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Global protection of the right to asylum and partial compliance

Abstract: The paper examines obligations towards bearers of the right to asylum in circumstances of partial compliance. Who should bear the burdens when a state responsible for assisting bearers of the right to asylum fails to comply with the requirements of justice and unjustly defaults on its responsibilities? Are the complying states obligated to ‘take up the slack’ and assist the bearers of the right to asylum, or are they obligated to bear only their ‘fair share’ of burdens in the global protection of the right to asylum. The paper argues that the complying states with the capacity to assist can have an obligation of justice to assist bearers of the right to asylum when other states unjustly default on their responsibilities.

Key words: The right to asylum, justice, partial compliance, states, assistance.

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This paper focuses on examining the issue of partial compliance in the context of the right to asylum. For the purposes of this paper, I will take the following starting-positions for granted: 1) All persons have the right to satisfaction of basic needs¹; 2) When a person’s basic needs are insufficiently protected in his or her home state, and the person cannot be provided a remedy to the occurring deprivations within the person’s home state, the person has the right to asylum in other states²; 3) All states together share responsibility for the assistance of the bearers of the right to asylum.³ The central question I tackle in the paper is the following: if some states unjustly default on their responsibilities, should the complying states ‘take up the slack’ and bear the non-compliers’ burdens? I will proceed with the enquiry in the following way. In the first section, I outline an argument suggesting that the complying states are not obligated to bear the non-complying states’ burdens in the global protection of the right to asylum. In the second section, I claim that this argument does not offer a satisfactory normative guideline for the complying states in circumstances of partial compliance. In the final section, I will examine whether the obligation to bear the non-complying states’ burdens should be understood as an enforceable obligation of justice or

1 On basic needs as the justificatory foundation for human rights, see David Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007), ch. 7; Peter Jones, *Rights* (London: MacMillan, 1994), ch. 7; Gillian Brock, *Global Justice – A Cosmopolitan Account* (Oxford: Oxford University Press, 2009), pp. 63-72. James Nickel, ‘Poverty and Rights’, *The Philosophical Quarterly*, 55/220 (2005), pp. 386-402; Frances Stewart, ‘Basic Needs Strategies, Human Rights, and the Right to Development’, *Human Rights Quarterly*, 11/3 (1989), 347-374.

2 On the universal moral right to asylum see for example Joseph Carens, ‘Who Should Get in? The Ethics of Immigration Admissions’, *Ethics & International Affairs* 17/1 (2003), 95-110; Michael Dummett, *On Migration and Refugees* (London: Routledge, 2001), p. 37; Miller (2007), pp. 224-227.

3 For a legal enquiry into states’ collective responsibility in the protection of refugees see Agn s Hurwitz, *The Collective Responsibility of States to Protect Refugees* (Oxford: Oxford University Press, 2009), ch. 4. and 5.

as a non-enforceable humanitarian obligation. I will argue that the citizens of complying states can have an obligation of justice to bear more than their 'fair share' of burdens in the protection of the right to asylum.

Full and partial compliance in the protection of the right to asylum

Let us start with the preliminaries. If we are asked how the burdens of assistance should be distributed in global efforts to protect the right to asylum, the obvious reply is: the burdens should be divided 'fairly' between citizens of all states. For the purposes of this paper, let us assume that a satisfactory theory of fair shares can be established, and that all states are aware of what would be their citizens' fair share of burdens in global efforts to protect the right to asylum. Let us also leave aside issues regarding compliance and non-compliance of particular citizens, and accept for the course of the current enquiry a statist account of compliance. In circumstances of full compliance all states bear their fair share of the overall burden⁴ in assisting bearers of the right to asylum. Conversely, in circumstances of partial compliance there are at least some states that choose not to fully comply with the fair share requirement. What happens to the responsibilities when some states unjustly default, and unilaterally decide against fulfilling their full share of responsibility? Do the responsibilities transfer to other states, or is each state obligated to bear only their fair share of burdens regardless of other states' compliance or non-compliance?

Some theorists have suggested that moral demands on complying duty-bearers in a group of duty-bearers do not change in non-ideal circumstances where other duty-bearers choose not to comply with morality's demands. Jonathan Cohen and Liam Murphy, for example, have defended this type of view. Cohen asks us to imagine a distant island with two small communities, one poor and the other affluent due to existing climate differences. While according to Cohen members of the affluent community each may have a duty to give food to the members of the poor community so that they can avoid starvation and malnutrition, the complying members of the rich community are not morally obligated to step in on behalf of their non-complying fellows and discharge more than what would be their share of duties towards the less affluent community in circumstances of full compliance.⁵ In his book *Moral Demands in Nonideal Theory* Liam Murphy outlines a very similar but more elaborate account of moral demands in circumstances of partial compliance. He proposes 'the compliance condition'

⁴ In the context of the paper, the idea of burden denotes cases where the accommodation of bearers of the right to asylum involves costs. Some asylum seekers can, for example, be in need of housing, legal assistance, welfare benefits and cultural education on their arrival. Of course, as asylum seeking right-bearers are not a homogenous group, providing asylum is not necessarily always costly to the duty-bearers in a particular recipient society. But for the sake of simplicity, I will use the term 'burden' to denote the general idea that the protection of the right to asylum can entail costs which the duty-bearers in a recipient society are reluctant to bear.

⁵ Jonathan L. Cohen, 'Who is Starving Whom?', *Theoria*, 47/2 (1981), 65-81, p. 73.

as the central limiting factor for duties of assistance, and argues that ‘an agent-neutral moral principle should not increase its demands on agents as expected compliance with the principle by other agents decreases’.⁶

Following Cohen’s and Murphy’s arguments, it might be claimed that in circumstances of partial compliance complying states have no obligation to bear those burdens in the global protection of the right to asylum that belong to the non-complying states. On this approach, each state is simply required to discharge its fair share of responsibilities, and no state is required to ‘take up the slack’ if other states will not comply. It is not hard to see why some may consider this argument appealing. After all, it is morally desirable that all states have to bear strictly their fair share of burden, i.e., the approach recognising the level of overall compliance is designed to advance an important moral aim. When the complying states are obligated to bear burdens that all things considered belong to the non-complying states, the direct benefit to the non-compliers is that they are free to allocate the relevant resources elsewhere. As well, there can be indirect benefits for the non-complying states. If the complying states are already comparatively disadvantaged, the additional burden may affect their global competitive position detrimentally. If countries struggle to succeed in the global trade market, unfair burdens resulting from the requirements of assisting bearers of the right to asylum can lead to even greater competitive disadvantage on this area. When other states are not complying with the requirements of justice, the citizens of the complying states may ask: ‘why should we bear the burdens that all things considered belong to some other states? It is not us who are unjustly failing to discharge responsibilities. Why should we be held accountable for the injustice committed by other states?’

What should we make of the argument of the citizens of the complying states? Should we accept that the accounts offered by Cohen and Murphy provide a satisfactory guideline for understanding obligations of justice states can have in global protection of the right to asylum in circumstances of partial compliance? Should we accept that when some states choose not to discharge their fair share of responsibilities, other states do not have to step in on their behalf and make up for the non-compliance?

Are complying states obligated to bear burdens of non-complying states in global protection of the right to asylum?

The non-compliance in the protection of the right to asylum clearly constitutes an injustice by the non-complying states. When a state fails to comply with the fair share requirement, the state is committing an injustice towards the right-

⁶ Liam Murphy, *Moral Demands in Nonideal Theory* (Oxford: Oxford University Press, 2000), p. 77.

bearers. Once a non-complying state has committed an injustice towards the bearers of the right to asylum, the right-bearers turn to the compliant states with the capacity to assist. When a rich complying state denies assistance from asylum seeking right-bearers, it owes a satisfactory explanation for its omissions due to the existing right-bearer/duty-bearer relationship. The question here is essentially about whether the fair share requirement provides a sufficient reason against the transferring of responsibilities to those with the capacity to assist under circumstances of partial compliance.

If it is correct that states are morally obligated to bear only their fair share of burdens in global protection of the right to asylum, this means that the responsibility to assist will not transfer to the complying states regardless how minor the additional burdens would be in the absolute sense, how extensive absolute capacities the state would have to bear the additional burden, and what would be at stake in the transferring of the responsibility. Consider, for example, a boatload of right-bearing asylum seekers that has been unjustly rejected by one state. After discharging its fair share of responsibilities a complying rich state would be in a position to rescue the asylum seekers, and to distribute the burdens between its citizens. Once the burdens of assisting the boatful of asylum seekers – say a group of 30 – would be distributed within the wealthy state between millions of citizens, there would be no practical impact on any of the particular duty-bearers within the state. In fact, the burdens would be non-existent. But if each state has only the obligation to bear its fair share of burdens, the state can after discharging its fair share of obligations legitimately reject assistance from the thirty right-bearers facing imminent threat to their lives.

Although fair distribution of burdens in the protection of the right to asylum is a morally desirable aim, it is questionable that when faced with needy right-bearers it is sufficient for a state to refer to the fact that other states have failed to comply with the requirements of justice. Those right-bearers left without asylum take no comfort in the knowledge that they would have had access to asylum if (and only if) all states had fully complied and had satisfactorily borne their fair share of the overall burden. The right-bearers might say to the wealthy complying states: ‘what we care about is having access to asylum. We have a claim to asylum against all of you as a collective. So you should protect our rights, and solve disputes of compliance and burden distribution amongst yourselves without letting us suffer further’. It is important to recognise that it is one thing to refer to the fact that additional assistance would unreasonably burden the state in the absolute sense, and completely another thing to refer to the fact that other states are non-compliant and that as a consequence the complying state has to bear unfair burden vis-à-vis other states. The argument on the requirement to bear only the

fair share of burdens does not appeal to the burdens of assistance in the absolute sense but instead to the burdens of assistance in the relative sense. This means that it essentially suggests that unfair distribution of burdens between states constitutes a greater injustice than the injustice of some right-bearing refugees remaining without asylum. In the end, I believe this is a dubious claim to make.

To assert that the fairness of burden distribution between states overrides the fundamentally important right to asylum would be, in the words of Peter Singer, 'taking fairness too far'.⁷ The unfairness that occurs in burden distribution is surely an important moral issue, but taking into consideration what is at stake in the right-bearers' access to asylum it seems that the unfairness constitutes the 'lesser injustice' in the current case. Basic needs are essential human needs the satisfaction of which may be understood as a precondition for the very possibility of agency, and not meeting them can be considered as a universally severe harm to any life plan.⁸ With basic needs we are not concerned about the ability to live a 'full life', or a 'good life', or a 'flourishing life' in any particular society. Instead, we are strictly concerned about a minimal foundation for the pursuit of a flourishing human life. Basic needs may be argued to amount to a fundamental normative resource base from which stringent duties of assistance can be derived. While in some cases of burden distribution fairness may be the overriding consideration, in circumstances where basic needs are at stake it is questionable that this is the case.

When basic needs are at stake, it seems reasonable to suggest that the complying duty-bearers can have an obligation to bear burdens under circumstances of partial compliance to the point in which the burdens become excessive in the absolute sense. If this conclusion is correct, where does it leave us regarding assistance of right-bearing asylum seekers in circumstances of partial compliance? If basic needs can override considerations of fairness in burden distribution, then states have the moral obligation to take up the slack and assist (within the

⁷ Peter Singer, 'The Singer Solution to World Poverty', *New York Times Sunday Magazine*, September 05 (1999), available online: <http://www.nytimes.com/library/magazine/home/19990905mag-poverty-singer.html> (accessed 01.04.12). Other philosophers have also outlined similar conclusions regarding duties of assistance. For example Bart Streumer and Garrett Cullity have both appealed to a modified version of Singer's famous 'drowning child' example, and have claimed that the theories of duties of assistance outlined by Murphy and Cohen are highly unintuitive. The modified example is as follows: If there are two drowning children, and two passers-by in a suitable position to rescue the children, each passer-by may be considered to have an obligation to rescue one of the children if they are able to do so within the limits of reasonable costs. However, if one of the passers-by decides to run away, the other passer-by now has the obligation to rescue both children if the second rescue could be executed within the limits of reasonable costs. Bart Streumer, 'Review of Liam B. Murphy, *Moral Demands in Nonideal Theory*', *Ratio*, 17/3 (2004), 357-362, p. 361. Garrett Cullity, *The Moral Demands of Affluence* (Oxford: Clarendon Press, 2004), pp. 76-77.

⁸ To have a basic need for X is to suffer severe harm when lacking X. In the words of Garret Thomson: 'A fundamental need for X is itself inescapable in the sense that the fact that X is causally necessary for not suffering serious harm cannot be altered. The causal link is inescapable.' Garrett Thomson, 'Fundamental Needs', in Soran Reader (ed.), *The Philosophy of Need* (Cambridge: Cambridge University Press, 2005), 175-186, p. 177.

limits of reasonable costs) those bearers of the right to asylum who have been unjustly treated by the non-complying states. But it is important to recognise that this conclusion, while providing a general answer to the question set in the beginning of the paper, still leaves open issues regarding duties of assistance in circumstances of partial compliance. One issue the conclusion does not clarify is the *kind* of obligation the obligation to take up the slack is. Next, I will turn to examine this question.

Obligation of justice or humanitarian obligation?

The claim that other states are obligated to take up the slack and assist right-bearers who have been unjustly treated by the non-complying states suggests that the compliers can be morally obligated to rectify injustices the non-complying states are committing. But what kind of obligation is the obligation to bear unfair burdens? In his paper on partial compliance, David Miller argues that ‘we are not required as a matter of justice to correct the injustice that others perpetrate, although we may have reason to do so’.⁹ On these grounds, Miller concludes that even if it is accepted that in circumstances of partial compliance duty-bearers have an obligation to bear more than their fair share of burdens in global assistance of the poor, this obligation should not be considered as an enforceable obligation of justice. Instead, as the obligation to take up the slack is an obligation to rectify injustices, it should be considered only as a non-enforceable humanitarian obligation.¹⁰ If Miller’s argument is correct, it seems to entail that the obligations of citizens of each state to bear more than their fair share of burdens in the global assistance of the bearers of the right to asylum are strictly humanitarian obligations, i.e., states cannot legitimately enforce their citizens’ obligation to take up the slack for citizens of other states with threats of sanctions.¹¹ What should we make of this conclusion? Should we accept Miller’s argument as valid, and also accept that the obligations of citizens of each state to bear more than their fair share of burdens in global protection of the right to asylum can be only humanitarian obligations?

In order for us to be in a position to conclude whether Miller outlines a satisfactory account of the kind of obligations that duty-bearers in one state can have in circumstances of partial compliance, there is a need to clarify further Miller’s argument on human rights and obligations of justice to remedy harms

⁹ Miller gives an example of three persons, Bert, Anne, and Charles. He contends that ‘if Bert steals Anne’s money, justice does not require Charles to right this wrong, although if Charles happens to be so placed that he can direct the money back to Anne, this would very likely be the right thing for him to do’. David Miller, ‘Taking Up the Slack? Responsibility and Justice in Situations of Partial Compliance’ in Carl Knight and Zofia Stemplowska (eds.), *Responsibility and Distributive Justice* (Oxford: Oxford University Press, 2011), 230-245, p. 239.

¹⁰ Miller (2011), pp. 240-241.

¹¹ In addition, it seems to also entail that in the first place those with the capacity to assist have no duty of justice to assist bearers of the right to asylum whose need for asylum has emerged due to fault of other agents.

right-bearers in other communities are facing. In his work on global justice Miller defends a premise that is also accepted in the current paper, namely that ‘basic needs appear to have the kind of moral urgency that we look for in a justification of human rights’.¹² In addition to the claim that basic needs can ground human rights, Miller argues that a person can have an obligation of justice to remedy harms bearers of human rights in other communities are facing when: 1) the person bears moral responsibility for the right-bearers’ deprivations;¹³ 2) the person is in a well-suited position to assist deprived right-bearers who are not morally responsible for their own deprivations and whose circumstances have emerged due to no fault of recognisable third parties (e.g., victims of natural disasters).¹⁴ Conversely, those in a well-suited position to assist persons in other communities whose human rights have been violated by third parties have only humanitarian duties of assistance due to the fact that the violators are primarily responsible for remedying the right-bearers’ harms.¹⁵ On Miller’s view, this is the case even if it would not be excessively demanding in the absolute sense for a duty-bearer to assist bearers of human rights who have been unjustly treated by others.¹⁶

While it may be correct that ‘as a general matter’ we are not obligated by justice to correct injustices others perpetrate, contrary to what Miller claims it is not directly obvious that the obligation of justice could not remain in circumstances of partial compliance when basic needs are at stake. When arguing that human rights can be grounded in basic needs, Miller essentially accepts that needs qua needs can be sufficiently weighty to ground duties of justice in persons with the capacity to assist. After all, he is suggesting that a person with the capacity to assist can have an obligation of justice to assist right-bearers who are not morally responsible for their own deprivations and are not victims of third parties. Miller recognises, rightly, that there can be circumstances under which duty-bearers are not required by justice to assist right-bearers. For example, the fact that a person has a human right to *x* does not directly mean that others have an obligation of justice to guarantee the right-bearer *x*, as to guarantee the right-bearer *x* may excessively burden the duty-bearers in the absolute sense.¹⁷

But Miller’s view that duty-bearers with the capacity to assist are not required by justice to assist those bearers of human rights who have been treated unjustly

¹² Miller (2007), p. 185.

¹³ Miller (2007), pp. 249-250.

¹⁴ Miller (2007), pp. 254-255.

¹⁵ Miller (2007), 257-258. It should be pointed out, however, that Miller does seem to be claiming that there can be some special circumstances where the compliers can possibly be required by justice to take up the slack. This, he argues, may be the case when the non-compliers ‘belong to the same group of agents’ as the compliers. Miller (2011), pp. 240-241.

¹⁶ Miller (2011), p. 241.

¹⁷ Miller (2007), p. 189.

by third parties is questionable. If a need can ground obligations of justice in those with the capacity to assist, why wouldn't the duty-bearers be obligated by justice to assist needy victims of third parties? I can see how an argument can be made to defend the view that the stringency of duty-bearers' obligations are eroded if the right-bearer bears moral responsibility for the occurrence of his or her own plight. But why exactly does the introduction of an agent who is primarily responsible for the assistance diminish the moral weight of basic needs in such a way that the corresponding obligations of those with the capacity to assist can no longer be obligations of justice? Put differently, why the need that has come into existence due to no fault of the needy can no longer ground duties of justice in those compliant agents with the capacity to assist? Miller fails to explain satisfactorily this erosion of basic needs as a fundamental normative resource base.

Miller offers only one explanation for his conclusion. He claims that to compel a duty-bearer to bear burdens that all things considered belong to other agents is to 'fail to treat the duty-bearer as an agent'.¹⁸ But it is not immediately clear why exactly compulsion under circumstances of partial compliance immediately entails a failure to treat the duty-bearer as an agent. After all, the question here is about unfair relative burdens instead of excessive burdens in the absolute sense.¹⁹ Why could we not say that instead of being linked to relative burdens the failure to respect the duty-bearer as an agent is centrally linked to the absolute floor that recognises the limit beyond which requirements on duty-bearers become excessively demanding? In terms of internal consistency it seems much more satisfactory to either attempt to fully reject the view that basic needs are sufficiently weighty moral considerations to ground obligations of justice in those with the capacity to assist, or to accept that those with the capacity to assist can have an obligation of justice to assist needy right-bearers who are not morally responsible for their own plight – including victims of injustices committed by third parties – to a specific point in which the obligation becomes excessively demanding in the absolute sense. If it is correct that basic needs qua needs are sufficiently weighty to ground obligations of justice in the first place, I see no strong reason why we could not conclude that in circumstances of partial compliance the citizens of complying states are required by justice to assist right-bearing asylum seekers who are not responsible for their own plight.

¹⁸ Miller (2011), p. 243 n. 16.

¹⁹ As well, it is important to remember here that we are talking about the protection of basic needs. Those whose basic needs are not sufficiently protected are already facing the rejection of conditions under which they can meaningfully act as agents. In other words, to compel those duty-bearers for whom assistance would not be excessively burdensome in the absolute sense is to protect the opportunity of other right-bearers to be in the position of an agent.

The next step, then, is to examine the location of the absolute floor. This floor marks a point in relation to each state's capacities after which the citizens of a state are no longer obligated by justice to assist bearers of the right to asylum. In general terms, whether a state's burden in protecting the right to asylum actually reaches the absolute floor is dependent on three primary factors. Firstly, it depends on how much overall effort is required for all right-bearers to have their right protected. The second relevant factor is the level of compliance in the global efforts to realise the right to asylum. If the global level of compliance among states is high, it is less likely that the absolute floor will be reached by each particular complying state. In turn, the lesser the general compliance, the more likely it is that the complying states will not have sufficient capacities to assist all the needy right-bearers. Thirdly, whether a state reaches the absolute floor is dependent on where exactly the absolute floor will be located. The establishment of the absolute floor is a central part of any account of obligations in global protection of the right to asylum.²⁰ Put differently, the issue of the absolute floor is a general question that requires answering, and any positive account on the right to asylum faces the task of providing satisfactory reasons as to why exactly the absolute floor should be located in one place rather than some other place. In the current paper, I will stop short of analysing this complex issue in detail.²¹ Here it is enough to recognise the more general conclusion of the paper: states with the capacity to assist can have an obligation of justice to bear more than their fair share of burdens in the protection of the right to asylum.

Conclusion

In the current paper, I have examined the duties of assisting bearers of the right to asylum in circumstances of partial compliance. I have defended the conclusion that complying states can have the obligation to take up the slack and assist bearers of the right to asylum when other states default on their obligations. I have also argued against David Miller, who suggests that duties of global assistance in circumstances of partial compliance should be considered as humanitarian duties instead of duties of justice. I have claimed that Miller seems to be outlining a problematic view when suggesting that the obligations to assist right-bearers

²⁰ This is the case even for an approach recognising that complying states are not obligated to bear non-complying states' burdens. In his account of moral obligations under circumstances of partial compliance, Liam Murphy questions the possibility of establishing a fixed absolute floor on duties of assistance beyond a stringent absolute floor of the kind outlined by Peter Singer. Murphy (2000), 64-70. See also Peter Singer, 'Famine, Affluence and Morality', *Philosophy and Public Affairs*, 1/1 (1972), 229-243, pp. 229-231.

²¹ The over-demandingness objection was originally targeted against act-utilitarian moral accounts that can require persons to give up all their personal commitments and fully commit to assisting strangers. For a thorough enquiry on the idea of over-demandingness, see Murphy (2000), ch. 2. and 3. See also Scheffler, 'Morality's Demands and Their Limits', *The Journal of Philosophy*, 83/10 (1986), 531-537. Scheffler distinguishes four possible responses to the criticism of over-demandingness. 1) To abandon the theory for a less demanding one, 2) to restrict the scope of moral demands in human lives, 3) to argue that morality altogether deserves less respect than is generally given to it, or 4) to reject that over-demandingness constitutes any type of a criticism towards a moral theory.

who are not responsible for their own plight and who are not victims of third parties are obligations of justice, but that the obligation to assist right-bearers who are victims of third parties are humanitarian obligations. If it is correct that basic needs *qua* needs can ground duties of justice in those with the capacity to assist, I see no strong reason why we could not conclude that also the duty to assist victims of third parties is in fact a duty of justice.

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