

Moral Theory, International Law and Global Justice

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1. INTRODUCTION

The issue which stands behind nearly every controversy in contemporary legal theory is the problem of how law is to be understood in relation to moral values.

Mark Tebbit, *Philosophy of Law*¹

The question of the moral foundations of obligations of international cooperation in human rights might seem little more than a distraction for legal positivists.² For others, moral theory may well symbolise the very antithesis of the subject of international law, disturbing cherished orthodoxies and wresting the field back into its naturalistic foundations. On this view, international law is simply the body of rules to which States have agreed to be bound, particularly in the form of treaties and custom.³ This much, the jurist Abi-Saab makes clear in his defence of the dangers

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¹ M. Tebbit, *Philosophy of Law* (2nd edition, London: Routledge, 2005), p. 3.

² It may be equally so for those who take a realist perspective of international relations (see discussion on realism in Chapter 1). There is no necessary incompatibility though between normative and rationalist or consequentialist theories of international relations. In a constructivist vein, Hurrell contends that, "How we calculate consequences is often far from obvious and not easily separable from our understanding of legal or moral norms." A. Hurrell, 'Norms and Ethics in International Relations', in W. Carlsnaes, T. Riise and B. Simmons (eds.), *Handbook of International Relations* (London: Sage, 2002), pp. 137–53, at 144.

³ H. Kelsen, *Principles of International Law* (Robert W. Tucker ed., 2nd. rev. edition, 1966), pp. 438–9. See discussion of different theories in international law in S. Ratner and A. M. Slaughter, 'Appraising the Methods of International Law: A Prospectus for Readers', *American Journal of International Law*, Vol. 93, No. 2 (1999), p. 291.

of normative theory: “That is why I would discard from the discourse of legitimacy any attempt to use it as a means to dodge or get around the law; as a *passé-droit*, a licence trumping legality or a ‘justification’ of its violation.”⁴

Without entering the debate on epistemology of law, a broader reflection on the *interrelationship* between moral theory and international law, in the context of the current theme of this book, offers three potential contributions to legal discussions. First, moral theory provides an external viewpoint in which to view and evaluate the development of international law. The field is still very much embryonic and it useful to contrast it against normative yardsticks. It may reinforce or problematise proposals for legal interpretation, institutional reform or new standards or point to underexplored themes. Second, it might help shed light on the nature of controversies at hand. If one of the central aims of philosophy is to “bring analytic clarity,”⁵ a turn to theory may help explain divergent interpretations and expose the underlying premises. As the foregoing chapters reveal an array of competing interpretations on central topics, moral theory may be able to explain different perspectives but also reveal some surprising unanimity. Third, the normative legitimacy of international law itself has become the subject of a debate that stretches far beyond the questions of legality.⁶ Moral theory provides one route to seeing how different conditions and positions in international law may be normatively justified (or not) and on what grounds.

At the same time, it is arguable that much moral theorising on global justice occurs without reference to the remarkable developments in international law over the last sixty years. It is thus useful to try and link the two fields within this book, even if in a necessarily abbreviated and synthetic form. International law may even stimulate and provide the basis for fresh theorising, as Charles Beitz’s recent work demonstrates,⁷ or at least contribute to the context in which political philosophers may more effectively frame their proposals for global institutional reform. This is not to say that moral theory should be obliged to accept international law at face value.

⁴ G. Abi-Saab, ‘Security Council as Legislator and as Executive in Its Fight against Terrorism and against Proliferation of Weapons of Mass Destruction’, in R. Wolfrum and V. Röben (eds.), *Legitimacy in International Law* (Berlin: Springer, 2008), pp. 109–30, at 116.

⁵ M. Adams, interviewed in D. Edmonds and N. Warburton (eds.), *Philosophy Bites* (Oxford: Oxford University Press, 2010), p. xiii.

⁶ L. Meyer and P. Sanklecha, ‘Introduction: Legitimacy, Justice and Public International Law. Three Perspectives on the Debate’, in L. Meyer (ed.), *Justice, Legitimacy and Public International Law* (Cambridge: Cambridge University Press, 2009), p. 1; D. Bodansky, ‘The Legitimacy of International Governance: A Coming Challenge for International. Environmental Law?’, *American Journal of International Law*, Vol. 93, No. 3 (1999), pp. 596–624; A. Føllesdal, ‘Survey Article: The Legitimacy Deficits of the European Union’, *The Journal of Political Philosophy* Vol. 14, No. 4 (2006), pp. 441–68: To “say that an institution is legitimate in the normative sense is to assert that it has the right to rule” through “promulgating rules and attempting to secure compliance”. A. Buchanen and R. Keohane, ‘The Legitimacy of Global Governance Institutions’, in R. Wolfrum and V. Röben (eds.), *Legitimacy in International Law* (Berlin: Springer, 2008), pp. 25–62, at 25.

⁷ C. Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009). See discussion of his theory in Section 4.

As Griffith states in a slightly different context, “No matter who we are, we cannot establish the existence of a human right just by declaring it to be one. We can get it wrong”, and further, “A judge on an international bench cannot resolve conflicts by *fiat*. The resolution must be reasoned.”⁸

The central question for this chapter is how different moral theories relate to the key legal issues in this book, which have already been summarised and discussed in the Introduction. What does normative theory tell us about the content of the negative and positive extraterritorial duties of States in the field of economic, social and cultural (ESC) rights and when and how these obligations arise? Our primary aim, however, is not to advance our preferred moral theory or argument. Nor is it possible here to analyse in any depth the wide range of relevant political theories and religious and secular ethical traditions and associated notions of global justice, even if we constrain our discussion to ESC rights. We proceed instead by examining three clusters of theories, which, on their face, respectively appear sceptical, modestly supportive, and strongly supportive of global justice obligations and contrast them with the current state of international law.

Sceptical theories are examined in Section 2. This covers communitarianism and utilitarianism although we explore some alternative versions of each that may be more open to extraterritorial obligations. In Section 3, we trace three positions which tend to be more supportive of human rights, including ESC rights, but which possess a strong national orientation: liberal egalitarianism, democratic republicanism and dependency theory. In these theories, there is only a limited role for global obligations and institutions. In Section 4, we explore a final bundle of theories that take a clear departure point in individual rights in the global sphere. Many of these draw on cosmopolitanism but come to different conclusions.

2. SCEPTICAL THEORIES

2.1 *Communitarianism*

Communitarianism and utilitarianism represent the two schools of thought with a significant distrust of rights, and it is not surprising that this scepticism extends to the global sphere. For communitarians, by definition, the community rather than the individual is the ultimate unit of moral concern. This poses a direct challenge to the (predominantly) liberal theoretical foundations and historical origins of international human rights law. Communities can be defined at the level of families, tribes, religious and ethnic groups and States, united in theory by shared moral values and ideas about justice.⁹ A communitarian ethic may at first glance seem inimical with

⁸ J. Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008), p. 5.

⁹ International Council on Human Rights Policy (ICHRP), *Duties Sans Frontières: Human Rights and Global Social Justice* (Geneva: ICHRP, 2003), p. 67.

ideas about global justice and extraterritorial obligations, to the extent that operative moral standards are defined locally or nationally, without any external validation or legitimisation or any necessary reference to other communities' standards. Michael Walzer argues that transnational distributive justice has no place in international law as such issues need to be determined internally within States.¹⁰ According to this theory,

[E]ach distinct society is engaged in an ongoing process of developing and revising shared social meanings that ground distinctive principles of distributive justice, and the identity and well-being of individuals depends upon their participation in this cultural project. The benefits that individuals derive from the process depend upon its integrity, and this in turn requires that their shared meanings be worked out among themselves without standards being imposed from outside. Thus, the whole enterprise of transnational distributive justice is illegitimate, because it is an attempt to impose an external conception of distributive justice, with the result that the integrity of the indigenous process will be undermined.¹¹

Communitarians are not necessarily relativists. The importance of 'intra-communal justice' is not axiomatically questioned: a good society usually possesses principles of distributive justice. However, the empirical fact of the interdependence of States, societies, communities and individuals does not of itself constitute a community as a 'moral fact',¹² and communitarians generally balk at the idea of exporting their arguments for 'justice at home' to elsewhere.¹³ National communitarianism is particularly consonant with a Westphalian conception of the international order. It is suspicious towards conceptions of rights and obligations that are applicable in a global or extraterritorial sphere, a position that coincides with the formal legal stance of some States.¹⁴

These concerns need to be kept in perspective. First, Walzer's theory appears to overlook the plurality of distinct communities and societies within existing State borders. Communities themselves may be defined and sustained by exclusion of the 'other', thereby putting into question Walzer's premise of a single process of developing shared meanings for a single people within the borders of the State. Second, communities are in fact capable of sharing moral principles. Although many important sources of self-identification are defined in local and regional terms, transboundary influences have become particularly pronounced in the context of global economic

¹⁰ Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983).

¹¹ A. Buchanan and D. Golove, 'Philosophy of International Law', in J. Coleman and S. Shapiro (eds.), *Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2002), pp. 868–934, at 900.

¹² S. Hoffmann, *Duties beyond Borders* (Syracuse, NY: Syracuse University Press, 1981), p. 151.

¹³ C. Jones, *Global Justice: Defending Cosmopolitanism* (Oxford: Oxford University Press, 1999), p. 16.

¹⁴ See Section 3.1 of Chapter 3 in this volume.

integration, and communications and information technology revolutions,¹⁵ as the Arab Spring and ‘Occupy’ movements worldwide appear to bear out. Commitments to local values need not preclude adherence to global human rights treaties, even if one does not automatically assume the universality of the particular conceptions and definitions embodied in these treaties are empirically defensible across all communities.¹⁶ Third, in many countries individuals lack the material resources to participate in developing shared ‘local’ meanings. In these circumstances, minimal standards of transnational distributive justice may “facilitate the very benefits that Walzer assumes would be endangered by them”.¹⁷ Finally, the privileging of intra-community relations does not necessarily imply indifference to outsiders, and the feasibility of global solidarity depends as much upon the perceived importance of the issue of moral concern as upon the size of the putative community. For example, human solidarity may form more readily in reaction to torture, starvation, forced labour or genocide in foreign countries than in response to less glaring violations¹⁸ or cases in which a community’s State actively participated. Moreover, it may be possible to clear the communitarian hurdle for extraterritorial ESC rights more easily than for civil and political rights. As Heard notes, it may be easier to establish agreement on subsistence rather than liberty rights, as the latter might “pertain to a particular – liberal – conception of society”.¹⁹

Communitarianism is also a broad family, and some international rights have been framed in a collectivist rather than an individualist fashion. Whereas many of these rights have enjoyed a rocky ride, at best, in international law,²⁰ the human rights of groups – beyond individuals – do enjoy some degree of protection under international human rights law. Some of the rights are particularly close to a non-nationalist communitarian conception. For instance, minority rights protections under Article 27 of the International Covenant on Civil and Political Rights (ICCPR) (although framed as individual rights) and the right to self-determination of peoples (particularly indigenous and occupied peoples) are amongst the more prominent examples. As was discussed in Chapter 3 of this book, the extraterritorial dimension

¹⁵ Buchanan and Golove, ‘Philosophy of International Law’ (11 above), p. 901. See also Dani Rodrik, *The Globalisation Paradox: Why Global Markets, States, and Democracy Can’t Coexist* (Oxford: Oxford University Press, 2011), p. 231, drawing from the World Values Survey databank, available at <http://www.worldvaluessurvey.org/>, accessed 22 May 2012.

¹⁶ See, for example, M. Mutua, ‘The Complexity of Universalism in Human Rights’, in András Sajó (ed.), *Human Rights with Modesty: The Problem of Universalism* (Antwerp: Martinus Nijhoff, 2004), pp. 51–64.

¹⁷ Buchanan and Golove, ‘Philosophy of International Law’ (n. 11 above), p. 901.

¹⁸ ICHRP, *Duties sans frontières* (n. 9 above), pp. 68–70.

¹⁹ A. Heard, *Human Rights: Chimeras in Sheep’s Clothing?*, available at <http://www.sfu.ca/~aheard/intro.html>, accessed 28 February 2012. Antiglobalisation movements from Seattle onwards appear to bear out this proposition, although Arab Spring and ‘Occupy’ movements reflect rights concerns across a wider spectrum.

²⁰ P. Alston, ‘People’s Rights: Their Rise and Fall’, in P. Alston (ed.), *People’s Rights* (Oxford: Oxford University Press, 2001), pp. 259–93.

of the right to self-determination has been applied by different United Nations (UN) bodies in practice for the benefit of these groups: for example, those living in the occupied territories of Western Sahara and Palestine.

Another variant is what might be called transnational communitarianism. Bailliet argues that the international human rights framework needs to better incorporate communitarian concerns but also take seriously at a global level the consequences of recognising the duties of different actors.²¹ Her communitarian critique proceeds as follows:

The emphasis of the international human rights community on rights, often to the exclusion of duties, may well be one of the factors behind widespread rejection/marginalization of human rights within Africa, the Middle East, and Asia. . . . At essence is concern that over-emphasis of individualism over communal identity delegitimizes the normative regime as overriding the local context in which it is to be applied. Protection strategies should be evaluated from the perspective of to what extent do the objectives match the interest of the community in ensuring its collective aspirations – and whether the program ignores, violates, or supports the underlying network of reciprocal duties and benefits within the social structure. Discussion of rights based protection of vulnerable individuals and groups within a community should not occur in a vacuum, but rather elaborated with full recognition and respect for the bonds sustaining the community.²²

The consequence of this approach is to shift the emphasis towards the obligations of a range of actors – individuals, communities, corporate entities, as well as States – taking into account the need for participation of individuals and vulnerable groups in the formulation of duties. However, she rejects simply focusing on “network initiatives at the local community level” in seeking to improve social justice, but advocates the importance of “transnational solidarity actions policies that reflect and respond” to the current global order.²³

2.2 *Utilitarianism*

Utilitarianism may give rise to more serious challenges. Under this theory, as in the case of classical liberalism, individuals – not communities – are the fundamental units of moral concern:

Utilitarians evaluate each action in terms of whether it maximises welfare, as summed across all individuals. Consequences – and therefore the actions that caused them – are judged by the degree to which they secure the greatest benefit

²¹ C. Bailliet, ‘What Is to Become of Human Rights Rule-Based International Order within an Age of Neo-Medievalism?’, in C. Bailliet (ed.), *Non-State Actors, Soft Law and Protective Regimes: From the Margins* (Cambridge: Cambridge University Press, forthcoming 2012).

²² Ibid.

²³ Ibid.

to all concerned. Benefit is assessed in terms of the satisfaction of individual preferences; all individuals are valued equally and all persons have a common duty to maximise utility.²⁴

Utilitarianism no doubt provides a useful reminder of the central value of individuals as moral agents, and challenges us to act on the basis of moral duty rather than charity.²⁵ However, utilitarianism and its underlying logic of consequentialism (the view that the value of an action derives solely from the value of its consequences, independent of any normative reference point) are the tools and language of cost-benefit analysis and mainstream economics, sitting uneasily with normative or deontological justifications of human rights (as being of intrinsic moral worth or value).

When it comes to extraterritorial human rights obligations, an inordinate focus on the morality, conscience, preferences and actions of individuals ignores “the direct and indirect, cumulative and complex effects of multiple human interactions”²⁶ and the vital function of social and political institutions in achieving change. A utilitarian perspective worries that rights approaches will threaten policies that will lead to improved social welfare: Utilitarianism “has a world view that is more aggregated, with a longer time horizon”.²⁷ In practice, utilitarian arguments are often used to resist the extraterritorial application of ESC rights, for example, in the regulation of transnational corporations or military operations.

One common response is to attack the assumptions of utilitarian models. This includes highlighting their “tendency to ascribe competitive structure to markets”,²⁸ which appears incongruent with actual domestic and global realities (a power imbalance which will be explored in subsequent sections). An alternative approach is to say that the tensions between the two paradigms are exaggerated and that constructive synergies can be found. It can be argued that human rights are rarely expressed as absolute trumps but as strong standards that must be overcome with significant justification.²⁹ Such reasoning can be found in the treatment by the Committee of Economic, Social and Cultural Rights (CESCR) of issues of sanction regimes or forced evictions: Interferences with ESC rights may be permitted, but strong justification is necessary, due processes must be followed and the minimum core of the

²⁴ ICHRP, *Duties Sans Frontières* (n. 9 above), at 71.

²⁵ The seminal work in this field is P. Singer’s ‘Famine, Affluence and Morality’, *Philosophy and Public Affairs*, Vol. 1, No. 1 (1972), pp. 229–43. For a different perspective, see A. Kuper, ‘More Than Charity: Cosmopolitan Alternatives to the “Singer Solution”’, *Ethics and International Affairs*, Vol. 16, No. 1 (2002), pp. 107–26, at 112.

²⁶ Kuper, *ibid.* p. 112.

²⁷ R. Kanbur, ‘Development Disagreements and Water Privatization: Bridging the Divide’, *Journal of Poverty Alleviation and International Development*, Vol. 1(1), (2011), pp. 1–20, at 10.

²⁸ *Ibid.*

²⁹ For a critique of this approach, see M. Koskeniemi, ‘Human Rights Mainstreaming as a Strategy for Institutional Power’, *Humanity: An International Journal of Human Rights, Humanitarianism and Development*, Vol. 1, No. 1 (2010), pp. 47–58.

rights must be respected. Thus, utilitarian and consequentialist considerations are incorporated within human rights both legal standards and doctrines. The two fields are thus complementary. Seymour and Pincus formalise this by arguing that human rights provide the normative boundaries whereas economics provides the tools for choice-making and trade-offs within this frame.³⁰

We can also problematise what we mean by utility or its synonym 'social welfare'. Perhaps the most convincing articulation of global human rights duties from a utilitarian perspective comes from the theory of global public goods. In Paul Samuelson's seminal but often forgotten 1954 essay on public goods,³¹ he tried to push economists past a technical definition of public goods.³² Public goods are not only those naturally occurring phenomena such as air but also those goods desired by all individuals, some of which the market cannot provide and which therefore require public provision. The market is unlikely to adopt measures to prevent the spread of communicable diseases, for example, and will only produce the medicines to treat them. Moving beyond the State, global public goods are those goods, as defined by Kaul and Mendoza, "whose benefits extend to all countries, peoples and generations".³³ The typical list of such goods tends to include naturally occurring phenomena through to human interventions such as environmental sustainability, peace and security multilateral trade, and even respect for human rights or international human rights treaties.³⁴

This global public goods approach leads to some interesting conclusions. To the extent that providing these rigorously defined global public goods is in the 'self-interest' of all countries, programmes to provide them should be supported by funds outside those allocated for international development. This would extend to assisting developing countries undertake the necessary 'complementary' activities, for

³⁰ See D. Seymour and J. Pincus, 'Human Rights and Economics: The Conceptual Basis for Their Complementarity', *Development Policy Review*, Vol. 26, No. 4 (2008), pp. 387–405.

³¹ P. Samuelson, 'The Pure Theory of Public Expenditure', *Review of Economics and Statistics*, Vol. 36 (1954), pp. 387–9.

³² In the tradition of Anglo-American economics, public goods can be simply described as those goods which are both non-rival and non-excludable. *Non-rivalry* refers to the fact that one person's consumption of the good does not deprive another of it – moonlight being a common example. *Non-excludability* means everybody can access this good – moonlight again is accessible to all although incarcerated persons may beg to differ. On the contrary, private goods are characterised by both rivalry and excludability. Consumption of a carton of milk deprives others of consuming it, and that carton is not publicly available for all. The approach is nuanced by pointing out that many public goods, in practice and possibly in their perfect form, are impure. They possess one or more features of a private good. A public good might thus be *exclusive* and restricted to a group of persons (e.g. merit-based criteria may limit access to higher education) or a good might be *competitive* in that scarce financial resources restrict availability of the public good for all.

³³ I. Kaul and R. Mendoza, 'Advancing the Concept of Global Public Goods', in I. Kaul, P. Conceição, K. Le Goulven and R. Mendoza (eds.), *Providing Global Public Goods: Managing Globalization* (New York: Oxford University Press, 2002), pp. 78–111, at 98.

³⁴ *Ibid.* p. 98. See also O. Morrissey, D. Velde and A. Hewitt, 'Defining International Public Goods: Conceptual Issues', in M. Ferroni and A. Mody (eds.), *International Public Goods: Incentives, Measurement and Financing* (The Hague: Kluwer, 2002).

example, building necessary health facilities in the case of addressing communicable diseases. To this extent, many extraterritorial human rights obligations may be effectively seen as requiring States to do little more than act in their own self-interest, rather than out of solidarity, charity or moral compulsion. Such an approach can be seen at times in international trade law. For example, the World Trade Organisation's panels have struck down some trade barriers on economic grounds, State behaviour which would be equally problematic from an ESC rights perspective.³⁵

A further insight from global public goods theory is the emphasis on the constructivist nature of social welfare and utility functions. Kaul has sought to move the debate beyond Samuelson's positivist point that 'human-made' public goods are necessary to maximise utility, and emphasises that both the present availability and distribution of public goods is a matter of social construction and social contestation.³⁶ Value judgments (including those relating to human rights) are thus relevant in determining utility. On this reading, not only does utilitarianism struggle methodologically to determine what constitutes the maximisation of welfare or acceptable trade-offs in a particular context,³⁷ it seems unable to sufficiently incorporate shifting and normatively driven preferences.³⁸ Following this line of argument one could imagine utility functions and preferences that take into account our global inter-relatedness: Our utility is improved when we know that human rights are secured globally.

However, the overlap between the idea of extraterritorial obligations and utilitarianism can only be stretched so far. At some point, the demand for empirical justification of the so-called added value of human rights for development is anathema from a deontological, but not consequentialist, standpoint.

3. MODEST EXTRATERRITORIALITY

3.1 *Liberal Egalitarianism*

The liberal egalitarian theories of John Rawls have revived a liberal tradition that is concerned with both rights protections and broader social justice.³⁹ Rawls posited a theory of justice as fairness based upon a hypothetical social contract arising

³⁵ See Chapter 9 by Salomon in this volume.

³⁶ Kaul and Mendoza, 'Advancing the Concept of Global Public Goods' (n. 33 above).

³⁷ M. Langford, 'Social Security and Children: Testing the Boundaries of Human Rights and Economics', in S. Marks, B. A. Andreassen and A. Sengupta (eds.), *Poverty and Human Rights: Economic Perspectives* (Paris: United Nations Educational, Scientific and Cultural Organization [UNESCO], 2010).

³⁸ For a contrary opinion, see V. Gauri, 'Social Rights and Economics: Claims to Health Care and Education in Developing Countries', in P. Alston and M. Robinson (eds.), *Human Rights and Development: Towards Mutual Reinforcement* (New York: Oxford University Press, 2005), pp. 65–83.

³⁹ J. Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971); and J. Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999).

from rational deliberation amongst individuals within a given society. Rawls sought to reconcile ideas about personal liberty with fair equality of opportunity and the ‘difference principle’, justifying redistribution of wealth amongst members of a given society in order to maximise the welfare of the least advantaged members.

However, when transposed to deliberations amongst representatives of sovereign peoples in the international arena, the principles of equality and redistribution were significantly undermined. Rawls’s *Law of Peoples* has instead a distinctly communitarian flavour. The reason for this is his empirical premise that poverty is essentially, and almost categorically, ‘endemic’ or endogenous, and therefore the sole responsibility of the State concerned.

I believe that the causes of the wealth of a people and the forms it takes lie in their political culture and in the religious, philosophical, and moral traditions that support the basic structure of their political and social institutions, as well as in the industriousness and cooperative talents of its members, all supported by their political virtues. I would further conjecture that there is no society in the world – except for marginal cases – with resources so scarce that it could not, were it reasonably and rationally organized and governed, become well-ordered.⁴⁰

In effect, therefore, Rawls advocates a double standard in responding to inequality at the domestic and international levels, supporting only a weak international duty of assistance.⁴¹ This duty of assistance is required only up to the point at which a society is “well-ordered” enough to make “effective use of their freedoms”, which usually means a “working liberal or decent government”.⁴² Beyond that point, “there is no further need to narrow the gap”.⁴³ Rawls is also concerned with the qualitative dimension of any assistance provided: It should not be provided in a paternalistic fashion (retarding the development of freedom and equality in a society) and should be focused on promoting human rights such as freedom of expression and women’s rights which will give the greatest chance for that society to be well-ordered and secure sustainable social progress.⁴⁴

Although one must certainly be cautious about externalising responsibility for poverty at home, Rawls’s unduly categorical premise appears to rest on somewhat tenuous empirical grounds,⁴⁵ eroding the foundations of his weak theory of global

⁴⁰ Rawls, *The Law of Peoples*, *ibid.* p. 108.

⁴¹ *Ibid.* p. 37.

⁴² *Ibid.* pp. 111 and 114.

⁴³ *Ibid.* p. 114.

⁴⁴ *Ibid.* pp. 108–11.

⁴⁵ For example, Florencia Luna argues that it is impossible for sub-Saharan countries to solve their own health problems as these problems could not be solved solely within States. She notes that, “These are countries with a colonial past, ravaged by AIDS, by enormous national debts, lacking minimal infrastructure, and with less than US\$10 per person to invest in health care. Can the rest of the world simply stand by and watch? Should the model continue to be global distribution of wealth by appeal to charities?”. See F. Luna, ‘Poverty and Inequality: Challenges for the IAB: IAB Presidential Address’, *Bioethics*, Vol. 19, No. 5 (2005), pp. 451–9. See also discussion of Pogge’s critique in the next section.

justice and, arguably, exposing a critical methodological constraint and the conceptual bias of classical liberalism. He is correct that the starting point in terms of resources is not determinative of economic and social outcomes, but his analysis glosses over both historical injustices and the structure of the international economy. Within Rawls's global model, the individual is also not the object of concern, which has fostered a debate with cosmopolitans as will be discussed later in this chapter. On this point Rawls is clear:

The cosmopolitan view... is concerned with the well-being of individuals, and hence with whether the well-being of the globally worst off person can be improved. What is important to the Law of Peoples is the justice and stability for the right reasons of liberal and decent societies, living as members of a Society of well-ordered Peoples.⁴⁶

Despite these weaknesses, Rawls's emphasis on national responsibility for alleviating poverty has a certain contemporary appeal, at least on practical grounds. An ever-growing number of States have attained middle-income status, meaning that they arguably possess the capacity to address domestic poverty. The enhanced resources of these countries make the argument for traditional international development assistance less compelling. A number of Southern countries do not seek it at all or are establishing their own aid agencies (e.g. China, India and Brazil). What is even more striking is that according to Sumner, 72 per cent of the world's poor now live in these middle-income States.⁴⁷ Economic growth has not translated into significant global poverty reduction with countries such as India maintaining stunningly high levels of malnutrition and maternal mortality.

This reconfiguration of global wealth and poverty creates a sympathetic environment for a Rawlsian position in two ways. The first is that the number of countries that have a clear need for resource transfers has declined. The second is that the type of international cooperation required by many middle-income countries may be precisely along the lines envisaged by Rawls: support for working democratic liberal institutions and the human rights of women and others who are likely to ensure that democracies produce favourable social outcomes. Nonetheless, the problem with this line of logic again is its mono-causal understanding on poverty; a function of domestic factors. It ignores international structures and relations; a political economy that may help sustain and entrench poverty rather than alleviate it. Moreover, the statism in the Rawlsian view occludes some of the most vulnerable: individuals and communities that are weakly recognised in a State's 'demos' (e.g. ethnic minorities, homeless, children, persons with disabilities) or fall completely outside it (e.g. refugees, stateless persons, economic migrants).

⁴⁶ Rawls, *The Law of Peoples* (n. 40 above), p. 120.

⁴⁷ A. Sumner, *Global Poverty and the 'New Bottom Billion': What If Three-Quarters of the World's Poor Live in Middle-Income Countries?*, Institute of Development Studies (IDS) Research Summary of IDS Working Paper 349 (Brighton: IDS, 2010).

3.2 Democratic Republicanism

Contemporary or civic republicanism has been less analysed from an extraterritorial perspective. It shares with egalitarian liberalism an emphasis on both freedom and democratic control over authority,⁴⁸ but its vision of democracy and freedom is less formalistic. It is more concerned with preventing domination than with ensuring a neutral playing field. It thus places emphasis on positive or substantive freedom, and most distinctively an instrumental emphasis on the virtues of 'active citizenship', whether through individual or organised engagement in political life or through referenda and other forms of direct political participation.⁴⁹

One leading republican proponent, Richard Bellamy, has begun to develop a more fleshed-out theory of the relationship between republicanism and international institutions and law. The conclusions are interesting for the manner in which they simultaneously generate radical and conservative perspectives of extraterritorial obligations. According to Bellamy, if democracies are to be the main forum for the enforcement and articulation of rights, international law should serve a different role: namely, to redress lack of State coordination. Thus, addressing global problems like refugee rights and the negative externalities of State behaviour should be the central focus rather than domestic human rights enforcement. He argues:

Meanwhile, there are also the rights of those without access to democratic fora, such as asylum seekers and the stateless, and those affected by the actions of democratic and non-democratic states other than their own. . . . In an increasingly globalised world, the knock on effects of decisions by one state on the domestic democratic processes of another are more salient than ever, as are the importance of transnational enterprises and movements of people, finance and services. Finding ways of uniting international legal control of these with domestic democracy is a crucial question. . . .⁵⁰

The consequence of this logic is that extraterritorial obligations are placed at the centre of international human rights law, at least for mature democracies. This is significant because it would potentially provide for stronger law or mechanisms in addressing key extraterritorial deprivations of human rights and would provide a

⁴⁸ There is considerable debate over whether republicanism is an alternative to or a variant of liberalism, due to its emphasis on the substantive dimensions of freedom. See, for example, M. Rogers, 'Republican Confusion and Liberal Clarification', *Philosophy and Social Criticism*, Vol. 34, No. 7 (2008), pp. 799.

⁴⁹ A. Thomas, 'Liberal Republicanism and the Role of Civil Society', *Democratisation*, Vol. 4, No. 3 (1997), pp. 26–44.

⁵⁰ R. Bellamy, *Bringing Home the Facts about the ECHR and Parliamentary Democracy*, Blog, available at http://www.ucl.ac.uk/european-institute/comment_analysis/commentary/ecthr/rbellamy, accessed 22 May 2012. See also R. Bellamy, 'Political Constitutionalism and the Human Rights Act', *International Journal of Constitutional Law*, Vol. 9 (2011), pp. 86–111.

positive basis for addressing the ESC rights of some of the world's most vulnerable groups. This conclusion, however, is offset by its conservative consequences: a return to more Westphalian structures and reluctance for any international oversight of the compliance by 'democracies' with human rights law for other groups.

Moreover, what is not clear is how much this theory would promote positive extraterritorial duties given the emphasis on externalities, but it may be possible to find the answer to this elsewhere within republican theory. Other republican scholars such as Pettit have placed great emphasis on positive freedoms.⁵¹ Moreover, he has argued that the republican tradition cannot endorse a liberal notion of parliamentary sovereignty: Domination by a majority is a concern.⁵² In his view, constitutional (and arguably international) protections and judicial review can be supported. They disperse power (thereby reducing the chances of domination) and if structured well, can be a servant for the republican project:⁵³

Being included, having an audible voice, does not reduce to being satisfactorily represented. What is even more important, especially with the administration and judiciary, is that there is room for you and those of the relevant kind to protest to the representative bodies in question, in the event of your believing that things have not been properly done. You must be able to complain and appeal; you must be able to state a grievance and demand satisfaction.⁵⁴

In this conception, social movements generally will be the "most effective" channels of contestation⁵⁵ but they are limited in taking up multiple claims and issues and thus more formal legal mechanisms are also important.⁵⁶

As a consequence, it may be possible to construct a worked-through republican theory that promotes positive extraterritorial duties and international legal protections where this is essential for individuals to escape from effective domination.

3.3 *Dependency Theory and Cosmopolitanism from Below*

A third theory shares some similarities with democratic republicanism. Dependency theory emphasises the freedom of States to chart their own social and economic paths, but it draws on a different heritage (Marxist and radical) as well as social science. It views underdevelopment as largely a result of the dominance of core powerful Northern States over peripheral Southern States. This dependence not only was manifested in early colonial European exploitation of resources in the

⁵¹ P. Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997).

⁵² *Ibid.* p. 179.

⁵³ *Ibid.* p. 180.

⁵⁴ *Ibid.* p. 193.

⁵⁵ *Ibid.* pp. 193, 304.

⁵⁶ *Ibid.* p. 193.

Third World but also is present in the orientation of Third World economies towards exports for the Western core. This is facilitated by Western support for small ruling classes that prioritise luxury consumption rather than investment and the activities of Western-based multinationals that own and control the most profitable and dynamic elements of the international economy, and is maintained with the threat of military force.⁵⁷ The solution to such dependence is for Southern countries to withdraw from the international capitalist economy and develop alternative forms of economic growth or establish industries that could better compete internationally. Thus, the identification of the cause of poverty is the opposite of Rawls: It is external power relations rather than domestic decisions.

The fall of the Berlin Wall dealt a blow to the credibility of such radical economic theories, but the basic ideas have re-emerged in debates and struggles over globalisation. Attacks on the World Trade Organisation and international investment regime have centred on the way in which it entrenches Northern economic power over the South. The solution for the anti-globalisation movement and some Southern States has been less to transform the global sphere but rather reduce its relevance for national and local development.

The attitude towards human rights within radical theories is equivocal. On one hand, there is a suspicion that human rights are a liberal device for asserting Western dominance (e.g. establishing property rights for multinationals or compliant democracies in the South).⁵⁸ On the other hand, ESC and civil and political rights have been deployed as arguments against various aspects of the international economic order. There have been calls for new treaties, such as one on the human right to water, which would prevent privatisation of water utilities and the dominance of multinational water companies.⁵⁹ In some cases, these movements have availed themselves of legal mechanisms, for example, making *amicus curiae* interventions in investment arbitrations or using shadow reporting mechanisms of UN human rights treaty bodies. Some Latin American States have also introduced constitutional provisions that prevent the State from participating in certain types of international economic regimes. However, these rights-based discourses and interventions tend to be more tactical than strategic.⁶⁰ The emphasis tends to be on returning power to people (although not necessarily States and certainly not national elites) rather than seeking a transformed global order with human rights at the centre. Thus, although there is a cosmopolitan concern with the rights of the individual, the solution is ultimately not to be found in rights or the global order. As Neocosmos states:

⁵⁷ R. Peet, *Theories of Development* (New York: The Guilford Press, 1999), pp. 107–14.

⁵⁸ R. D'Souza, 'Liberal Theory, Human Rights and Water-Justice: Back to Square One?', *Law, Social Justice & Global Development Journal (LGD)*, Vol. 1 (2008), pp. 1–14.

⁵⁹ M. Barlow, *Blue Covenant: The Global Water Crisis and the Coming Battle for the Right to Water* (New York: New Press, 2009).

⁶⁰ See C. Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (London: Routledge, 2007).

Citizenship, from an emancipatory perspective, is not about subjects bearing rights conferred by the State, as in human rights discourse, but rather about people who think becoming agents through engagement as militants/activists and not politicians. . . . These prescriptions are assertions of rights to be fought for not pleas for human rights to be conferred by the State.⁶¹

4. GLOBAL JUSTICE AND INDIVIDUAL RIGHTS

Most cosmopolitan theories, by contrast, argue that principles of distributive justice should not only apply to all human beings but must be respected by the domestic *and* international order. Rights should be viewed from a worldwide rather than a limited or provincial perspective. The cosmopolitan ideal of the “citizen of the world” can be traced to Diogenes the Cynic and the European Enlightenment, and has been invoked by political philosophers from Immanuel Kant to Jeremy Bentham.⁶² However, thinkers differ considerably on the form that cosmopolitanism should take in matters of transnational justice.

4.1 Institutional Cosmopolitanism

According to Thomas Pogge, institutional cosmopolitanism reflects the position that “all persons stand in certain moral relation to one another: we are required to respect one another’s status as ultimate units of moral concern – a requirement that imposes limits on our conduct and, in particular, upon our efforts to construct institutional schemes”.⁶³ Institutional cosmopolitanism shares certain features with utilitarianism, but whereas the latter theory views institutions as a means through which individuals discharge their duties, the former theory concerns itself with the moral relevance of institutions themselves.⁶⁴ Under institutional cosmopolitanism, we (as individuals) assume responsibility for individuals in others countries to the extent that social and political institutions in which we participate affect the human rights of others.⁶⁵ According to this theory, personal responsibility for poverty elsewhere can be justified on the basis of the historical domination and neocolonial exploitation of many poorer countries and persistent inequities in the global economic order and international trade. Where poverty is attributable to these kinds of exogenous factors, Pogge argues that it constitutes a human rights violation.

⁶¹ M. Neocosmos, ‘Civil Society, Citizenship and the Politics of the (Im)possible: Rethinking Militancy in Africa Today’, *Interface: A Journal for and About Social Movements*, Vol. 1, No. 2 (2009), pp. 263–334, at 276.

⁶² S. Caney, ‘Cosmopolitanism and Justice’, in T. Christiano and J. Christman (eds.), *Contemporary Debates in Political Philosophy* (Oxford: Wiley-Blackwell, 2009), pp. 387–407, at 388.

⁶³ T. Pogge, ‘Cosmopolitanism and Sovereignty’, *Ethics*, Vol. 103 (1992), pp. 48–75, at 49.

⁶⁴ ICHRP, *Duties sans frontières* (n. 9 above), p. 73.

⁶⁵ Pogge, ‘Cosmopolitanism and Sovereignty’ (n. 67 above), p. 52.

His theory is strongly grounded in a negative obligation not to harm others, through our participation in the ‘global basic structure’ of international institutions. In order to activate this theory, human rights harms stemming from international institutions need to be foreseeable and ‘reasonably avoidable’ in the minds of those creating or upholding these institutions.⁶⁶ Unlike dependency theorists or cosmopolitans from below, Pogge asserts that these unjust global structures deserve a global response.⁶⁷ Moreover, where such harms arise, positive obligations may arise. For example, he writes: “those who make more extensive use of our planet’s resources should compensate those who, involuntarily, use very little”.⁶⁸ The emphasis, however, is on compensation rather than equal sharing of global resources, which leaves each country in control of the natural resources in its territory. Thus, Pogge makes, in his words, “modest” proposals such as a Global Resource Dividend which requires sharing a small part of the value of any resources that are used or sold or the establishment of a health impact fund to ensure markets provide medicines to the poorest and most remote individuals.⁶⁹

This argument has intuitive appeal as a stricter and less morally ambiguous duty of positive assistance, but in so doing, this theory may unwittingly undermine more far-reaching arguments for transnational distributive justice, bearing in mind poverty’s many exogenous causal factors.⁷⁰ For example, geographical factors – such as whether a country is land-locked – have been shown to play a causal role in the production of poverty, as has malaria. Moreover, the theory glosses over important distinctions between just and unjust harms (requiring independent moral justification). This theory may also confront problems with the highly attenuated, and perhaps artificial, nature of our participation or interaction with the “global basic structure”, limiting collective responsibility and attribution of harm, as well as with the voluntariness of participation which should arguably be seen as a precondition for responsibility.⁷¹ As Buchanan and Golove argue, “there is a deep incoherence in asserting that equal regard for persons requires refraining from violating their rights even if this comes at great cost, while denying that equal regard requires any efforts whatsoever to ensure that persons’ rights are protected from violations by others”.⁷²

⁶⁶ T. Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms*, 2nd edition (Cambridge: Polity Press, 2008), p. 26.

⁶⁷ For an exploration of the relationship between positive obligations in Pogge’s theory and international law, see Salomon in this volume and M. Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (Oxford: Oxford University Press, 2007).

⁶⁸ *Ibid.* p. 210.

⁶⁹ *Ibid.* See Chapters 8 and 9.

⁷⁰ See P. Collier, *The Bottom Billion: Why the Poorest Countries are Failing and What Can Be Done About It* (Oxford: Oxford University Press, 2007), chapter 4; and J. Sachs, *Common Wealth: Economics for a Crowded Planet* (London: Allen Lane, 2008), pp. 212–17.

⁷¹ Buchanan and Golove, ‘Philosophy of International Law’ (n. 11 above), pp. 904–5.

⁷² *Ibid.* p. 906.

4.2 Humanity-Based Cosmopolitanism

Other cosmopolitans take a clearer departure point in the rights or needs of individuals for establishing extraterritorial obligations. Charles Beitz's theory of cosmopolitan justice, similar to Pogge's, sought to establish a global 'difference principle' based upon Rawls's theory of justice. Rejecting Rawls's assumption that societies were largely self-contained, Beitz marshalled a wide body of empirical evidence in support of the existence of a global 'basic structure' as the basis for a global 'original position' (in Rawlsian terms) and a global difference principle under which transnational distributive justice could be justified.⁷³ The attenuated nature of our participation in the global structure was not lost on Beitz, who argued that there must be "a threshold of interdependence above which distributive requirements like a global difference principle are valid, but below which significantly weaker principles hold".⁷⁴

Føllesdal likewise emphasises the impact of global institutions on the lives of individuals. These effects not only provide evidence of a global basic structure but provide justifications for justice principles that go beyond minimum vital needs towards some level of global redistribution and global democratic participation.⁷⁵ The first argument is similar to Beitz – global institutions have "pervasive" consequences for "individual life chances and preference formation".⁷⁶ His second argument is more distinctive. The increasing power of the global basic structure – both formally and informally – creates a normative legitimacy problem; and thus the coercive nature of this structure must be justified to individuals. As these two arguments underscore the basis for a domestic basic structure (with a resulting distributive principle according to Rawls), Føllesdal sees no compelling reason why it should not be extended to the global level.

As Caney observes, however, the principal weaknesses of these types of argument lie in the lack of any evident criteria or means for determining the degree of global interaction above which distributive requirements come into play, and what principles apply at the sub-threshold level of integration.⁷⁷ The more fundamental problem of tying distributive justice only to members of a basic structure, according to Caney, lies in the Rawlsian justification that it is the basic structure that impacts upon people's lives and influences the extent to which people may realise their interests. If we accept the importance of individuals being able to engage in activities

⁷³ C. Beitz, *Political Theory and International Relations* (Princeton: Princeton University Press, 1999), pp. 143–53.

⁷⁴ *Ibid.* pp. 165–7.

⁷⁵ 'The Distributive Justice of a Global Basic Structure: A Category Mistake?', *Politics, Philosophy and Economics*, Vol. 10, No. 1, pp. 46–65.

⁷⁶ *Ibid.* p. 53.

⁷⁷ Caney, 'Cosmopolitanism and Justice' (n. 62 above), p. 392.

in which they have an interest, “then this should surely bear not simply on how the basic structure is organised but also on the behaviour of those who are external to it but who may be able to have a considerable effect on those interests”.⁷⁸ The moral reason to assist others in the furtherance of their interests exists, on this line of reasoning, whether or not we are members of the same scheme.

Nonetheless, while arguing that the existing extent of global interaction is sufficient to ground obligations of transnational distributive justice, Beitz did not regard it as a prerequisite: According to him, distribution across borders may be justified even in the absence of interaction in a global basic structure, in order to ameliorate inequalities between peoples in different States.⁷⁹ Beitz’s account still appears to leave open the question of the underlying basis for extraterritorial duties of assistance in the absence of cooperative interaction.

In his more recent work, Beitz develops this content further in the direction of a more humanity-centred approach. Instead of beginning with Rawls, Beitz starts with the post-1945 international human rights regime. Within it he discerns a “practice” through which its members “recognise the practice’s norms as reason-giving and use them in deliberating and arguing about how to act”.⁸⁰ From this we can identify human rights, which are “requirements whose object is to protect *urgent* individual interests against certain predictable dangers . . . under typical circumstances of life in a *modern world* order composed of States” to which “political institutions” must respond.⁸¹

Turning to extraterritorial obligations, he takes seriously Article 2(1) of the ICESCR and Article 25 of the Universal Declaration on Human Rights, noting that “an international role is plainly contemplated” within them for the realisation of ESC rights. He concludes that there is a negative and facilitative “duty to cooperate internationally to remove obstacles or disincentives for local governments”.⁸² He is more cautious, however, on the idea of a duty to “contribute a system of international transfers”,⁸³ envisioning instead a more conditional, contextual and consequentialist obligation. Thus, any transfer must:

[P]roduce a greater sustainable improvement in living standards for those below a threshold of ‘adequacy’ than would be produced by the various other measures

⁷⁸ Ibid. To similar effect, see S. Caney, ‘Global Poverty and Human Rights: The Case for Positive Duties’, in T. Pogge (ed.), *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (Paris: UNESCO, 2007), pp. 275–302, at 283.

⁷⁹ C. Beitz, ‘International Liberalism and Distributive Justice: A Survey of Recent Thought,’ *World Politics*, Vol. 51, No. 2 (1999), pp. 269–96, discussed in Buchanan and Golove, ‘Philosophy of International Law’ (n. 11 above), p. 904.

⁸⁰ Beitz, *The Idea of Human Rights* (n. 7 above), p. 8.

⁸¹ Ibid. p. 109.

⁸² Ibid. p. 162.

⁸³ Beitz, *The Idea of Human Rights* (n. 7 above), p. 162.

likely to be open to outside agents – for example, investment in a society’s physical infrastructure, reform of trade practices, relaxation of immigration controls in wealthy countries, and so forth.⁸⁴

This perspective leads him to assert that three factors must be present before a duty of assistance or resource arises: that the interest at stake is “urgent”, that there are “eligible” actors with the capacity and position to support, and that the costs of action are modest in comparison to alternative forms of cooperation.⁸⁵ The first two factors are not foreign to the jurisprudence discussed elsewhere in this book: They are very much the position adopted by the CESC. The third factor, however, is less discussed by international lawyers and deserves more consideration. As noted in the Introduction, excessive attention appears to have been given to the international duty of assistance in the literature and not enough to other forms of international cooperation that may be as or more effective.⁸⁶

Caney goes further though and argues for a clearer “humanity-centred” (as distinct from institutional or interactionist) conception of juridical cosmopolitanism, based upon the putative moral arbitrariness of characteristics such as ethnicity, religion, regional identity, national boundaries and membership of economic and institutional schemes.⁸⁷ According to Caney, a humanity-centred approach does not deny the moral relevance of global interdependence or institutional cosmopolitan theories such as those advanced by Pogge, and indeed the former may be of great help in terms of defining the content of distributive justice and the magnitude of claim-holders’ entitlements as well as the moral weight of the duty of justice that people are under.⁸⁸ For example, Caney suggests that institutional cosmopolitan theory, predicated upon the moral significance of global interdependence, may help to delimit the content and boundaries of distributive justice claims in the following manner:

Consider needy people who live in a remote section of Indonesia and suppose that while Indonesia is within a global scheme, there are, at time *t*₁, only rather minimal trade and transport links with the rest of the world. Suppose now that the intensity of trade between the rest of the world and Indonesia increases such that at time *t*₂ it is much easier to further the interests of these impoverished Indonesians. Now in virtue [*sic*] of this increased contact one might say that the disadvantaged have an entitlement to more assistance than they could claim under *t*₁. At *t*₁, members of the rest of the world may not, for example, have been able to provide the necessary medication for certain diseases but now at *t*₂ they can do so at reasonable cost. As a consequence, it seems reasonable to say that the needy people are now entitled

⁸⁴ Ibid. p. 163.

⁸⁵ Ibid. p. 167.

⁸⁶ See Section 5.4 of Introduction.

⁸⁷ Caney, ‘Cosmopolitanism and Justice’ (n. 62 above), pp. 394–5.

⁸⁸ Ibid. pp. 399–400.

to the necessary medication whereas before they were not. The extent of global interdependence can therefore affect the nature of people's entitlements.⁸⁹

Perhaps, to a greater extent than the other theories canvassed here, the problem with humanity-centred cosmopolitan justice lies in defining their scope, limitations and concrete implications. Under each of these positive theories, it is comparatively difficult to specify what duties and costs an individual should be expected to bear as part of the intergenerational project of institution-building for distributive justice, beyond comparatively (but not perfectly) defined 'negative' duties not to collaborate with unjust global institutions and, arguably, certain other duties flowing from interactionist or institutional cosmopolitan accounts.⁹⁰ As Buchanan and Golove suggest, the complexity of these challenges may put more ambitious attempts towards distributive justice questions at the global level, as distinct from a more modest ethical project of poverty alleviation through charitable means and motives.⁹¹ At the same time, Beitz and Caney do provide some parameters that are increasingly reflected in international law.

4.3 *Sen's Liberal Cosmopolitan Consequentialism*

A final author, Amartya Sen, deserves mention. His theory of justice is rather difficult to categorise, drawing as it does from consequentialism, liberal egalitarianism and cosmopolitanism. Sen begins with the first. He argues that "a theory of justice that can serve as the basis of practical reasoning must include ways of judging how to reduce injustice and advance justice, rather than aiming only at the characterization of perfectly just societies".⁹² He further posits that consequentialism, and in particular the theory of social choice, is the only approach equipped to offer solutions between "any two non-transcendental alternatives".⁹³ As to the second, from liberalism and the work of Rawls, he emphasises the importance of public reason in informing the way in which we frame and make social choices.⁹⁴ As to the third, the moral end

⁸⁹ Ibid. p. 399.

⁹⁰ Ibid.

⁹¹ Buchanan and Golove, 'Philosophy of International Law' (n. 11 above), p. 906.

⁹² A. Sen, *The Idea of Justice* (Cambridge, MA: Harvard University Press, 2009), p. ix.

⁹³ Ibid. p. 17. Sen states that, "The outcomes of the social choice procedure take the form of ranking different states of affair from a 'social point of view', in light of the assessments of the people involved." Advantages of such partial-order ranking are said to include "recognition of the inescapable plurality of competing principles", "allowing and facilitating re-examination", "permissibility of partial resolutions", "diversity of interpretation and inputs", "emphasis on precise articulation and reasoning" and "role of [actual] public reasoning in social choice" (pp. 106–11). Thus, one may end up with different results from Rawls: e.g. "There may also be varying reasonable compromises in balancing small gains in liberty, which is given priority in Rawl's first principle, against any reduction in economic inequality, no matter how large" (p. 104).

⁹⁴ "If the demands of justice can be assessed only with the help of public reasoning, and if public reasoning is constitutively related to the idea of democracy, there is an intimate connection between justice and democracy." Ibid. p. 326.

according to Sen is neither maximised utility nor well-ordered societies but rather the capability of individuals and their “opportunity to pursue” their “objectives”.⁹⁵ The capability approach is a “general approach, focusing on information on individual advantages, judged in terms of opportunity rather than a specific design for how a society should be organized”.⁹⁶ Such capabilities include liberties, social goods and even outputs such as income or wealth.⁹⁷ Capabilities are not rights, but according to Sen the step between them is a short one: Human rights are primarily “ethical affirmations” of what is important rather than what is legally prescribed or what even may be feasible for a current society.⁹⁸ Thus, he argues that economic and social rights mesh well with “understanding the importance of advancing human capabilities”, and perfect obligations need not be enunciated for them to be recognised as rights.⁹⁹

Sen’s hybrid theory is interesting in two ways for the current discussion. First, the role of public reason means that greater attention needs to be given to the participatory aspect of international cooperation and the level of global democratic deliberation.¹⁰⁰ Sen goes beyond a standard liberal articulation of the importance of public reason to argue that we need to hear reasons from those living beyond our societies. He draws on Adam Smith’s idea of the ‘impartial spectator’ and emphasises that obtaining this view from elsewhere helps “protect people’s interdependent ‘interests’” and “may be particularly crucial in interpreting systematic and persistent illusions that can significantly influence – and distort – social understanding and the assessment of public affairs”.¹⁰¹ However, Sen does not call for a formal global democracy: “Active public agitation, news commentary and open discussion are among the ways in which global democracy can be pursued, even without waiting for the global State.”¹⁰²

Sen does not spell out in detail what this means. Persons directly affected by extraterritorial actions or omissions should be able to at least participate in relevant (even if not representative) forums of debate according to Sen. However, his approach to global democracy relies heavily on journalists, social movements, civil society organisations, diplomats, parliamentarians, and so forth, to discuss, protest,

⁹⁵ Ibid. p. 228.

⁹⁶ Ibid. p. 232.

⁹⁷ Nussbaum, for example, has argued that ten capabilities can be established: They are Life, Bodily Health, Bodily Integrity, Senses, Imagination, and Thought, Emotions, Practical Reason, Affiliation, Other Species and Play: M. Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge: Cambridge University Press, 2000).

⁹⁸ Sen, *Idea of Justice* (n. 92 above), p. 358.

⁹⁹ Ibid. p. 381.

¹⁰⁰ “If the demands of justice can be assessed only with the help of public reasoning, and if public reasoning is constitutively related to the idea of democracy, there is an intimate connection between justice and democracy.” Ibid. p. 326.

¹⁰¹ Ibid. p. 168.

¹⁰² Ibid. p. 410.

debate, negotiate and resolve. These actors possess enormous responsibility or power over what issues to bring to public debate. They may not always reflect the most important ones for affected groups. Without being diverted by the debate over proposals for global democracy,¹⁰³ the commonly invoked “all-affected” principle should lead at least to consideration of *weak* forms of global democracy. Groups that are both marginalised and invisible should have the right to participate in forums in which violations affecting them are deliberated and debated. Thus, efforts to democratise globalisation should not only focus on strengthening global democracy from below or reforming global institutions top-down but ensuring extraterritorial forms of participation that engage with States.¹⁰⁴

Second, Sen’s non-transcendental approach causes him to depart ways with Rawls on substantive global duties although it also remains under theorised. In essence, he partly aligns himself with cosmopolitan interactionists in saying that we cannot ignore substantive injustice elsewhere: “Our involvement with others through trade and communication is remarkably extensive in the contemporary world, and further, our global contacts . . . make it hard for us to expect that an adequate consideration of diverse interests or concerns can be plausibly confined to the citizenry of any given country ignoring all others.”¹⁰⁵ However, similar to global public goods theory, he also emphasises the utilitarian consequences for many in the world of failing to pay attention to global justice citing trade, financial and commercial decisions made by the United States and the impact of AIDS and other global epidemics.¹⁰⁶

5. CONCLUSIONS: DRAWING LINKS WITH INTERNATIONAL LAW

Even the international theorists in the era of the peace treaties of Westphalia were concerned with how to achieve peace, stability and order in world politics. Few of them regarded the parameters of the Westphalian order as something immutable, fixed, and beyond the control of political actors.

Johan Karlsson, *Democrats without Borders: A Critique of Transnational Democracy*¹⁰⁷

The conclusions to be drawn from the preceding analysis, abbreviated as it was, are necessarily both nuanced and modest. The theories summarised here provide only a partial and selective account of moral theories and agency relevant to ideas

¹⁰³ See D. Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Cambridge: Polity Press, 1995); J. Karlsson, *Democrats without Borders: A Critique of Transnational Democracy* (Gothenberg: Gothenburg Studies in Politics, No. 113, 2008).

¹⁰⁴ For a similar perspective, see M. Weinert, ‘Globalizing Democracy or Democratizing Globalism?’, *Human Rights and Human Welfare*, Vol. 5 (2005), pp. 17–30.

¹⁰⁵ Sen, *Idea of Justice* (n. 92 above), p. 403.

¹⁰⁶ *Ibid.* pp. 402–3.

¹⁰⁷ Karlsson, *Democrats without Borders* (n. 103 above), p. 210.

about global social justice and extraterritorial human rights obligations, present and future. We can draw four conclusions about their relationship with the current state of international law and debate.

The first is that many theories seem to provide a strong basis for a ‘do no harm’ principle. It is particularly strong in the republican and cosmopolitan theories as well as different utilitarian and communitarian theories to varying degrees. This should come as no surprise to international lawyers: At the level of State duties, it is the most accepted in discussions of extraterritorial ESC rights obligations, but the strength of the unanimity of most moral theories on the ‘do no harm’ principle does not seem to match the current international institutional architecture. As preceding chapters make clear, global policies, mechanisms and sanctions seem to be rather weak in ensuring that “externalities” are effectively prevented, monitored and remedied, particularly when they affect discrete individuals and communities or weaker States and peoples.

Second, and more surprising, is that almost all of these moral approaches are *not* particularly concerned with the question of legal *jurisdiction*. Even theories that are modest as to extraterritoriality – such as utilitarianism and democratic republicanism – do not introduce a threshold proximity requirement such as control. Rather they began with the effects of the act – the ‘externality’. Justifications for it are then assessed according to the substance of the relevant theory. This should give international lawyers pause. The relative silence on proximity for negative obligations in moral theory makes the focus on this criterion in international law look curiously obsessive. However, it is for positive obligations that proximity plays a larger part in shaping the contours of moral theory. There seems to be greater unanimity on extraterritorial responsibility where States have played some contributing role in structural injustice or have interactions with affected individuals. For positive ESC rights obligations, international law has been conversely less concerned with jurisdiction here except for obligations to protect,¹⁰⁸ perhaps because international law, and particularly jurisprudence, has largely accepted the principle that positive obligations depend on the capacity to assist.

¹⁰⁸ For instance, the International Court of Justice (ICJ) stated that the determination of State responsibility for preventing genocide in another State depends on “capacity to influence effectively the action of persons likely to commit, or already committing, genocide”. This capacity is said to depend, *inter alia*, “on the geographical distances of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between authorities of that State and the main actors in the events. The State’s capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law; seen thus, a State’s capacity to influence may vary depending on its particular legal position vis-à-vis the situations and persons facing the danger, or the reality, of genocide”. International Court of Justice, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, ICJ Reports 2007, para. 430.

Third, many of the theories stress the *qualitative* dimension of positive international cooperation. In liberal egalitarianism, non-paternalistic assistance and extraterritorial support for domestic human rights were stressed; in transnational communitarianism and Sen's theory, democratic participation in the formulation of duties; in republicanism, support for groups most vulnerable to the pathologies of domestic governments (e.g. non-nationals); in utilitarianism, global public goods; and in cosmopolitanism, the reform of structures and entities that cause deprivation or the targeting of international assistance to where there is the greatest need and/or where it will have greatest the effect.

As this book has shown, this qualitative dimension has gained a more significant place in international treaties and legal jurisprudence. The concern is not only with the existence or level of assistance provided but the ends to which it is directed. This qualitative and structuralist perspective was largely identified as the key issue for the world by Heads of State in the Millennium Declaration of 2000:

[T]he central challenge we face today is to ensure that globalization becomes a positive force for all the world's people. For while globalization offers great opportunities, at present its benefits are very unevenly shared, while its costs are unevenly distributed. We recognize that developing countries and countries with economies in transition face special difficulties in responding to this central challenge. Thus, only through broad and sustained efforts to create a shared future, based upon our common humanity in all its diversity, can globalization be made fully inclusive and equitable.¹⁰⁹

However, it is difficult to conclude that the pace of globalisation has been matched by sufficient efforts to ensure that international order provides more just outcomes. The key obstacle to this is not necessarily a utilitarian logic: There are many measures which may improve ESC rights which have strong economic justification: for example, an increase in migration of low-skilled migrants to wealthier countries, conclusion of the Doha development trade round or the abolition of tax havens. Rather, the motivation appears to be national communitarianism or national self-interest.¹¹⁰ This confluence within moral theory justifies more sustained research and debate in this area.

The same applies to the emphasis by Sen of ensuring global forms of democratic participation. The rise of new communication technologies and global media operators has widened the space for global exposure of and debate on extraterritorial injustice by individuals and organisations. More formally, UN structures have gradually opened spaces for participation of non-governmental organisations – such as periodic reporting processes and the Universal Periodic Review process – and to a

¹⁰⁹ General Assembly Resolution, *United Nations Millennium Declaration*, UN Doc. 55/2, 18 September 2000, para. 5.

¹¹⁰ Note that sometimes there are other arguments for closed borders such as preserving well-functioning social welfare States and their high levels of social rights.

lesser extent to individuals through complaint mechanisms. However, in the absence of a globally representative mechanism for individuals, it is arguable that more attention needs to be given to how affected groups and advocates are better able to foster extraterritorial and global debates on violations and proposals for reform. If policies decided by policymakers and politicians in London have damaging consequences in remote rural areas in Malawi, how do those affected groups engage in at least a political conversation about those policies with the decision makers? Democratic theory and practice have advanced in fostering new forms of participation, but this has primarily been at the domestic level.

Fourth, moral theories do clearly part ways over the duty to provide international assistance or transfer resources. Cosmopolitan (and some utilitarian and liberal) theories are strong on the existence of the duty, but they differ on when the duty arises and how far it extends. More in-depth analysis of these relationships is clearly warranted, and there appears to be ample support within these theories for the normative proposition that the human being deserves consideration as a fundamental unit of moral concern and considerable support for moving away from the charity model of bilateral aid and philanthropy towards the realms of rights and duties.¹¹¹

In this respect, division in moral theory is reflected in law. It is the issue that has bogged down discussions and development in the area of extraterritorial ESC rights in international arenas. At the same time, international law, particularly through the application of 'soft' law, has possibly advanced further by providing some benchmarks for the provision of assistance, and division of responsibility, for example, proportions of gross national product that are to be devoted to development in less developed countries. Whether it affects the development of 'hard' international law and the international policy in the years to come is unknown.

There is of course the question as to whether these quantitative norms are the most appropriate ones. Are there other ways to imagine the operationalization of quantitative duties of assistance? Moral theory does have the potential to generate counterproposals – such as Pogge's resource divided and health impact fund discussed earlier, and economists have long proposed measures such as the Tobin tax on financial transactions – but they do require the creation of new institutions or mechanisms. Moreover, perhaps moral theory could also contribute with more consequentialist analysis, along the lines of Beitz and Sen, but that could be applied more directly to current practice and shifting circumstances.

Because of the economic growth of many previously poorer States, the emphasis on the quantitative dimension is likely to lessen. However, it will continue to be a real issue for the many smaller but poorer countries, and some areas of social policy in middle-income countries will often require some additional support. There is also

¹¹¹ For similar conclusions drawn from an analysis of Rawls's liberal egalitarianism and Pogge's institutional cosmopolitanism, see Luna, 'Poverty and Inequality' (n. 45 above), p. 457.

some recognition that some groups, such as indigenous peoples, have the right to seek direct assistance in the context of international development cooperation.¹¹² Attention is also likely to shift to other forms of resource sharing beyond the fiscus, such as rare minerals, water, energy and technologies. The sharing of resources is unlikely to ever be a closed question when poverty and inequality appear so persistent. As Griffin notes, the duty to provide assistance emerged in natural law long before the creation of even States or the liberal Enlightenment:

Contrary to widespread belief, welfare rights are not a twentieth century innovation, but are among the first rights ever to be claimed. When in the twelfth and thirteenth centuries our modern conception of a right first appeared, one of the earliest examples offered was the right of those in dire need to receive aid from those in surplus.¹¹³

¹¹² See discussion in Chapter 3 on the UN Declaration on the Rights of Indigenous Peoples.

¹¹³ J. Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008), p. 177. Numerous other examples are given.