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

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1. INTRODUCTION

Imagine the following situation: the State of Elbonia¹ is based on an island. One day, the citizens and residents of the State of Elbonia are informed that their island henceforth will be permanently covered in water, destroying all of their property and making it impossible for them to live there. This could be the result of shifting tides, tsunami waves, earthquakes, volcanic eruptions, or other major natural catastrophes that occasionally occur in the world.² As the water slowly washes away their homes, towns, road, and fields, it kills a handful of citizens of the State of Elbonia. The others all quickly understand that, in order to survive, they must emigrate and seek shelter in a different country. While these people

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¹ The State of Elbonia is a fictional country from Scott Adams's comic strip Dilbert. It is an extremely poor "fourth-world" country, mostly covered with waist-deep mud. Elbonia is also experiencing a civil war. As such, it serves as a good prototypical state for the purpose of this article. For more on Elbonia, see http://en.wikipedia.org/wiki/Elbonia (last visited June 20, 2008).

² Indeed, this is not an imaginary scenario, but rather a scenario that is predicted by scientists as a result of global warming. See, e.g., An Inconvenient Truth Official Site, http://www.climatecrisis.net/thescience (last visited Sept. 1, 2007). For instance, this seems to be the case for the Pacific island nation of Tuvalu, which is gradually becoming covered with water, causing its citizens to seek asylum in New Zealand. See, e.g., Anwen Roberts, What Will Become of Tuvalu's Climate Refugees?, SPIEGEL ONLINE INTERNATIONAL, Sept. 14, 2007, http://www.spiegel.de/international/world/0,1518,505819,00.html.
would not be considered to be refugees in the legal sense, they are also very different from the average immigrant.

The citizens of the State of Elbonia are not legally refugees because the 1951 Convention Relating to the Status of Refugees defines a refugee as a person who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality.” The citizens of the State of Elbonia have not been persecuted and their flight is not related to any of the five grounds mentioned in the Convention. Nonetheless, these people are also not “ordinary” immigrants, since their emigration is indeed a necessitous flight rather than one of choice. Nor are they stateless persons, since, formally speaking, they still possess citizenship status in their country, Elbonia. This is true even though Elbonia was rendered completely unable to protect them.

In order for these persons whose state no longer physically exists to survive, each of them must impose on some other state and ask to be accepted into it and to receive assistance from it. Nevertheless, they are not eligible for protection under international law, despite the fact that their case does seem morally distinguishable from that of other immigrants because their immigration was driven by necessity. I refer to the lack of international protection for the people of Elbonia as “the protection gap,” hinting at the fact that international law’s protection mechanism is

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4 I use the term “immigrants” to refer to those who leave their countries of residence. Most commonly, the movement of immigrants, as opposed to that of refugees, is a result of some degree of choice and is connected to a desire to improve quality of life or economic opportunities.
6 On the concept of necessity in immigration, see NIRAJ NATHWANI, RETHINKING REFUGEE LAW 27-30 (2003). Nathwani acknowledges the fact that often people cannot realistically be expected to stay in their country of origin, and offers the necessity principle (which is used in many criminal systems) to distinguish those who have little choice but to leave from those who genuinely leave voluntarily. According to this principle, immigration is justified when it is the “lesser of two evils” and the immigrant seeks to prevent an “evil” such as imminent risk to one’s life or health.
incomplete and falls short of protecting all of those whose immigration is a result of necessity. I wish to contribute a moral angle to this discussion of the lack of justification of the “protection gap,” a discussion which several scholars have conducted from an abstract or a legal point of view.\footnote{Andrew E. Shachnove, 
*Who Is a Refugee?*, 95 ETHICS 274 (1985); Arthur C. Helton & Eliana Jacobs, 
*What Is Forced Migration?*, 13 GEO. IMMIGR. L.J. 521 (1999); see also 
Michelle Foster, 
INTERNATIONAL REFUGEE LAW AND SOCIO-ECONOMIC RIGHTS: 
REFUGE FROM DEPRIVATION (2007).}

In an attempt to examine this “protection gap,” the question we must clarify is whether another state has a moral obligation to these people who want to immigrate to its territories. In this article, I will provide different moral perspectives through which one can evaluate the moral basis of this duty and discuss its scope. Because I aim to focus the discussion on the duty, I ask that you imagine a world in which only the State of Elbonia and another state (State B) exist.\footnote{Compare James M. Buchanan, 
*A Two-Country Parable, in Justice in Immigration* 63 (Warren F. Schwartz ed., 1995).} I chose to illustrate my point with this imaginary example so I am not forced to address some complex questions that might arise in a real-life situation, such as how this duty should be shared internationally. These are questions which I have addressed elsewhere.\footnote{Tally Kritzman-Amir, 

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

It is important to discuss the morality of states’ obligations to immigrants, although—and perhaps even because—international law does not provide us with an adequate answer to the question of the scope of these obligations. While the basic notions of international law would traditionally justify a conclusion that states have no such obligations, this does not seem to be the approach that most states currently hold.\(^{10}\) Therefore, we are justified in examining both the legal and the moral aspects of the obligations of states to immigrants.

International law in its classic form claims that the primary and sole responsibility of the state is to manage events within its borders.\(^{11}\) The state is not obliged to attend to any problems that occur outside its borders in foreign states; its main obligation is towards its citizens and residents. The state should protect the human rights of the people who reside in its territories. It is a social unit in which resources are divided through various means, such as taxation. It is also a unit in which notions of national identity and solidarity are formed and sustained. The state has no such obligation to citizens of other states. According to this notion,

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\(^{10}\) This is evident from the practices of complimentary protection which many states adopt voluntarily. The most obvious form of complimentary protection is temporary protection, typically given to groups of immigrants who are unable to return to their countries of origin, since their countries are going through a particular crisis. For further information on temporary protection, see, for example, Joanne Fitzpatrick, Temporary Protection of Refugees: Elements of a Formalized Regime, in 94 AM. J. INT’L L. 279, 282-87 (2000). For more general information on on complimentary protection, see JANE M’Cadam, COMPLEMENTSARY PROTECTION IN INTERNATIONAL REFUGEE LAW 19-22 (2007); and TALLY KRITZMAN, SOCIO-ECONOMIC REFUGEES (2008).

\(^{11}\) The rights, immunities, and responsibilities that come with sovereign power are comparable to the rights, immunities, and responsibilities that comprise the right to property. For example, the right to prevent persons from entering the state is comparable to the right to prevent trespassing and to administer the property. See Wesley Hohfeld, Some Fundamental Legal Conceptions As Applied in Judicial Reasoning, 23 YALE L.J. 16 (1913). It was later applied extensively by legal realists; see e.g., Felix Cohen, Dialogue on Private Property, 9 RUTGERS L. REV. 357 (1954). See also Thomas C. Grey, The Disintegration of Property, in PROPERTY, NOMOS XXII 69 (J. Roland Pennock & John W. Chapman eds., 1980).
states are autocratic, independent, self-managed, and autonomous. This notion values the sovereignty of the state over all contradicting principles.\footnote{See, e.g., Christoph Schreuer, The Waning of the Sovereign State: Towards a New Paradigm for International Law?, 4 EUR. J. INT’L L. 447, 447–49 (1993), on the supremacy of the sovereignty in international law.} The byproduct of sovereignty—the ability of the state to run itself and to decide who should be included and excluded as members of the state\footnote{See, e.g., Linda Bosniak, Citizenship Denationalized, 7 IND. J. GLOBAL LEG. STUD. 447 (2000) (discussing the relationship between state sovereignty, membership in states, and practices of inclusion or exclusions of members in states.)}—is a lack of similar responsibility to the decision-making that takes place outside its territory. Another byproduct is that states have the ability to make decisions regarding who is allowed to cross their borders, and those decisions are regarded as their private matter.\footnote{David Held, Law of States, Law of Peoples, 8 LEG. THEORY 1, 4-6 (2002).} From this classic international law perspective, we arrive at the conclusion that the state bears no duty towards immigrants who want to enter it.

While the concept of sovereignty is still very influential in international law, it has been somewhat challenged in the past few decades.\footnote{As former UN Secretary General Kofi Annan has expressed it, “[s]tate sovereignty, in its most basic sense, is being redefined.... States are now widely understood to be instruments at the service of their peoples, and not vice versa.” Kofi A. Annan, Two Concepts of Sovereignty, ECONOMIST, Sept. 18, 1999, at 493, quoted in Michael W. Reisman, Why Regime Change Is (Almost Always) A Bad Idea, 98 AM. J. INT’L L. 516, 517 (2004). Reisman refers to the modern concept of sovereignty as “simply the demand of each territorial community however small and weak and however organized, to be permitted to govern itself without interference by larger and more powerful states and, at least in 1945, without interference by the entire organized international community. Our international legal system is scarcely imaginable without such a concept of sovereignty...” Id. at 516 (internal citations omitted).} Most significantly, it has been challenged by the recent rise of the humanitarian intervention doctrine.\footnote{See Seyla Benhabib, The Rights of Others: Aliens, Residents and Citizens 9-10 (2004) (discussing the effect that humanitarian intervention has had on the concept of sovereignty).} According to this doctrine, states are no longer responsible only for activity within their territory; rather, they are also somewhat responsible for the prevention of severe human rights violations that occur in other countries. In other words, under the humanitarian intervention doctrine, the intervention of states in the human
rights-violating policies of other states is sometimes morally justifiable, and perhaps even morally (though not legally)\textsuperscript{17} required. This doctrine, although severely criticized and often perceived as misused, has led to states intervening (either by military measures or by sending aid) in civil wars and large-scale massacres for the purpose of preventing crimes against humanity and other human rights violations.\textsuperscript{18}

However, the humanitarian intervention doctrine is not the only exception to the classic perception of states as self-managed and autonomous. States have taken upon themselves several other obligations which either contradict the notion of sovereignty or do not derive from it.\textsuperscript{19} In fact, international practice indicates that many states see themselves as de facto obligated to help nationals of other states, even in the absence of legal obligations. States are taking an increasing interest in the trials and tribulations that are occurring in other states, and as a result they are taking practical steps like providing financial aid\textsuperscript{20} and offering military assistance\textsuperscript{21} and temporary protection to immigrants.\textsuperscript{22} All of these

\textsuperscript{17} In a different context, the ICJ imposed a legal duty to prevent genocide outside the country in Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 2007 I.C.J. 154-59 (February 26), available at http://www.icj-cij.org/docket/files/91/13685.pdf?PHPSESSID=8d1d1d86f6f8418930a7927f92212017.

\textsuperscript{18} See, e.g., J. L. Charney, NATO's Kosovo Intervention: Anticipatory Humanitarian Intervention in Kosovo, 93 AM. J. INT'L L. 834 (1999) (arguing that the doctrine of humanitarian intervention is often criticized as too offensive to the sovereignty of states and too politicized.)

\textsuperscript{19} E.g., the sovereignty of states has also been affected in a similar manner by the different means of international criminal law; self-interest has also led states to intervene in the policies of other states with regards to matters from environmental issues to workers' rights.

\textsuperscript{20} See, e.g., AID IN PLACE OF MIGRATION? SELECTED CONTRIBUTIONS TO AN ILO-UNHCR MEETING 73, 91 (W.R. Bohning & M.L. Schloeter Paredes eds., 1994) (discussing the provision of financial aid to support countries of origin and prevent the need for immigration).

measures are taken by states as a means of preventing human rights violations or of improving the human rights situations of persons from other countries, whether within or outside their effective control. It seems that although not legally bound to intervene or attempt to assist other states or their nationals, many states feel morally bound to do so.

Consequently, it is worthwhile to examine the philosophical question of the nature and extent of these moral duties. This examination might shed some new light on the tendency of states to deviate from the original notions of international law, as well as help rationalize and define the extent of the political and legal obligations in the future. As such, the morality of sovereignty should be explored and discussed to the extent that it serves as a shield of protecting the human rights of immigrants.

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

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

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23 Rudiger Bittner claims that global justice is falling behind since people are slow to react to the global economy, and finds that “moralists, thus, should be patient, and in the meantime do their best in spreading the word.” It seems that discussion of the moral implications of the global situation is believed to have a long-term effect on behaviors and political decisions. See Rudiger Bittner, Morality and World Hunger, in GLOBAL JUSTICE 24, 25 (Thomas W. Pogge ed., 2001).
the less obvious positive duties and determine whether a state also holds these duties to immigrants.26

Moreover, the discussion should be focused on the moral obligation of a state to immigrants. This obligation differs from other types of obligations—legal or other—that a state may have to immigrants. For example, a state may hold different duties to immigrants due to some prior agreements or relationships it has with these immigrants or with their homeland or due to some harm it caused the immigrants to which it must offer compensation.27 This article will not focus on such historical duties, which are more easily accounted for. Instead, it will deal with the more difficult task of determining whether a state has any moral duties that are independent of any pre-existing historical duties.28 However, it should be noted that states have relatively few legal obligations towards immigrants. These legal obligations include the right to leave the country (but not the right to enter another country),29 the right to enjoy asylum under specific conditions,30 and the right to nationality.31 The moral duty could encompass much more than that.

26 Compare positive and negative duties with the discussion of the difference between positive and negative freedoms in ISAIAH BERLIN, Two Concepts of Liberty, in Four Essays on Liberty, 118, 121-54, 169-72 (1969).
27 See Jurgen Habermas, Struggles for Recognition in the Democratic and Constitutional State, in MULTICULTURALISM 107, 141 (Amy Gutmann ed., 1997) (arguing that First World countries have an obligation to absorb Third World immigrants as a way of making up for the evils of colonialism).
31 Universal Declaration, id., at arts. 1 & 15.
Let us turn now to an analysis of this moral duty. I will examine it through the lens of three different schools of thoughts: distributive justice theory, utilitarianism, and the feminist “ethics of care” approach.

IV. DISTRIBUTIVE JUSTICE

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

Distributive justice is one form or perception of justice that, according to Aristotle, is derived from the idea of equality.\textsuperscript{32} To Aristotle, inequality is, in fact, injustice. Aristotle frames “justice in distribution” as having to do with fitting the share each recipient gets to her rights.\textsuperscript{33} In other words, distributive justice is related to dividing goods—or burdens—among persons according to a certain criterion—their rights.\textsuperscript{34} Distributive justice is a formal concept that could be applied in several ways, through a large number of criteria. The distribution, according to Aristotle, needs to be proportional.\textsuperscript{35} Aristotle’s ideas were refined and elaborated on by many later philosophers, one of the most notable being

\textsuperscript{32} Aristotle distinguishes distributive justice from retributive justice, and these are the two basic forms of justice we recognize today. But it is common to discuss a third form of justice today—corrective justice. For a short description of these three forms of justice, see Menachem Mautner, The Eternal Triangles of the Law: Towards a Theory of Priorities in Conflicts Involving Remote Parties, 90 Mich. L. Rev. 95, 103-07 (1991).


\textsuperscript{34} Naturally, distribution can occur not only among persons, but also among other sorts of parties, such as animals, corporations, administrative agencies, and so on. For the purposes of this discussion, we will focus on distribution among persons.

\textsuperscript{35} If A and B represent the persons, and C and D represent their matching shares, Aristotle argues that “proportion is equality of ratios and involves at least four terms. The just, too, involves at least four terms and the ratio [between the terms of one pair] is equal [to the ratio between the terms of the other pair], for persons and things are similarly distributed. Therefore, A:B=C:D and, by alteration A:C=B:D [...]. Consequently, the combination of term [person] A with term [share] C and of term [person] B with term [share] D is just.” ARISTOTLE, supra note 33.
John Rawls, whose applications of the theory of distributive justice will be discussed below.\textsuperscript{36}

In the political context, distributive justice has to do, among other things, with the way that the state participates in the allocation of goods and burdens. The criteria for distribution are numerous: equality; need; ability, merit or achievement; efforts or sacrifices; productive contribution; public utility; and supply and demand. Nicholas Rescher offers another criterion, "the claim criterion," which is more pluralistic and heterogeneous, and according to which distributive justice consists of the treatment of people according to their legitimate claims.\textsuperscript{37}

The moral justification for the allocation of goods and burdens is seemingly some form of relationship of mutuality or bond between those people in the group in which the allocation takes place. An arena for the application of distributive justice can be found in its most obvious form in a close-knit community that is committed to dividing, exchanging, and sharing among itself.\textsuperscript{38} This bond has also been applied within the framework of the state. Aristotle's writings about the principle of distributive justice have been interpreted to apply to justice within the state, although Aristotle obviously could not have been referring to the modern nation state. The question therefore remains: Does the principle of distributive justice persist outside the borders of the nation state? Or, for the purposes of this discussion, can the principles of distributive justice stretch across national borders and apply to non-members of a state?

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

\textsuperscript{36} See infra, Part III.4, text after note 84.

\textsuperscript{37} Nicholas Rescher, Distributive Justice: A Constructive Critique of the Utilitarian Theory of Distribution 73-83 (1966).

\textsuperscript{38} Walzer, supra note 25, at 1. See also Robert Nozick, Anarchy, State and Utopia 183-85 (1974) (arguing that distributive justice should not be viewed solely as a merit of a cooperative institution, but rather as having a significance regardless of a cooperative framework).
justice. In other words, this question regards the right to have access to rights.

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

A. Walzer’s “Mutual Aid” Principle

Michael Walzer discusses distributive justice theory from a communitarian position. He attributes a value to belonging to a specific community as a source of rights. To Walzer, aliens at least potentially pose a threat or dilute the demos, the bonds of the community of solidarity. He describes political communities as analogous to neighborhoods, clubs, or families, which are all complex human associations. When included in any of these forms of association, people gain some kind of affinity: a strong feeling of belonging; an understanding of the basic norms; or a comprehension about each association’s unique features of

39 By no means do I claim that the following pages are an exhaustive survey of everything that has been written on the topic of distributive justice. I will mention several of the main authors on the subject, trying to highlight a few of the main questions that are of interest to my project.
40 BENHABIB, supra note 16, at 173.
41 David Miller, who is also a communitarian, also made this comparison to clubs to justify restrictive immigration policies. See David Miller, Immigration: The Case for Limits, in CONTEMPORARY DEBATES IN APPLIED ETHICS 193, 199 (Andrew I. Cohen & Christopher Heath Wellman eds., 2005).
exclusion and inclusion. All of these social institutions favor their members over non-members and grant their members rights or privileges that are not granted to non-members. Just as these associations apply certain criteria so as to determine who may become members, political communities screen candidates who want to acquire citizenship. However, political communities in the form of states also possess territory, which the other forms of associations do not possess. Territory supplies the political community with a living space, water, and minerals, as well as with a protected area of its own, guarded by borders and police forces. Furthermore, since political communities both possess territory and have the ability to include or exclude those who want to enter and use their territory, Walzer examines in detail the admission policies of states to determine whether they befit the principles of distributive justice.

Walzer offers a very narrow interpretation of the principles of distributive justice, which he calls the “mutual aid” or the “good Samaritan” notion. In his view, this is the extent to which states hold an obligation to distribute the good of membership in a just manner. He compares the moral obligation of states towards immigrants with the obligation of a person towards a stranger she meets in the desert who asks her for a share of her water or of a person towards an injured stranger when she is faced with the dilemma of whether to take him into her house. The duty in these scenarios extends to those cases in which positive assistance is urgently needed by a party, but only if the risks and costs (or burdens) of offering such assistance are relatively low for the other party. Walzer sees the mutual aid principle as extending “across political (and also cultural, religious, and linguistic) frontiers.” In his view, this is the one form of distributive justice that applies in the

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43 Id. at 42-46.
44 Id.
45 Id.
46 Id.
47 Id.
48 Benhabib mentions that since the duty to assist foreigners is not absolute, but is instead contingent on not being overtly disruptive to the life and welfare of a society, it is an “imperfect” or “conditional” duty of the state. See Benhabib, supra note 16, at 36-37.
49 Walzer, supra note 42, at 33.
international arena. Even though not clearly stated, it seems that, according to Walzer, the moral obligation derives from the random encounter, from the relationship that was formed between strangers in the middle of the desert, which exposes one to the immediate needs of the immigrant. It is not clear whether such a duty also exists with respect to destitute persons who have not left their countries of origin.

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

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

Walzer’s philosophical argument is susceptible to critique. His communitarian starting point of seeing states as similar to clubs, families, or neighborhoods with the one difference being possession of territory, seems, at the very least, inaccurate. States have a much stronger grasp on people than clubs, families, and neighborhoods. Belonging to a state defines one’s being, identity, and—most importantly—the rights and privileges one is entitled to enjoy. Therefore, patterns of inclusion or exclusion have a much more coercive impact when applied by states than

50 Walzer, supra note 25, at 48-53.
51 Id.
52 Id.
53 Id.
54 See Alan Gewirth, Ethical Universalism and Particularism, THE JOURNAL OF PHILOSOPHY XXXV(6) 283, 292-93 (1988) (commenting on how the ability to limit membership in organizations is related to the protection of human rights).
by clubs or other social institutions. The differences between states and clubs, families, or neighborhoods go beyond just their scale.\textsuperscript{55} Chaney criticizes this analogy, stating that states are de facto limited in their ability to exclude and include in ways that other social institutions are not.\textsuperscript{56} In her critique of Walzer’s work, Chaney mentions that unlike clubs, states are unable to apply an effective process of exclusion or inclusion, as they are entered into by masses of undocumented immigrants whom they are unable to stop at the border and who challenge their policies; additionally, they are subject to restraints in international law.\textsuperscript{57}

Carens offers a more moralistic critique of the right of a state to favor its own members.\textsuperscript{58} He compares states with families and claims that although families care about their members more than non-members, they do not favor them no matter what.\textsuperscript{59} In many contexts, we believe that favoring family members (or, for the sake of this discussion, club members) is morally wrong or at least morally arbitrary. Similarly, we may find that there are circumstances in which favoring members of a state is morally dubious.\textsuperscript{60} Other authors write that states do not share the affinity of families, and that such an affinity should not be the basis for rights. Rather, everyone should receive basic rights in a liberal democracy.\textsuperscript{61}

\textsuperscript{55} Rawls argues that “we are not seen as joining society at the age of reason, as we might join an association, but as being born into society where we will lead a complete life.” 
\textit{John Rawls, Political Liberalism} 41 (1993). Thus, when abandoning the association analogy, Rawls neglected to treat immigration as a phenomenon of social and normative importance. For a discussion of Rawls's above-mentioned statement, see Bennhabib, \textit{supra} note 16, at 74-94.

\textsuperscript{56} Eliza M. Chaney, \textit{Migrant Workers and National Boundaries: The Basis for Rights and Protections, in Boundaries: National Autonomy and Its Limits}, \textit{supra} note 28, at 37, 41-44.

\textsuperscript{57} It should be noted, however, that Chaney does not establish a claim according to which states are by definition unable to exclude. \textit{Id.}


\textsuperscript{59} \textit{Id.}

\textsuperscript{60} \textit{Id.}

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

Although it might not have been Walzer’s intention to claim that the mutual aid principle should not be applied narrowly (in other words, that it applies only between states with mutual cooperation and ties), it is possible to misinterpret his theory in this way. This interpretation derives from the usage of the term “mutuality,” which refers to the concept of justice as reciprocity, meaning that “an individual has a right to a share of social resources ... only if the individual contributes or at least can

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62 The term “hospitality” is used by Emmanuel Kant in his book *Perpetual Peace* (1795). Kant, unlike Walzer, perceives “hospitality” not “as a virtue of sociability, as the kindness and generosity one may show to strangers who come to one’s land or who become dependent upon one’s acts of kindness through circumstances of nature or history; hospitality is a ‘right’ which belongs to all human beings insofar as we view them as potential participants in a world republic.” Benhabib, *supra* note 16, at 26. Walzer, *supra* note 25, at 35-46.

63 In the above-mentioned scenario of the State of Elbonia it would not, of course, be possible to assist the immigrant in her home country because Elbonia is about to disappear of the face of the earth.
contribute to the cooperative surplus.” But what happens if the state from which the immigrants come is unable to compensate in the foreseeable future the state that allowed the immigrants to enter its borders? What about cases involving immigrants who cannot genuinely be expected to contribute to the production of common goods? It seems that in such cases the idea of “mutuality” does not hold much promise to the immigrants. A subject-centered approach to justice, which focuses on the immigrant as a person who is entitled to rights, seems more adequate and morally well-founded in the liberal human rights theory than the “justice as reciprocity” approach.

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

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

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55 Id.
56 WALZER, supra note 42, at 35-46.
immigrants. Clearly, Walzer does not challenge—or closely examine—the exact boundaries of the category of “refugee.”

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

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

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

David Miller offers a different perspective. Although Miller does not focus solely on immigration, his conclusions could be applicable to the issue discussed here. While Miller does not defend the status quo, he also does not want to explore inequality as such, but rather to emphasize the reasons behind it. The aspiration for global equality is too abstract for

67 David Miller, Justice and Global Inequality, in Inequality, Globalization and World Politics 187, 188 (Andrew Hurrell & Ngaire Woods eds., 1999).
Miller. He sees moral significance in issues such as the state’s own contribution to its poverty and the support—or dissent—given to the regime by its citizens. Miller does not directly deal with the matter of the duty of a state to immigrants, but we can follow his path and question why a state should be held responsible for caring for the members of other states who are in distress due to the poor management of resources by their countries of origin. Imposing such a duty on a state would also create problematic ex-ante incentives on other states to manage themselves efficiently. In light of these notions, Miller offers his own criteria for just distribution based on the ideas of basic rights and exploitation, which are applicable even when the other states are required to intervene due to circumstances for which the first state is at fault.

The first criterion for just distribution is the idea of basic rights. The idea of basic rights is the idea that “there are certain conditions that are universally necessary for human beings to lead minimally adequate lives.”68 States are responsible for ensuring that these basic rights are enjoyed by every person, regardless of her nationality. Although Miller does not argue this specifically, the basic rights idea could serve as a justification for imposing a duty on states towards immigrants whose basic rights have been violated.

In a sense, Miller joins Walzer in maintaining that there is “a cross-cultural moral minimum” to which every person is entitled.69 As such, both Miller and Walzer are exposed to the moral relativism critique. However, their beliefs can be distinguished from those of global egalitarianism since both Miller and Walzer demand that the state give the immigrant minimal rights, rather than optimal or equal ones.

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

In a different context, Miller discusses the duty towards refugees, which is perhaps related to the subject of the human rights exception. Miller maintains that as “people whose basic rights are being threatened or

68 Id. at 198.
69 Id. at 199.
violated in their current place of residence [they] clearly do have the right to move to somewhere that offers them greater security.”70 Accordingly “states have an obligation to admit refugees.”71 Interestingly, Miller thinks that states should define refugees “more broadly than is often the case to include people who are being deprived of rights to subsistence, basic healthcare etc.”72 However, Miller does not see the deprivation of the human rights of refugees as necessarily entailing long-term immigration, but rather as a problem that may be dealt with through short-term protection solutions.73

The second criterion for just distribution is the idea of exploitation. An exploitive transaction takes place when two parties that have some degree of freedom but are unequal in power transact in a manner that seems unfair when measured against a suitable benchmark. Miller respectfully disagrees with the Marxist claim that every transaction is exploitive as such.74 He sees transactions as exploitive only when the inequality of power is so drastic as to lead one party to total vulnerability.75 It seems that, in our context, a “Millerian” claim would be that it is just to presume that a state has a duty to allow immigrants from exploited states to enter. However, Miller fails to fulfill the extremely difficult task of offering an accurate criterion for exploitation, and he is satisfied with simply giving examples of it. Also, it is not clear if this duty is only to immigrants from countries that have been exploited by the state itself or whether there is a general duty of the state towards all members of exploited states.76

Although Miller is right to note that there is something unfair about a state being obliged to help the members of another state that has inefficiently used its resources, it seems that there is almost always a strong correlation between the inefficient use of resources and morally neutral facts, such as the economic situation of the state. Thomas Pogge

71 Id.
72 Id.
73 Miller does recognize the risk that the temporary solution will become “semi-permanent,” as he puts it, but he does not think that this needs to be the case. Id. at 202-03.
74 Id. at 205-06.
75 Id. at 206.
76 Id. at 204-09.
notes that there is a strong link between the inefficient use of resources in a state and its general situation in terms of education, poverty, disease, and so on. He claims that states suffering from pre-existing poverty will tend to not be as efficient in using their resources as wealthier states. In other words, it seems improper to treat the inefficient use of resources as a matter of "blame," since it is derived from pre-existing conditions. In a way, Pogge's argument makes it apparent that Miller's focus on the state's "blame" can easily be misused to justify the status quo. Additionally, there is something discriminating in Miller's perception: the question of how much a state is to blame for its impoverished situation might be a good criterion for distinguishing between states, but it is hardly an adequate criterion for distinguishing among persons, or, in our case, immigrants. In other words, in many cases it seems difficult to have people bear the consequences of the actions of their state. Since people often do not have an ability to change their state's policies, it could be problematic to derive their rights from this criterion. Accordingly, it is problematic to form an immigration policy using this criterion. Moreover, it seems that Miller's conclusions do not provide an answer to the question of whether we should correct economic inequalities through immigration or through financial aid to poor countries.

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

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78 Id.
79 On the issue of allocating responsibility for the actions of groups or states on individuals and vice versa, see George P. Fletcher, The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt, 111 Yale L.J. 1499 (2002).
80 Miller, supra note 67, at 209-10.
researchers whose writing does support applying distributive justice principles across borders in a more extensive and categorical manner.

C. Towards Cosmopolitan Egalitarianism: Coleman and Harding’s Correction to the Original Allocation of Resources Between States

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

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

Coleman and Harding offer a more cosmopolitan perspective on distributive justice than Walzer. Their view is more consistent with the

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82 *Id*.
83 *Id*.
liberal view, according to which traits like nationality are morally arbitrary and should not determine access to resources. Moreover, Coleman and Harding do not take the status quo as a morally neutral fact, but rather they imply that the borders might have been placed in bad faith or in a way that reflects the interests of the states that were responsible for drawing them. Therefore, it might be justified to deviate from the existing allocation of responsibilities and resources. However, Coleman and Harding’s view, which does not go as far as a totally cosmopolitan egalitarianism view, seems morally risky. For example, in theory, this position could well serve as a justification for poor states occupying territories in richer countries.

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

D. Pogge and Beitz: The Cosmopolitan View of Distributive Justice and the Expansion of Rawls’s Ideas

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

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

84 Id.
85 Id. at 152.
86 Id. at 153.
87 Id. at 60.
88 Id.
This notion of justice, if applied internationally, would place a duty on states towards citizens and non-citizens alike. Since nationality is a morally arbitrary trait, states would have the same compelling duty towards everyone as they have towards their own citizens. This theoretical paradigm can also serve as the basis for a claim for open borders and cosmopolitan egalitarianism. However, when carefully examining Rawls's position, it is clear that he applied the aforementioned principles only within the framework of the nation. Rawls does not see a need for overcoming arbitrary disadvantages and inequalities outside the context of a society. In his view, the two principles of justice are contingent on an ongoing scheme of social cooperation. They apply in "a self-contained national community," meaning in national communities, which are territorially defined by borders and essentially self-sufficient. However, according to Rawls, the two principles of justice do not apply internationally. The only universal duty for Rawls is a non-egalitarian one, somewhat similar to the duty Walzer writes about. Rawls seems to think that "peoples have a duty to assist other peoples living under unfavorable conditions that prevent their having a just or decent political and social regime." Thus, well-ordered societies have the duty to help burdened societies in their attempt to become well-ordered. However, it does not appear as though Rawls believes that a transfer of wealth from wealthier societies to poorer societies should take place.

Other philosophers support the aforementioned conclusion that there is no justification for applying standards of justice in the global sphere given the absence of global governance. Nevertheless, much like Rawls, they maintain that this should not be interpreted as supporting "ethical egoism," and they do support offering some form of humanitarian

91 Thomas Nagel, *The Problem of Global Justice*, 33 Phil. & Pub. Aff. 113, 128 (2005). This is so even though belonging to a specific society is in itself arbitrary.
92 RAWLS, supra note 85, at 457. Rawls tries to distinguish states from peoples in a manner that is arguably unconvincing.
assistance, either through governments or international NGOs. Such assistance would aim to minimize global poverty, regardless of our conception of justice. Therefore, even according to those scholars, it would be hard or even impossible to justify a situation in which State B rejects the Elsonian immigrants. Rawls, however, does not discuss immigration extensively, as he views it as unessential to human existence and therefore not a part of his ideal theory.

Nevertheless, later authors who further developed Rawls’s ideas have applied his notions internationally, while altogether rejecting the claim that these ideas apply in “a self-contained” state. Many authors have further developed Rawls’s theory, thus applying the principles of

96 Under this approach, it is not clear that such humanitarian assistance should be provided through states, and it is possible to imagine it being provided through international NGOs. Nagel, supra note 91, at 132.
97 Thomas Nagel is explicit about this, and says that “[w]hatever view one takes of the applicability or inapplicability of standards of justice to such a situation, it is clearly a disaster from a more broadly humanitarian point of view. I assume there is some minimal concern owed to fellow human beings threatened with starvation or severe malnutrition and early death from easily preventable diseases, as all these people in dire poverty are. Although there is plenty of room for disagreement about the most effective methods, some form of humane assistance from the well-off to those in extremis is clearly called for quite apart from any demand of justice, if we are not simply ethical egoists. The urgent current issue is what can be done in the world economy to reduce extreme global poverty.” Still, Nagel believes that “[j]ustice as ordinarily understood requires more than mere humanitarian assistance to those in desperate need, and injustice can exist without anyone being on the verge of starvation.” Thus, Nagel believes that this requirement of refraining from “ethical egoism” does not solve the fundamental dilemma on the scope of the principles of justice. Nagel, supra note 91, at 118-19.
98 Rawls does find immigration concerning to some extent, as he analyzes the phenomenon of immigration as an externality and a risk to the cultural and constitutional principles of a state. See Rawls supra note 75, at 8-9. Societies are not obliged to apply distributive justice outside their “self-contained” selves, and therefore they have no duty to allow immigration. Id. If they do allow immigrants in, then those immigrants have a right to distributive justice just as any other member of the society. This means they are not to be treated differently than the locals, a result which operates as an incentive to disallow immigration altogether. This creates an incentive for states not to allow immigration to begin with. For an overview of Rawls’s writing on immigration in his book The Law of Peoples, see Seyla Benhabib, The Law of Peoples: The Law of Peoples, Distributive Justice, and Migrations, 72 Fordham L. Rev. 1761 (2004). See also Howard F. Chang, The Immigration Paradox: Poverty, Distributive Justice and Liberal Egalitarianism, 52 DePaul L. Rev. 759, 769-72 (2003).
distributive justice globally. I will focus on the scholarship of two of the most prominent of these authors: Charles Beitz and Thomas W. Pogge.\footnote{For a further discussion of authors who write about the application of distributive justice in the global sphere, see, e.g., Joseph Carens, Immigration, Welfare and Justice, in *Justice in Immigration* 1 (Warren F. Schwartz ed., 1995); Joseph Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POL. 251 (1987).}

Charles Beitz argues that Rawls’s perception of states as “self-contained” is wrong. First, he claims that if states are really “self-contained” rather than interconnected, then there is no point in considering global justice, since there is no international conduct to regulate by the criteria of justice. Since justice, according to Rawls, is a characteristic of cooperative social institutions, it is worthwhile discussing justice in the international sphere, which can also be characterized by cooperative ties. Consequently, it seems that Rawls’s perception of states as “self-contained” is unrealistic or obsolete. Even Rawls himself admits in his later writing that “[t]he relatively narrow circle of mutually caring peoples in the world today may expand over time and must never be viewed as fixed.”\footnote{RAWLS, *supra* note 93, at 113.} States interact in the most significant ways, especially in terms of economy and commerce. If states are not perceived as “self-contained,” then there is some justification for thinking of an international original position. This position is similar to the one described by Rawls above, and the same principles of justice apply.

In general, Beitz claims that national boundaries have no moral significance. In other words, there is a justification to an international principle of distributive justice.\footnote{Otherwise, according to Beitz, there is no justification for a national application of the principle. Simon Caney, *International Distributive Justice*, 49 POL. STUDIES 974, 975-76 (2001).} The result is that Beitz claims that everyone should be included in the hypothetical original position—behind the veil of ignorance—and their nationalities should be disregarded.

Pogge agrees with Beitz that Rawls is mistaken in rejecting the idea of enforcing distributive justice at the international level.\footnote{See, e.g., THOMAS W. POGGE, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* 110-14 (2d. ed. 2008).} He stresses above all else that Rawls fails not only in not applying the idea of distributive justice universally, but also in not proving that if this idea is
not applied universally, there are still reasons for applying it within states.\textsuperscript{103} Pogge ponders Rawls's methodology, wondering why he only focuses on persons in his discussion of national justice and on states in his discussion of international justice.\textsuperscript{104} He argues that Rawls's theory suffers from a double standard, since it sets different standards for the national sphere and the international sphere without proper justification.

Furthermore, Pogge asserts that the idea of distributive justice derives directly from the fact that each person is entitled to welfare rights.\textsuperscript{105} He sees distributive justice as an institutional principle, having to do with the just distribution of resources in an institution. Due to the extent of global economic interdependence, there is a global basic structure on which the principle of distributive justice should be applied.\textsuperscript{106} It is noteworthy that some (though not all) of the other authors under discussion believe that the obligation to help others, which is derived from the idea of distributive justice, is compelling and exists even if those others do not belong to the same institution.\textsuperscript{107}

Both Beitz and Pogge reach the conclusion that wealth should be distributed in the international sphere in a manner that maximizes the benefit of the least well-off persons.\textsuperscript{108} As such, this point of view is a sophisticated twist on egalitarianism, protecting substantial, rather than formal, equality. On the issue of the duty to necessitous immigrants, it seems that those who side with the cosmopolitan view of distributive justice will argue that such immigrants should be offered assistance by all states in the form of membership and protection of their rights. The duty of distributive justice applies to the individual and, therefore, the individual has the right to claim just distribution.\textsuperscript{109} This conclusion is supported by the notion of the universal nature of human rights as

\textsuperscript{103} Id. at 112-14.
\textsuperscript{105} Id.
\textsuperscript{106} THOMAS W. POGGE, REALIZING RAWLS 219 (1989).
\textsuperscript{107} See, e.g., Peter Singer, Famine Affluence and Morality, 1 PHIL. & PUB. AFF. 229, 234 (Spring 1972).
\textsuperscript{109} BEITZ, supra note 108, at 152-53.
something that every person is entitled to enjoy, \textsuperscript{110} and it is reaffirmed by the natural law tradition, according to which rights arise through recognition of the inherent dignity of a person. \textsuperscript{111}

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

However, the cosmopolitan point of view of distributive justice is subject to several critiques. The first critique is the nationalist critique.\textsuperscript{112} In essence, the nationalist critique argues that the cosmopolitan egalitarianism approach overlooks the special obligations of distributive justice that people have towards members of their national group.\textsuperscript{113} However, this claim should not necessarily be considered to contradict the cosmopolitan claim. Cosmopolitians simply argue that there is also a moral basis to a cosmopolitan distributive justice principle. Some nationalists claim that the cosmopolitan egalitarianism approach is not viable, since systems of distributive justice need to be compatible with nation states.\textsuperscript{114} This, of course, is a descriptive argument, rather than a normative one, and as such it does not undermine the mere moral claim of the cosmopolitan egalitarianists. Other nationalists agree with the notion that people have entitlements, but disagree with the cosmopolitan point of view that states are primarily responsible for granting these entitlements.\textsuperscript{115} This critique, however, fails to deal with the extreme cases in which the state does not or cannot grant the required entitlements.

\textsuperscript{110} Bo, supra note 61, at 404-05.
\textsuperscript{112} For a more detailed description of the nationalist critique and the responses to it, see Kok-Chor Tan, Justice Without Borders: Cosmopolitanism, Nationalism and Patriotism 85-132 (2004). See also an interesting angle of the nationalist critique developed by Seyla Benhabib. Benhabib, supra note 16, at 110-14.
\textsuperscript{113} See Christina Boswell, The Ethics of Refugee Policy 35-74 (2005); see also Simon Caney, International Distributive Justice, 49 Political Studies 974, 980-83 (2001).
\textsuperscript{114} Caney, supra note 113, at 980-83.
\textsuperscript{115} Id. at 982-83.
Another critique of cosmopolitan egalitarianism is that this approach is offensive to the idea of state sovereignty, as it indicates that states should enforce an egalitarian distribution of resources on other states. This critique is indeed of great significance and brings up an important point. Namely, that the problem in most of the cases is not that individuals or states are forced to receive benefits and resources from intervening countries. Rather, the opposite is true: individuals and states who want more resources and benefits through redistribution are encountering a lack of willingness on the part of other states to grant them the needed resources. It seems, therefore, that this critique does not rule out the cosmopolitan view altogether, but rather suggests that cosmopolitan redistributive notions should not be misapplied to abolish cultural differences nor should they otherwise be forcefully misused.

The third type of critique is the realistic critique. This critique claims that states should—and would—advance their own national interests rather than take care of those living abroad.¹¹⁶ Scholars who support this critique cite the understanding of human nature, the nature of international relations, and utilitarian arguments as challenges to “global justice.”¹¹⁷ According this line of thought, those who seek to promote the rights of immigrants to the same extent as the rights of locals are “politically naïve.”¹¹⁸ Once again, these arguments seem to be more descriptive than normative, and therefore seem unconvincing.

Seyla Benhabib offers an additional critique to the cosmopolitan egalitarianism position. First, Benhabib offers an “epistemic objection.”¹¹⁹ She claims that economic research has been inconclusive with respect to the effects of redistribution on welfare parameters and immigration patterns. Therefore, she suggests a reevaluation of the redistribution idea in order to develop a specific distribution mechanism to achieve the best results. Ultimately, Benhabib claims that it is possible that redistribution should take a different form than the current conception of distribution, which favors “the least advantaged one.”¹²⁰ Yet while Benhabib rightly points out the possibility that other mechanisms of redistribution might be

¹¹⁶ Id. at 986.
¹¹⁷ Id. at 986-88.
¹¹⁸ Boswell, supra note 113, at 7.
¹¹⁹ BENHABIB, supra note 16, at 106.
¹²⁰ Id. at 108.
more effective, her argument does not undermine the idea that redistribution is an unavoidable means of reducing global inequality.

Second, Benhabib offers a "hermeneutic objection" in which she maintains that it is not clear how the redistribution of wealth should occur because it is not clear "who is to count as 'the least advantaged'" in order for the redistribution to work in her favor.\textsuperscript{121} The determination of who is "the least advantaged" is "not a econometric judgment alone, but a political-economic one."\textsuperscript{122} While objection holds true, the same argument can be made with respect to the determination of who is "the least advantaged" within a state. Although determining who is "the least advantaged" in a state may be somewhat less complex than making the same determination in the global sphere, it is still complicated and difficult.

Distributive justice theory literature offers various perspectives to the morality of the protection gap. Though there are many critiques of cosmopolitanism, these various perspectives indicate that protection of the Elbonians is justifiable.

\section{Utilitarianism}

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

The utilitarian point of view measures the moral value of an act according to whether it increases or decreases the total amount of utility. From a simple utilitarian point of view, therefore, it is clear that State B must admit the citizens of the State of Elbonia to the extent that their immigration will improve the utility of the citizens of the State of Elbonia more than it will decrease the utility of the citizens of State B. In this case, since the utility of the citizens of the State of Elbonia will likely increase dramatically, it seems that State B must assist them by allowing their entry. In addition, due to the cost diminishing marginal utility principle

\textsuperscript{21} \textit{Id.}
\textsuperscript{22} \textit{Id.} at 108-09.
(which states that for any good or service, the marginal utility of that good or service decreases as the quantity of the good increases), accumulative utility will, in fact, increase due to immigration. This is mainly because political borders are not determinative in utilitarianism with regards to the allocation of resources between persons. This is also, as Joseph Carens puts it, due to the fact that "the utilitarian commitment to moral equality is reflected in the assumption that everyone is to count for one and no one for more than one when utility is calculated."

Recent findings also generally support this notion by finding that the liberalization of immigration control increases efficiency gains over time, first of all by saving the expenses of immigration control. In addition, the liberalization of immigration control increases efficiency by increasing the real income of the world. This increase is estimated to be somewhere between doubling the real income of the world and increasing it by thirteen percent, according to the more modest estimates. In addition to the increase in real income, liberalizing immigration control decreases inequality in income distribution. While utility should not be confused with efficiency gains, there is a connection between the two in many cases.

However, when the total amount of utility is measured, it is generally not in terms of the amount of utility in the world. Instead, when

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123 Economic research has been inconclusive regarding the economic effects of immigration. See George J. Borjas, Issues in the Economics of Immigration 2-3 (2000).
124 This is true if we assume that there is no particular utility in the mere fact of living in a certain country. See Charles R. Beitz, Justice and International Relations, in International Ethics: A Philosophy and Public Affairs Reader 283 (C.R. Beitz, M. Cohen, T. Scanlon & A.J. Simmons eds., 1985) (explaining that “utility-maximizing calculations need not respect national boundaries”).
125 Carens, Aliens and Citizens, supra note 99, at 263. This commitment to principles of equality leads Howard F. Chang to the conclusion that discrimination between non-citizens and citizens is as morally unjust as, for example, discrimination between African-Americans and whites. Howard F. Chang, The Economics of International Labor Migration and the Case for Global Distributive Justice in Liberal Political Theory, 41 Cornell International Law Journal 1, 12-17 (2008).
126 Id.
127 Id.
128 Id. at 4.
129 Id. at 4-5.
a country calculates the effect of an immigration policy, to the extent that it practices a utilitarian approach, it calculates the utility of its own persons. From a utilitarian point of view, one potential problem with immigration is “the tragedy of the commons.” If immigration is allowed, then the people who bear responsibility for a specific country are not the only ones who benefit from its assets and suffer its losses. Rather, immigrants share the assets and losses even though they have not contributed to the state and have no share of responsibility for it. This might affect any incentive to contribute to the state, which might, in turn, affect the utility. More specifically, the most imminent fear is that immigrants will cause a decrease in income and much more reliance on the welfare system.

To the contrary, research has demonstrated that even without considering the income increase of new immigrants, there is reason to expect an income increase for the natives of the state to which these immigrants arrive. The only negative effects of immigration are on the income of low-wage native employees, and these negative effects can be

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130 This moral stance often correlates to the political realism school of thought, according to which immigration policies are mainly influenced by a state’s self-interest. See PUNTERVOLD Bo, supra note 61, at 405-06.
131 See generally Garrett Hardin, The Tragedy of the Commons, 162 SCIENCE 1243 (1968).
132 Rawls, supra note 93, at 39.
133 This is comparable to similar efficiency arguments that are made in the context of property law theory, particularly with regards to domestic takings law. In the context of takings law, it has been argued that full compensation is crucial for providing incentives for owners to invest in their property. The concern is that giving a share of someone else’s property through takings law without fully compensating the property owner will discourage people from investing in their private property as they will fear losing it to others (who, in turn, did not invest). However, some argue that full compensation does not provide as much of an incentive as a progressive compensation regime does. See, e.g., Hanoch Dagan, Takings and Distributive Justice, 85 VA. L. REV. 741, 747-56 (1999). Compare also RONALD DWORKIN, SOVEREIGN VIRTUE 328-30 (2000).
134 Chang, supra note 126, at 4-5; Chandran Kukathas, The Case for Open Immigration, in CONTEMPORARY DEBATES IN APPLIED ETHICS 207, 212 (Andrew I. Cohen & Christopher Heath Wellman eds., Blackwell Publishing 2005).
corrected through distributive measures, such as taxation.\textsuperscript{135} The concern
that allowing immigration will impose a greater burden of taxation can be
refuted by the fact that immigrants will also be taxed on their income as
soon as they are employed in their state of immigration. Additionally, the
burden of taxation does not have to be increased if immigrants are not
fully integrated into the welfare system of the state.\textsuperscript{136}

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

It should be noted, however, that although maximizing utility is an
important consideration in immigration debates,\textsuperscript{137} I believe that other
political and moral considerations should also be taken into account when
forming immigration policies.

\section*{VI. Ethics of Care}

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

\textsuperscript{135} A comprehensive discussion of the methods of redistributing income and other profits
between high-wage native employees, immigrants, and low-wage native employees is
beyond the scope of this paper. For such a discussion, see Howard F. Chang, \textit{Liberalized
Immigration as Free Trade: Economic Welfare and the Optimal Immigration Policy}, 145
\textsuperscript{136} Kukathas, \textit{supra} note 135.
\textsuperscript{137} Robert W. McGee, \textit{Some Thoughts on the Relationship Between Property Rights and
A feminist account of international law suggests that we inhabit a world in which men of all nations have used the statist system to establish economic and nationalist priorities to serve male elites, while basic human, social and economic needs are not met. International institutions currently echo these same priorities.\textsuperscript{138}

Although the feminist critique of international law encompasses a wide variety of views, I will refer specifically to the ethics of care approach, as it is the most relevant on this point. The ethics of care approach is based on psychological research performed by Carol Gilligan,\textsuperscript{139} who analyzed the problem-solving attitudes of women and men in the hopes of determining whether women have a different “voice”—or approach—than men. Gilligan concluded that females apply an ethics of care approach and perceive ethical dilemmas in terms of relationships, responsibility, caring, context, and communication.\textsuperscript{140} Males, however, apply an ethics of rights or an ethics of justice approach, which leads them to perceive scenarios in binary terms of right and wrong, fairness, logic, rationality, and winners and losers, without taking into account context and relationships.\textsuperscript{141}

While the ethics of care approach seeks to improve our understanding of the problem-solving attitudes and “voices” of women, it has also served as a basis for the promotion of women’s interests. Additionally, the ethics of care approach has served as a call to recognize the validity and potential of that “different voice,” as the ethics of care approach is often more appropriate and more moral than the ethics of rights approach. In the context of international law, the general promotion of the ethics of care approach has far-reaching consequences not only with respect to women, but also with respect to other subordinate groups as they experience international law and its fundamental concepts. Indeed, this approach has been used to critique various phenomena in international

\textsuperscript{139} Carol Gilligan, \textit{In a Different Voice: Psychological Theory and Women’s Development} (1982).
\textsuperscript{140} \textit{Id.} at 64-105.
\textsuperscript{141} \textit{Id.} at 66-105.
law and international relations such as the treatment of third world countries, colonialism, sovereignty, transnational institutions, international norms and norm-making processes, and so on.\textsuperscript{142}

In the context of immigration, the ethics of care approach supports a view that diminishes the male-like "us" and "them" binary distinction between citizens and aliens. This approach also rejects a strong emphasis on sovereignty and nationalism and points to the fact that the countries of the world are interrelated and interconnected.\textsuperscript{143} Instead, the ethics of care approach embraces a more humanist-oriented viewpoint. With respect to human rights, the ethics of care approach promotes the protection of social and economic rights over civil and political rights.\textsuperscript{144} Consequently, this approach supports a "relational" attitude to immigrants, objects to criminalizing most kinds of immigrants, and requires offering them protection, especially when it comes to vulnerable immigrants, such as refugees,\textsuperscript{145} trafficking victims, and necessitous immigrants, such as the Elbonians. The ethics of care approach supports these positions both as a general policy recommendation and because women constitute a large—and often unheard and undocumented—group of immigrants.\textsuperscript{146}

The ethics of care approach argues that just as a child cannot survive without care, in some circumstances immigrants also cannot survive without care. In so doing, this approach challenges myths of self-sufficiency of immigrants. It also suggests that there is a moral obligation to care for immigrants and to feel empathy towards them, just as we feel

\textsuperscript{142} For an overview of the "ethics of care" approach to international relations, see Fiona Robinson, Methods of Feminist Normative Theory: A Political Ethic of Care for International Relations, in FEMINIST METHODOLOGIES FOR INTERNATIONAL RELATIONS 221 (Brooke A. Ackerly, Maria Stern & Jacqui True eds., Cambridge University Press 2006).

\textsuperscript{143} ANN TICKNER, GENDER IN INTERNATIONAL RELATIONS 64-65 (1992).

\textsuperscript{144} Charlesworth, Chinkin & Wright, supra note 139.

\textsuperscript{145} On the need for further protection of women in refugee law, see, e.g., Amy M. Lighter Steill, Incorporating the Realities of Gender and Power into U.S. Asylum Law Jurisprudence, 1 TENN. J.L. & POL’y 445 (2005).

\textsuperscript{146} Saskia Sassen, Is This the Way To Go?—Handling Immigration in a Global Era, 4 STAN. AGORA 1 (2003). Although Sassen does not refer specifically to the "ethics of care" approach, it can be inferred that she uses this approach. On the role of women in immigration law, see Nancy Ann Root & Sharyn A. Tejani, Undocumented: The Roles of Women in Immigration Law, 83 GEO. L.J. 605 (1994).
empathy towards other dependants. For example, in the case of the above-mentioned State of Elbonia, it is likely that the ethics of care approach would support assisting the members of the State of Elbonia by allowing them to stay in state B and enjoy some welfare benefits.

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

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

In a sense, the ethics of care approach somewhat rejects the provision of clear-cut definitions since it aims to avoid “male” binary distinctions. Therefore, it can be very difficult to draw modern policy recommendations based on this approach. It should also be noted that the ethics of care approach falls short of arguing in favor of a cosmopolitan egalitarian approach. Since this approach views the context of human

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47 Virginia Held has explored this issue, although not in the context of immigration. See Virginia Held, Draft Paper in Yale Legal Theory Workshop on Terrorism and Military Intervention (Feb. 1, 2007).
lives as crucial, it has difficulty accepting a full redistribution of wealth. Rather, it argues for a “softer” perception of states as units for the redistribution of wealth.  

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

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

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

Thomas Hobbes discussed this point and argued that people who cannot earn a living in their home states have the right to immigrate, with the state having a matching duty to allow them in, as long as the state to which they immigrate is not “sufficiently inhabited” and is rich with natural resources to the extent that its inhabitants cannot use them all up themselves.  

Hobbes’s notions may have been suited to the world that existed several centuries ago, prior to the formation of the modern nation-state and the enhancement of international trade and exportation; however his idea is not suited to today’s world, and therefore Michael Walzer

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148 Robinson, supra note 143, at 221.
149 THOMAS HOBBES, LEVITAN (1651) at Chapter XXX, available at http://etext.library.adelaide.edu.au/h/hobbes/thomas/h681/chapter50.html (last visited August 7, 2007). It is interesting to compare Hobbes’s argument with Kant’s justification of the right of a foreigner to hospitality. Kant argues that it is unjust to deny a foreigner the right to enjoy the land and its resources when this can be done peacefully and without endangering the life and welfare of the locals. His argument is based on the fact that the earth is a common possession of all men. See BENHABIB, supra note 16, at 30.
rejects it. Hobbes’s idea is too narrow in the sense that it does not prevail as a basis for a state’s obligation towards immigrants in most cases, because most states that are “sufficiently inhabited” are not sufficiently well-off to meet Hobbes’s criteria. On the other hand, Hobbes’s idea is too broad, since even if a country was so overflowing with resources that its natives could not consume them all, the state would be more likely to export these resources as goods than to increase its own consumption by allowing immigration. Additionally, Hobbes’s notion could potentially be misused as a justification for colonialism in countries that are rich in resources and not “sufficiently inhabited.” Nevertheless, it seems that an immigrant has a stronger claim when she wants to immigrate if the state to which she immigrates is not over-populated and if its resources are not overly used. This idea correlates with Walzer’s “mutual aid” principle, a part of which dictates that a state only owes a duty to assist immigrants if the assistance does not overburden it.\footnote{\textit{Walzer}, supra note 42, at 46-48.}

The scope of the moral obligation may also be influenced by the state’s social or demographic balance.\footnote{See supra Section III.1, text after note 49.} Some states have a delicate social composition, and therefore the immigration of a specific group of persons might have severe consequences on a country’s culture, demography and ethnic composition. Certain societies try to preserve their social composition and attribute an intrinsic value to it. These states will be reluctant to allow the entry of immigrants. This consideration, however, carries little weight in the aforementioned example in which the world is composed of two states and one is about to vanish, given the fact that the persons from the disappearing state would otherwise lose their lives. The superiority of “basic rights,” as explained by Miller and referred to above, should prevail.\footnote{For a discussion of the presumed effect of immigration on a people’s culture, see \textit{Rawls}, supra note 93, at 39.} While this consideration should normally be taken into account, it may not be appropriate to use it for the complete denial of entry to persons who would otherwise be unable to survive. Rather, states could take this into account when determining the extent of the integration of those immigrants they allow in.

\footnote{See supra Section III.2, text after note 67.}
Additionally, in certain circumstances, security considerations may also influence the scope of the moral obligation. For example, it seems that a country that is in a state of war may legitimately refuse, in some cases, to take upon itself the obligation to allow the entrance of enemy nationals who pose a danger to its security. In the case of a drowning state, the State of Elbonia, the only other state in the world, State B, should not be allowed to prevent the entry of immigrants who pose a security threat who want to save their own lives. Nonetheless, State B should be allowed to restrict the integration of the Elbonian immigrants into its society and to take steps to prevent them from endangering it. For instance, in order to prevent a security threat from materializing, the state might be allowed to detain these immigrants. In a world in which a person may immigrate to more than one state, it seems logical to require that a person immigrate to a state to which she does not pose a security threat. In other words, the security threat that an immigrant poses should be balanced against the existence of alternatives that might reduce the security risk.

Similarly, the moral obligation of a state to an immigrant might be affected by the reasons that led to the immigration. For instance, if the immigration was driven by force or necessity, such as the immigration of those fleeing from the State of Elbonia, the moral obligation of the state to allow the immigrant to enter might be stronger. Additionally, if the immigration is encouraged by the admitting state itself, then, in a sense, the moral obligation is derived from the responsibility of the state for the immigration. If the immigrant is a member of the social group that the state encompasses, then the state has a greater moral obligation to her. Although these factors have the most obvious effect on the extent of the moral obligation of the state to immigrants, there are numerous other factors that can also influence this obligation. For example, if an immigrant poses a security risk to a state, then its obligation to admit her does not appear to be very strong.

Finally, it can be argued that the scope of the moral obligation of the state is contingent on the scope of the wave of immigration. In other words, the state’s moral obligation might be smaller in cases of mass

154 See NATHWANI, supra note 6.
influx and greater in cases of a small number of immigrants. In a sense, this consideration is related to the other aforementioned considerations. For example, the economic situation and socio-demographic balance of a state may not carry much weight when only a few individuals want to immigrate, since those few immigrants will have little or no effect on the economic situation or the demography of the state. However, these factors may become significant considerations in cases of mass influx, since a large number of immigrants could shift the socio-demographic balance of the state and have an impact on its economy. This again connects to Walzer’s theory that the assistance should be limited to that which does not overburden the hosting country.

The “mass influx” consideration has been recognized as having impact on the scope of the right to enter one’s own country and on the scope of the ability of refugees to enjoy the right not to be sent back to their country of origin (“non-refoulement”). While, in principle, the quantity of immigrants should be unrelated to the duty of the state towards the individual immigrant, it has implications for the scope of the obligation of the state to necessitous immigrants in situations of mass influx. In the case of the sinking State of Elbonia, it seems unreasonable

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

156 See Walzer, supra note 42.

157 See sources cited supra note 29. This right is protected in international law in Article 12 of the International Convention on Civil and Political Rights, 1966 and Article 13(2) of the Universal Declaration on Human Rights, 1948. For discussions about the fact that the right to enter one’s country does not cover situations of massive waves of refugees wanting to return to their states of origin, see Stig Jagerskioeld, Freedom of Movement, in THE INTERNATIONAL BILL OF RIGHTS 166, 180 (Louis Henkin ed., 1981) and HANNUM, supra note 29, at 59.

that State B be allowed to prevent the entry of the members of the State of Elbonia who seek shelter. But it might be justifiable for State B to disallow the full and long-term assimilation of the former members of the State of Elbonia and to require that another solution be found for them.

It is also possible to argue that the scope of the duty changes with respect to different immigrants. Since, as David Miller mentions, protection of basic rights impacts the moral duty of the hosting state, the fact that the immigration is driven by necessity should increase the scope of the duty.\textsuperscript{159} Additionally, if the immigrant established a relationship with the hosting country, then the duty might be more expansive towards him. Such a relationship could be formed through contributing to the hosting society; sharing some cultural, ethnic, or other affinity; or integrating into the society. Such a conclusion would be supported by the “ethics of care” approach.\textsuperscript{160}

\textbf{VIII. CONCLUSION}

Let us return to our initial example in which we identified the State of Elbonia as a sinking state on the brink of nonexistence whose citizens are accordingly forced to flee. As I demonstrated in this article, there is disagreement between the different scholars as to the scope of the protection State B must offer to the members of the State of Elbonia, the moral grounds from which the duty towards a larger group of immigrants derive, and the scope of the access to rights and privileges which should be offered to immigrants. According to the utilitarian approach, assisting necessitous immigrants is justified since it increases the utility in the world. According to the “ethics of care” approach, assisting necessitous immigrants conforms to notions of caring and empathy as well as to perceptions of states as interrelated rather than autonomous. Walzer supports providing emergency assistance to necessitous immigrants, at least to the extent that assisting them does not create too large a burden. Miller justifies assisting necessitous immigrants to the extent that assisting them is necessary to protect their basic rights. Coleman and Harding would

\textsuperscript{159} See supra Section III.2, text after note 66.

\textsuperscript{160} See supra Section V.
perceive assistance to necessitous immigrants as a means of correcting the “original” distribution and redistributing resources in a more just way. Finally, the cosmopolitan egalitarianist approach supports a vast redistribution of resources because it is likely to mean a broad scope of assistance to necessitous immigrants. Nonetheless, it seems that most, if not all, of these scholars would agree that the members of the State of Elbonia should be allowed into State B, thereby imposing some sort of a distribution of the resources of State B among the members of both states. Even those scholars who object to applying the principles of justice across borders usually support the provision of humanitarian assistance.

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

The determination of the scope of these rights is once again a question of great moral and practical importance. Although general guidelines with respect to the scope of the rights should be defined in order to form concrete policy recommendations, the exact scope should be determined relatively, with respect to the specific characteristics of State B and the characteristics of the immigrants. Determining the exact scope of those rights goes beyond the aims of this project and requires making moral and political judgments regarding the importance of states.

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