not contributed to the state and have no share of responsibility for it.\(^9\) This might affect any incentive to contribute to the state, which might, in turn, affect the utility.\(^9\) More specifically, the

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\(^9\) Id. at 4-5.

\(^9\) This moral stance often correlates to the political realism school of thought, according to which immigration policies are mainly influenced by a state’s self-interest. See Bo, *supra* note 46 at 405-406.


\(^9\) This is comparable to similar efficiency arguments that are made in the context of property law theory and particularly with regards to domestic takings law. In the context of takings law, it has been argued that full compensation is crucial for providing incentives for owners to invest in their property. The concern is that giving people a share of someone else’s property through takings law without fully compensating the property owner will discourage people from investing in their private property as they will fear losing it to others (who, in turn, did not invest). However, research shows that full compensation does not provide as much of an incentive as a progressive compensation regime does. Hanoch Dagan, *Takings and Distributive Justice*, 85 Va. L.
most imminent fear is that immigrants will cause a decrease in income and much more reliance on the welfare system.

However, research has demonstrated that even without considering the income increase of new immigrants, there is reason to expect an income increase for the natives of the state to which these immigrants arrive.\(^9^9\) The only negative effects of immigration are on the income of low-wage native employees, and these negative effects can be corrected through distributive measures, such as taxation.\(^1^0^0\) The concern that is sometimes raised that allowing immigration will impose a greater burden of taxation can be refuted by the fact that immigrants will also be taxed on their income as soon as they are employed in their state of immigration. Additionally, the burden of taxation does not have to be increased if immigrants are not fully integrated into the welfare system of the state.\(^1^0^1\)

It should be noted that much of the research on the impact of immigration on utility (or income) focuses on migrant workers. However, it is possible to assume that absorbing the Elbonian immigrants will have a similar impact on their real income, the real income of natives, and income distribution. Such immigrants are likely to take those positions with low-wages and low-skills in the labor market, much like migrant workers. Also, they are likely to have the same consumption patterns as migrant workers.

It should be noted, however, that although maximizing utility is an important consideration in immigration debates,\(^1^0^2\) I believe that other political and moral considerations should also be taken into account when forming immigration policies.

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\(^1^0^0\) A comprehensive discussion of the measures of the redistribution of income and other profits between high-wage native employees, immigrants, and the low-wage native employees is beyond the scope of this paper. For such a discussion, see Howard F. Chang, *Liberalized Immigration as Free Trade: Economic Welfare and the Optimal Immigration Policy* 145 U. PA. REV. 1147 (1997).

\(^1^0^1\) Kukathas, supra note 99.

V. ETHICS OF CARE

The feminist critique of international law offers a different perspective on the extent of the duty states owe towards necessitous immigrants. This critique claims that international law concepts that appear unrelated to gender and overall neutral, such as states, boundaries, and sovereignty, are actually very male-oriented and have a serious impact on women. As Charlesworth, Chinkin, and Shelley Wright note,

A feminist account of international law suggests that we inhabit a world in which men of all nations have used the statist system to establish economic and nationalist priorities to serve made elites, while basic human, social and economic needs are not met. International institutions currently echo these same priorities.103

Although the feminist critique of international law encompasses a wide variety of views, I will refer specifically to the ethics of care approach, as it is the most relevant to this point. The ethics of care approach is based on psychological research performed by Carol Gilligan,104 who analyzed the problem-solving attitudes of women and men in the hopes of determining whether women have a different “voice” – or approach – than men. Gilligan concluded that females apply an ethics of care approach and perceive things in terms of relationships, responsibility, caring, context, and communication. Males, however, apply an ethics of rights or an ethics of justice approach, which leads them to perceive things in binary terms of right and wrong, fairness, logic, rationality, and winners and losers, without taking into account context and relationships.105

While the ethics of care approach seeks to improve our understanding of the problem-solving attitudes and “voices” of women, it has also served as a basis for the promotion of women’s interests.

104 CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT (1982).
105 Id. at 64-74.
Additionally, the ethics of care approach has served as a call to recognize the validity and potential of that “different voice,” as the ethics of care approach is often more appropriate and more moral than the ethics of rights approach. In the context of international law, the general promotion of the ethics of care approach has far-reaching consequences with respect to women, but also with respect to other subordinate groups and international law and its fundamental concepts. Indeed, this approach has been used to critique various phenomena in international law and international relations such as the treatment of third world countries, colonialism, sovereignty, transnational institutions, international norms and norm-making processes, and so on.  

In the context of immigration, the ethics of care approach supports a view that diminishes the male-like “us” and “them” binary distinction between citizens and aliens. This approach also rejects a strong understanding of sovereignty and nationalism and points to the fact that the countries of the world are interrelated and interconnected. Instead, the ethics of care embraces a more humanist-oriented approach. With respect to human rights, the ethics of care approach promotes the protection of social and economic rights over civil and political rights. Consequently, this approach supports a “relational” attitude to immigrants, objects criminalizing most kinds of immigrants, and requires offering them protection, especially when it comes to vulnerable immigrants, such as refugees, trafficking victims, and necessitous immigrants, such as the Elbonians. The ethics of care approach supports these positions both as a general policy recommendation and because women constitute a large – and often unheard and undocumented – group of immigrants.

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106 For an overview of the “ethics of care” approach to international relations, see Fiona Robinson, Methods of Feminist Normative Theory: A Political Ethic of Care for International Relations, in FEMINIST METHODOLOGY FOR INTERNATIONAL RELATIONS 221 (2006).

107 ANN TICKNER, GENDER IN INTERNATIONAL RELATIONS 64-65 (1992).

108 Charlesworth, Chinkin & Wright, supra note 103.

109 On the need for further protection of women in refugee law, see e.g., Amy M. Lighter Steill, Incorporating the Realities of Gender and Power into U.S. Asylum Law Jurisprudence, 1 TENN. J. L. & POLY 445 (2005).

110 Saskia Sassen, Is This the Way To Go? – Handling Immigration in a Global Era, 4 STAN. AGORA 1 (2003). Although Sassen does not refer specifically to the “ethics of
The ethics of care approach argues that much like no child can survive without care, some immigrants also cannot survive without care in some circumstances. In so doing, this approach challenges myths of self-sufficiency. Hence, there is a moral obligation to care for immigrants and to feel empathy and solidarity towards them. For example, in the case of the above-mentioned State of Elbonia, it is likely that the ethics of care approach would support assisting the members of the State of Elbonia by allowing them to stay in state B and to enjoy some welfare benefits.

However, the desirable extent of “care” of immigrants such as the Elbonian immigrants remains unclear under this ethical theory. The ethics of care approach does not clearly define the scope – and the limits and boundaries – of the moral duty of states towards necessitous immigrants. It does not clearly answer the questions of who should be cared for, under what conditions, and how they should be cared for.

The main criterion that this theoretical approach offers to help us determine the scope of the duty is that of relationship. At the core of the moral obligation of states towards immigrants, or of State B towards the Elbonians, is the relationship that was formed between them. The ethics of care approach attributes much importance to the depth of the relationship the immigrant has with the community, which translates to the scope of the duty that the state holds towards her. This helps differentiate between the duty owed to immigrants, and that owed to whom the hosting states has an immediate relationship. It also suggests that a duty of a wider scope should be owed to an immigrant, who had integrated into the society, that to an immigrant who has just availed himself to a hosting state’s authority at the border. Finally, the theory also implies a justification to a softly-limited participation of immigrants in the welfare system, since the relationship with them is often less profound and more short-termed than that which states hold with immigrants.

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111 Although not in the context of immigration, this issue is explored in Virginia Held, Draft Paper in Yale Legal Theory Workshop on Terrorism and Military Intervention (Feb. 1, 2007).
In a sense, the ethics of care approach somewhat rejects the provision of clear-cut definitions since it aims to avoid “male” binary distinctions. Therefore, it can be very difficult to draw modern policy recommendations based on this approach. It should also be noted that the ethics of care approach falls short of arguing in favor of a cosmopolitan egalitarianist approach. As this approach supports the view that the context of human lives is crucial, it has a hard time accepting a full redistribution of wealth. Rather, it argues for a “softer” perception of states as units for the redistribution of wealth.\footnote{Robinson, supra note 106 at 221.}

VI. THE RELATIVE NATURE OF THE DUTY OF THE STATE HOLDS TOWARDS DIFFERENT KINDS OF REFUGEES AND IMMIGRANTS

According to the above-mentioned theories as well as to other considerations, the moral duty of states towards necessitous immigrants should be balanced against other duties and moral ends. Additionally, the scope of the above-mentioned moral obligation is not absolute but relative, and it may vary from state to state and from one immigrant to the other. It seems morally justifiable to have a variable moral duty of states to immigrants, depending, on the one hand, on the merits of the state and, on the other hand, on the merits of the immigration and the immigrant.

Naturally, the scope of the moral obligation is dependent on the economic situation of the state. It would seem morally acceptable for a state in a harsh economic situation to decline immigration, but morally improper for a wealthy state to do so. We cannot expect developing states to hold the same responsibility towards immigrants as developed states.

Thomas Hobbes discusses this point and makes the argument that people who cannot earn a living in their home states have the right to immigrate (with a matching duty of the state to allow them in) as long as the state to which they immigrate is not “sufficiently inhabited” and is rich with natural resources to the extent that its inhabitants cannot use them all up themselves.\footnote{\textsc{Thom}as \textsc{Hobbes}, \textit{Leviathan} (1651) at Chapter XXX, \textit{available at} \url{http://etext.library.adelaide.edu.au/h/hobbes/thomas/h68l/chapter30.html} (last visited August 7, 2007). It is interesting to compare Hobbes’ argument with Kant’s justification of the right of a foreigner to hospitality. Kant argues that it is unjust to...} Indeed, it seems that Hobbes’s
notions, which may have been suitable to the world that existed several centuries ago prior to the formation of the modern nation-state and prior to the enhancement of international trade and exportation, is not suitable to today’s world. Michael Walzer therefore rejects it.\textsuperscript{114} Hobbes’s idea is too narrow in the sense that it does not prevail as a basis for a state’s obligation towards immigrants in most if not all cases, since most states that are in fact “sufficiently inhabited” are not well-off enough to meet Hobbes’s criteria. On the other hand, Hobbes’s idea is too wide, since even if there was a country that was so affluent with resources that its natives could not consume them all, the state would be more likely to export these resources as goods than to increase its own consumption by allowing immigration. Additionally, Hobbes’s notion could potentially be misused as a justification for colonialism in countries that are affluent and not “sufficiently inhabited.” Nevertheless, it seems that an immigrant has a stronger claim when she wants to immigrate – and impose on the state to which she immigrates - if the state is not over-populated and if its resources are not overly used. This idea correlates with Walzer’s “mutual aid” principle, a part of which dictates that states only owe a duty to assist the immigrants provided that the assistance doesn’t overburden it.\textsuperscript{115}

The scope of the moral obligation may also be influenced by the specific social or demographical balance.\textsuperscript{116} Some states have a very delicate social composition in which the immigration of a specific group of persons might have severe consequences for the country. In some states, this social composition is homogenous, while in others it is comprised of a particular balance of a few social groups. Certain societies try to preserve their social composition and attribute an intrinsic value to it. These states will be reluctant to allow the entry of immigrants. It should be noted, however, that this consideration carries little weight in the extreme above-mentioned example in which the world is composed of two states and one is about to vanish, given the deny a foreigner the right to enjoy the land and its resources when this can be done peacefully and without endangering the life and welfare of the locals. His argument is based on the fact that the earth is a common possession of all men. See Benhabib, supra note 15 at 30.

\textsuperscript{114} Walzer, supra note 40 at 46-48 (1983).
\textsuperscript{115} See supra, Section III.1, text after footnote 43.
\textsuperscript{116} On the presumed effect of immigration on a people’s culture, see Rawls, supra note 66, at 39.
fact that the persons from the disappearing state would otherwise lose their lives. The superiority of “basic rights”, as explained by Miller and referred to above, should prevail. While this consideration should normally be taken into account, it may not be appropriate to use it for the complete denial of entry to persons who would otherwise be unable to survive. Rather, states could take this into consideration when determining the extent of the integration of those immigrants they allow in.

Additionally, in certain circumstances, security considerations may also influence the scope of the moral obligation. For example, it seems that a country that is in a state of war may legitimately refuse, in some cases, to take upon itself obligations towards enemy nationals who pose a particular and personal danger to its security enter it as immigrants. Once again, any security considerations should be balanced against other considerations. In the above-mentioned case of a drowning state, the State of Elbonia, the only other state in the world, State B, should not be allowed to prevent the entry of immigrants who pose a security threat who want to save their own lives. Nonetheless, State B should be allowed to restrict the integration of the Elbonian immigrants into its society and to take steps to prevent them from endangering it. For instance, the state might be allowed to detain these immigrants in order to prevent a security threat from materializing. In a world with more than one state to which a person might immigrate, it seems logical to require that a person immigrate to a state to which she does not pose a security threat. In other words, the immanency of the security threat that an immigrant poses should be balanced against the existence of alternatives that might reduce the security risk.

Similarly, the moral obligation of a state to an immigrant might be affected by the reasons that led to the immigration. For instance, if the immigration was driven by force or necessity, such as the immigration of those fleeing from the above-described State of Elbonia, the moral obligation of the state to allow the immigrant to enter its borders might be stronger. If an immigrant poses a security risk to a state, then its obligation to admit her does not appear to be very strong. Additionally, if the immigration was encouraged by the state itself,

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117 See supra, Section III.2, text after footnote 52.
118 See supra, Footnote 6.
then, in a sense, the moral obligation is derived from the responsibility of the state for the immigration. If the immigrant is a member of the social group that the state encompasses, then the state has a greater moral obligation to her. Although these factors have the most obvious effect on the extent of the moral obligation of the state to immigrants, there are numerous other factors that can also influence this obligation.

Finally, it can be argued that the scope of the moral obligation of the state is contingent on the scope of the wave of immigration. In other words, the scope of the obligation might be smaller in cases of mass influx\(^{119}\) and greater in cases of a small number of immigrants. In a sense, this consideration is related to the other above-mentioned considerations. For example, the economic situation and socio-demographic balance of a state may not carry much weight when only a few individuals want to immigrate, since those few immigrants will have little or no effect on the economic situation or the demography of the state. However, these factors may become significant considerations in cases of mass influx, since a large number of immigrants could shift the socio-demographic balance of the state and have an impact on its economy. This, again, connects to Walzer’s determination that the assistance should be limited to that which does not to overburden the hosting country.

The “mass influx” consideration has been recognized as having impact on the scope of the right to enter one’s country\(^{120}\) and, on the scope of the ability of refugees to enjoy the right not to be sent back to their country of origin (“non-refoulement”).\(^{121}\) While, in principle, the

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\(^{119}\) In this discussion, I refer to a mass influx as a large wave of immigrants who enter or want to enter a specific state over a relatively short period of time, causing a tangible and significant change or impact in the state and/or in its society. Naturally, this term should be understood in a relative manner, as what constitutes “a large wave” depends on the size of the population of the hosting state, its available resources, and particular socio-demographic characteristics.

\(^{120}\) This right is protected in international law in Article 12 of the International Convention on Civil and Political Rights, 1966 and Article 13(2) of the Universal Declaration on Human Rights, 1948. For discussions about the fact that the right to enter one’s country does not cover situations of massive waves of refugees wanting to return to their states of origin, see Stig Jagerskiold, Freedom of Movement, in THE INTERNATIONAL BILL OF RIGHTS 166, 180 (Louis Henkin ed., 1981); Hannum, supra note 28 at 59.

\(^{121}\) This position was taken by James Hathaway in his book THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 357-363 (2005) but was rejected by the UNHCR
duty of the state towards the individual immigrant should be unrelated to the quantity of immigrants, it has implications on the scope of the obligation of the state to necessitous immigrants in situations involving a mass influx of immigrants. For example, in the case of the sinking State of Elbonia, in most cases it seems unreasonable that State B be allowed to prevent the entry of the members of the State of Elbonia who seek shelter, but it might be justifiable for State B not to allow their full and long-term assimilation and to require that another solution be found for the former members of the State of Elbonia.

It is also possible to argue that the scope of the duty changes with respect to different immigrants. Since, as David Miller mentions, protection of basic rights impacts the moral duty of the hosting state, the fact that the immigration is driven by necessity should increase the scope of the duty. Additionally, if the immigrant established a relationship with the hosting country, then the duty could be more expansive towards him. Such a relationship could be formed through contributing to the hosting society; sharing some cultural, ethnic or other affinity; or through integrating into it. Such a conclusion would be supported by the “ethics of care” approach.

**CONCLUSION**

Let us return to our initial example in which we identified the State of Elbonia as a sinking state on the brink of existence, whose citizens are accordingly forced to flee. As I demonstrated in this chapter, there is disagreement between the different scholars as to the scope of the protection State B has to offer the members of the State of Elbonia; the moral grounds from duty towards a larger group of immigrants derive; and the scope of the access to rights and privileges which should be offered to immigrants. According to the utilitarian approach, assisting necessitous immigrants is justified since it increases the utility in the world. According to the ethics of care approach, assisting necessitous immigrants conforms to notions of caring and

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122 See supra, Section III.2, text after footnote 52.
123 See supra, Section V.
empathy as well as to perceptions of states as interrelated rather than autonomous. Walzer supports providing emergency assistance to necessitous immigrants, at least to the extent that assisting them does not create too big a burden. Miller justifies assisting necessitous immigrants to the extent that assisting them is necessary to protect their basic rights. Coleman and Harding would perceive assistance to necessitous immigrants as a means of correcting the “original” distribution and redistributing resources in a more just way. Finally, the cosmopolitan egalitarianist approach supports a vast redistribution of resources as likely to support a broad scope of assistance to necessitous immigrants. Nonetheless, it seems that most if not all of these scholars would agree that the members of the State of Elbonia should be allowed into State B, thereby imposing some sort of a distribution of the resources of State B among the members of both states (including the members of the State of Elbonia). Even those scholars who object to applying the principles of justice across borders support the provision of humanitarian assistance.

I do not want to promote a specific perception of justice or a specific approach to the issue of the duty of the state towards non-members who want to emigrate from another state. I believe that, as I demonstrated above, none of the existing discussions about the duty of states to non-members has formed a comprehensive theoretical explanation that is up-to-date and not vulnerable to serious criticism. However, I do want to argue that while it is morally debatable as to who exactly among the immigrants ought to be assisted and how, it is clear that necessitous immigrants such as those from the State of Elbonia are at the core of those towards whom states hold a duty of assistance. In other words, there is moral justification for the elimination of the protection gap, through the provision of assistance and international protection to necessitous immigrants. Such assistance is necessary for the survival of necessitous immigrants and therefore qualifies as emergency assistance, according to Walzer; necessary for the protection of their basic rights, according to Miller; justifiable under the struggle for global justice; an increase in global utility, according to utilitarianism; and a form of care, according to feminist theory.

The determination of the scope of these rights is once again a question of great moral and practical importance. Although general guidelines with respect to the scope of the rights should be defined in
order to form concrete policy recommendations, the exact scope should be determined relatively, with respect to the specific characteristics of State B and the characteristics of the immigrants. Determining the exact scope of those rights goes beyond the aims of this project and requires making moral and political judgments regarding the importance of states. Personally, I support the cosmopolitan egalitarian approach, as I do not think there is a moral justification to national application of distributive justice principles. But let us assume for the purposes of this project that we hold a more minimal Walzerian perception, according to which the rights granted to immigrants should be those necessary to resolve an emergency situation and to the extent that they do not overburden the hosting society.

Although the example of a world in which only the State of Elbonia and State B exist and the State of Elbonia is about to be washed off the face of the earth is not entirely unrealistic, it is likely that the moral dilemmas relating to the obligation of states towards necessitous immigrants will arise in other less extreme circumstances. For instance, what is the moral obligation of states when the state of origin of the immigrants does not cease to exist? Or in other words: what are the moral obligations of states when immigrants are not completely unable to live in their state of origin, but rather find it extremely hard to survive there? In such a case, it seems that states may have a weaker obligation towards the immigrants and different considerations relating the characteristics of the hosting state and the nature of the immigration could be weighed. In some cases, the weight of these considerations would justify preventing the immigrants from entering and staying in the hosting state. However, in principle, the notions of the above-mentioned scholars would still apply. For example, there may be cases in which the state of origin does not cease to exist in the sense that it is not washed off the face of the earth or does not stop its de-jure existence. Still, even in the cases of those states, for some persons, their immigration may be a result of what they experience as the state ceasing its de-facto existence, and their need to receive the protection that they are unable to get from their own country elsewhere. In other words, surrogate protection might be morally required and necessary in the less extreme cases than that of Elbonia. Criteria to which conditions
make one a necessitous immigrant should be developed, as we strive to the aim of narrowing the protection gap and making our choice of protected immigrants morally justifiable.

124 I dealt with the issue of the definition of group of necessitous immigrants in my Ph.D thesis. TALLY KRITZMAN, SOCIO-ECONOMIC REFUGEES (Tel Aviv University, 2008).