

A Sceptic's Guide to Justice in International Tax Policy

Laurens van Apeldoorn

Critical Notice:

International Tax Policy: Between Competition and Cooperation
by Tsilly Dagan

What, if any, are the moral norms governing the international taxation regime if the sceptic is right to think that considerations of distributive justice do not apply beyond the state? I sketch an answer to this question by examining Tsilly Dagan's illuminating recent book *International Tax Policy: Between Competition and Cooperation*.¹ In her work, Dagan identifies the position of Thomas Nagel, an influential global justice sceptic, as predominant among commentators in legal scholarship and policy debates on international taxation.² In tracing the implications of his position for international tax policy she wishes to show that even a sceptic like Nagel is committed to identifying some considerations of distributive justice beyond the state when it comes to multilateral cooperation to ameliorate the harmful effects of tax competition. According to Nagel, such multilateral cooperation is appropriately conceived as a bargain between mutually self-interested states. Dagan maintains that Nagel must accept that states must consider the impact of such cooperation on the capacity of other states to secure domestic distributive justice. As she puts it, states' "bargaining position is constrained by the requirement that justice not be compromised within their cooperating state partners."³

Dagan's argument demands close attention for two related reasons. First, it proposes a way to develop a theory of international tax justice on minimalist foundations that may find a sympathetic ear with a large audience. This is a commendable aim worth pursuing. However, while I agree with Dagan that Nagel must accept that moral norms govern international tax policy, I disagree with her reasons for suggesting that he must. I assert that Dagan is correct to claim that the global justice sceptic is committed to seeing cooperation in international tax policy as constrained by moral norms, but these norms, I shall suggest, are based on what Nagel calls humanitarian duties rather than duties of justice.

Second, the paper engages with a philosophical question that has received scant attention—namely, how global justice sceptics like Nagel should conceptualize the

I wish to thank Allison Christians and Ivan Ozai for helpful comments on an earlier draft of this article.

1. Tsilly Dagan, *International Tax Policy: Between Competition and Cooperation* (Cambridge University Press, 2018). See also Tsilly Dagan, "International Tax and Global Justice" (2017) 18:1 *Theor Inq L*.
2. Thomas Nagel, "The Problem of Global Justice" (2005) 33:2 *Philosophy and Public Affairs* 113.
3. Dagan, *supra* note 1 at 211.

duty of individuals regarding domestic distributive justice beyond the borders of their own state. Dagan can be read as maintaining that, on Nagel's view, individuals have a duty of justice to further domestic distributive justice abroad. I will argue that Nagel is probably committed to denying Dagan's interpretation. The more plausible reading is that he considers any concern with domestic distributive justice abroad to be grounded in a humanitarian duty, rather than a duty of justice.

My argument proceeds as follows. First, I summarize Nagel's skeptical position and Dagan's treatment of it (section 1). Second, I establish that Dagan's argument that Nagel is committed to a duty of justice to promote distributive justice abroad faces some significant obstacles (sections 2-4). Finally, I suggest that Dagan can ground her argument in a humanitarian duty that Nagel does accept (section 5). The upshot of the argument is that even if the sceptic is right to think that considerations of distributive justice do not apply beyond the state, the international taxation regime is nevertheless governed by a set of moral norms of a humanitarian nature that, broadly speaking, require states to prevent human rights deficits where they can.

1. Nagel and Dagan on International Justice

Nagel defends a sharp discontinuity between the moral norms that apply to individuals belonging to the same state, and those that apply to foreigners. Within the state, where sovereign power is exercised, Nagel maintains that, "citizens have a duty of justice toward one another through the legal, social, and economic institutions that sovereign power makes possible."⁴ This duty of justice correlates with a claim by their fellow citizens (mediated by the state) that, in the organization of the fundamental institutions they jointly inhabit, their interests are taken into account as equals. This does not necessarily mean that in the distribution of advantages no inequalities are permitted, but it does mean that any such inequality is justifiable to all as equals. Egalitarian principles of justice, which concern what counts as acceptable inequalities, are thus essentially concerned with relative distribution of advantages between citizens. Outside the state, where individuals are not jointly subject to the coercive power of a sovereign, only "more basic duties of humanity" apply. These duties are universal. They are correlated with a claim by all individuals that their basic human rights, including rights to a minimally decent life, are guaranteed. "I assume", Nagel writes, "there is some minimal concern we owe to fellow human beings threatened with starvation or severe malnutrition and early death from easily preventable diseases."⁵ This minimal concern is not with regard to the relative distribution of advantages, but only with regard to ensuring that a minimal threshold is reached.

One may summarize Nagel's position by saying that with regard to justice (but not humanitarianism) Nagel is a relationalist and an internationalist.⁶ He is a

4. Nagel, *supra* note 2 at 121.

5. *Ibid* at 118.

6. For this distinction, and for the argument that Nagel does not clearly distinguish these two aspects of his view, see Andrea Sangiovanni, "Global Justice, Reciprocity, and the State" (2007) 35:1 *Philosophy and Public Affairs* at 6-7.

relationalist in the sense that principles of justice govern relations between individuals, specifically the relation of being subject to the same basic institutional structure that sovereign power makes possible. He is an *internationalist* in the sense that he thinks that principles of justice apply only within the state.

Why does Nagel think that principles of egalitarian justice only apply within the state? I quote his answer in full:

I submit that it is this complex fact—that we are both putative joint authors of the coercively imposed system, and subject to its norms, i.e., expected to accept their authority even when the collective decision diverges from our personal preferences—that creates the special presumption against arbitrary inequalities in our treatment by the system. ... Insofar as those institutions admit arbitrary inequalities, we are, even though the responsibility has been simply handed to us, responsible for them, and we therefore have standing to ask why we should accept them. This request for justification has moral weight even if we have in practice no choice but to live under the existing regime. The reason is that its requirements claim our active cooperation, and this cannot be legitimately done without justification—otherwise it is pure coercion.⁷

Demands of justice are triggered by being jointly subject to coercive institutions that we are asked to comply with, and are imposed on us in our name. Because we are made, in some sense, responsible for these institutions and are expected to comply with them, we have standing to demand that any inequalities regarding the distribution of advantages by those institutions are justifiable to us. But we can demand this only from our fellow citizens that are similarly placed and can reciprocally demand the same from us.

The rest of this paper is concerned with the question what the truth of this theory means for the moral evaluation of international tax policy. In her recent book *International Tax Policy: Between Competition and Cooperation*, Tsilly Dagan argues that even if we accept Nagel's form of relationalism, we are committed to non-internationalist conclusions in the context of multilateral cooperation on international taxation: Nagel must accept the existence of a duty of justice to further distributive justice abroad. Here, I very briefly summarize her argument before unpacking it in the subsequent sections. It starts with the plausible and familiar claim that tax competition endangers states' capacity to become and remain internally just. Trade and financial liberalization, in combination with technological advancements, have given rise to intense tax competition between states. The competitive pressure to attract, and avoid the outflow, of capital and highly skilled labour, makes it more difficult for the state to employ fiscal policy in aid of redistribution and domestic distributive justice.⁸ This leads Dagan to the less familiar, and more equivocal, claim that the "state loses its unique status as

7. Nagel, *supra* note 2 at 128-29.

8. Dagan, *supra* note 1 at 185-86. The classic paper in defense of this argument is Reuven S Aviyonah, "Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State" (2000) 113:7 Harv L Rev. See also Peter Dietsch, "Tax Competition and its Effects on Domestic and Global Justice" in Ayelet Bani, Miriam Ronzoni & Christian Schemmel, eds, *Social Justice, Global Dynamics* (Routledge, 2011).

locus for justice”,⁹ a situation she also describes as a “justice deficiency”.¹⁰ Finally, she concludes that given this “justice deficiency”, the precise nature of which I will discuss in greater detail below, multilateral cooperation of a certain kind is required as a matter of justice.¹¹ Even a global justice skeptic like Nagel must accept that states have a duty of justice to promote domestic distributive justice abroad and that multilateral cooperation on international taxation is just only if does not worsen the welfare of the least well-off in cooperating states.

2. Just Cooperation

Dagan’s formulation of the principle of justice governing multilateral cooperation is the following: “A multilateral regime established through cooperation is just ... if and only if it improves (or at least does not worsen) the welfare of the least-well-off of the constituents in all the cooperating states.”¹² In this section I show that this principle is implausible, by asking what is the baseline against which we should measure whether the welfare of individuals has been adversely affected. One possible answer, and the answer that is implied by Dagan, is the status quo. When considering whether and how to reform the international taxation regime, we should ensure that the interests of the worst-off, prior to the reforms, are not adversely affected. This baseline appears to be morally arbitrary, especially if we consider that according to Dagan’s analysis the status quo is unjust. Why would refraining from worsening the position of an individual, living under unjust institutions, guarantee justice?

An alternative baseline against which to measure whether the welfare of individuals has been adversely affected is the condition of economic autarky—the hypothetical situation where states do not facilitate international trade or capital flows and their economies are fully self-reliant. This baseline reveals the importance of taking a broader view of cooperation in the realm of international tax. Tax competition is the result of the concerted efforts of states to remove regulatory barriers to trade and capital. This cooperative effort includes an extensive network of tax treaties that are, at least in part, aimed at preventing double taxation that would discourage international investment.¹³ The reduced capacity to secure domestic distributive justice is a side effect of that

9. Dagan, *supra* note 1 at 205.

10. *Ibid* at 206.

11. She is skeptical of the virtues of some forms of cooperation (such as those exemplified by the OECD BEPS project) which in some contexts she calls ‘cooperation’ simpliciter. See, e.g., Dagan, *supra* note 1 at 203.

12. *Ibid* at 204. She also writes that “multilateral regime must set terms that ensure the welfare of the weakest segments in poor countries that might otherwise be harmed by the cooperative arrangement” (*ibid* at 208) and that “for a multilateral regime established through cooperation to be justified it must improve (or at least not worsen) the welfare of the least well-off citizens in all the cooperating states” (*ibid* at 189).

13. Dagan calls the idea that treaties are solely aimed at avoiding double taxation the “tax treaty myth” (*ibid* at 72).

cooperation. Seen from this perspective, what matters is that the effects of economic globalization, which are partly shaped by the international tax regime, are just. Dagan could therefore suggest that the institutions governing economic globalization, including the international taxation regime, cannot leave individuals worse off than under conditions of autarky.

On this reading, Dagan's principle closely resembles a principle proposed by Aaron James in his theory of fairness in trade. James maintains that international trade harms individuals and is unjust if the "injured person's life prospects would have been better under autarky, in which case he or she is made worse off, overall, for life in an open society."¹⁴ Christian Barry objects to this principle, claiming that it is too weak. He argues that the baseline against which the harm of individuals is to be identified, is the situation where domestic distributive justice is realised. Individuals can demand not only that they are no worse off than they would have been in the absence of economic globalisation, but that they are no worse off than they would be in a just society: "What individuals (and social classes) can demand of forms of economic integration is just what they can demand of other institutional arrangements that might be implemented in their society. That is, they can demand that it be justice preserving."¹⁵ This objection also applies to Dagan's principle. Individuals cannot merely demand that their welfare is not adversely affected by multilateral cooperation. They can demand that institutional reforms secure distributive justice and that their welfare is not worse than it would be under just institutions.

Thus, what Dagan should have said, and sometimes does say,¹⁶ is that a multilateral regime established through cooperation is just if, and only if, it preserves domestic distributive justice in cooperating states. The question is upon which individuals do the obligations fall to promote and preserve domestic distributive justice. Nagel holds that individuals have obligations of justice only in relation to those with which they share subjection to coercive institutions that are imposed in their name. This appears to mean that fellow citizens, not foreigners, have obligations to promote and preserve domestic institutions that are just. If multilateral cooperation on international taxation leads to domestic distributive injustices, the responsibility to correct these injustices falls exclusively on the citizens of the state in question. I now consider Dagan's argument that Nagel is committed to accepting that this responsibility also falls on foreigners: individuals have an obligation (mediated by their states) to promote and preserve domestic distributive abroad.

14. Aaron James, *Fairness in Practice: A Social Contract for a Global Economy* (Oxford University Press, 2012) at 211. This is what he terms the "collective due care principle" (*ibid* at 17).

15. Christian Barry, "The Regulation of Harm in International Trade: A Critique of James's Collective Due Care Principle" (2014) 44:2 *Can J Phil* 255 at 262.

16. She proposes, for instance, "to use the multilateral cooperation as a framework for re-empowering states to domestically pursue justice within their borders." (Dagan, *supra* note 1 at 206). See also *ibid* at 189, 210.

3. Tax Competition as Eroding *Preconditions* of Justice

Dagan's argument has two parts. First she argues that tax competition gives rise to a "justice deficiency". Second, she argues that this "justice deficiency" gives rise to a duty of justice to pursue multilateral cooperation in a way that secures domestic distributive justice abroad. Her analysis of the existence of a "justice deficiency" is somewhat ambiguous and invites two interpretations of the argument. On the first interpretation, Dagan's point is that tax competition erodes the *preconditions* for justice—the conditions Nagel thinks are necessary for egalitarian principles of justice to apply within the state. Because tax competition unequally affects the rich and the poor—the rich are facilitated to avoid taxes in the way the poor are not—Dagan thinks that the important institutions within states are no longer genuinely enacted collectively nor coercively imposed.¹⁷ She observes that "income taxation is no longer an archetypical example of a sphere where states exercise coercive power. Instead, it has come to more closely resemble a menu of options for (mostly wealthy and well-advised) taxpayers to select from."¹⁸ Accordingly, "state regulation does not apply equally to all,"¹⁹ and "the state can no longer claim to genuinely implicate the will of all of its constituents, nor accordingly, to legitimately speak on their behalf."²⁰ The implication, on this first reading, is that the relations between co-citizens sufficiently resemble the relations between foreigners to conclude that, like foreigners, they no longer owe duties of justice to one another.

On this first interpretation the argument is based on an implausible construal of Nagel's position. Nagel holds that the conditions that trigger a special presumption against arbitrary inequalities are weak enough to be satisfied under conditions of tax competition. Nagel makes it clear that he thinks that the condition of putative co-authorship is weak enough to apply in contexts where individuals are not treated as equals, such as in the case of colonial regimes or occupying forces. Even in such cases, Nagel argues, the institution imposed on them is intended, to some extent, to serve their interests and therefore, "there is a sense in which it is being imposed in their name."²¹ Nagel must of course accept that putative co-authorship is a condition weaker than justice, otherwise the implication would be that an unjust rule would undermine the conditions for evaluating it as unjust.²² The same holds for the coerciveness of institutions. Fiscal policies would appear to remain coercive even if they unequally affect citizens depending on their wealth. But even if we grant that fiscal policies lack coercive force (for some), it would be insufficient to establish the conclusion that principles

17. Dagan, *supra* note 1 at 199-202.

18. *Ibid* at 199.

19. *Ibid* at 202.

20. *Ibid*.

21. Nagel, *supra* note 2 at 129, n 14.

22. It should be pointed out that Nagel cannot escape this objection, however weak the condition of putative co-authorship. See Arash Abizadeh, "Cooperation, Pervasive Impact, and Coercion: On the Scope (not Site) of Distributive Justice" (2007) 35:2 *Philosophy and Public Affairs* 318. See AJ Julius, "Nagel's Atlas" (2006) 34:2 *Philosophy and Public Affairs* 176.

of egalitarian justice do not apply. Nagel is concerned with the so-called basic structure of society—the entirety of the legal, social, and economic institutions that importantly shape individuals' life prospects. Even if some individuals were able to escape coercively imposed fiscal policies, their lives would remain significantly shaped by coercively imposed institutions in many other respects. Furthermore, denying this would have the implausible implication that individuals living in states with weak administrative institutions (such as post-conflict states where the state is unable to enforce laws in some domains of common life) lack duties of justice to promote and uphold just institutions. Tax competition, in sum, does not undermine the conditions of the basic institutions in society being collectively enacted and coercively imposed, and on Nagel's view these institutions remain appropriate objects of evaluation in terms of egalitarian principles of distributive justice.

There is a further, more fundamental, objection to this first interpretation, since it remains unclear why, in the face of a "justice deficiency", states should pursue multilateral cooperation in a way that promotes and preserves distributive justice abroad. Even if we assume that tax competition erodes the conditions that trigger duties of justice, this would still not help Dagan to establish her desired conclusion. Nagel accepts that states can shore up their capacity to be internally just by engaging in certain forms of cooperation, and that this may be required on the basis of considerations of domestic distributive justice,²³ but any agreement they reach is not subject to principles of justice that are global in scope. Dagan wants to deny this internationalist conclusion. She wants to argue that Nagel must accept the existence of some duties of international justice: duties by states to promote domestic distributive justice in other states. But this conclusion does not follow on the assumption that tax competition has undermined the conditions allowing us to assess domestic socio-economic institutions as just or unjust. First, if we cannot assess institutions as just or unjust, there is no injustice to correct—no justice to promote. Second, if the conditions triggering duties of justice are not met within states suffering from tax competition, then these conditions are certainly not met at a supranational level, where nothing close to the dense institutional framework of the state is present. Dagan's argument on this first interpretation is a non-starter.

4. Tax Competition as Eroding *Constitutive* Condition of Justice

Let me therefore turn to the second interpretation. On the second interpretation Dagan treats the requirements that institutions are collectively enacted and coercively imposed, not as *preconditions* for principles of egalitarian justice to apply, but as (partially) *constitutive* conditions of egalitarian justice. So understood, Dagan is making a substantive claim about what domestic distributive justice requires, namely that the state is able to, inter alia, effectively impose institutions

23. Nagel, *supra* note 2 at 138.

that are genuinely co-authored by citizens subject to them. Thus, when she observes that tax competition undermines the ability of states “to equally implicate the will of their constituents”²⁴ she does not mean to imply that conditions of justice no longer hold, but rather that the state is unable to treat its citizens justly and with equal concern and respect. Tax competition gives rise to a “justice deficiency” because, as she puts it, “the state can no longer ensure justice.”²⁵

Why would this situation entail a duty of justice to pursue multilateral cooperation in a way that promotes domestic distributive justice abroad? Dagan’s argument, on this second interpretation, is that states may pursue their own national interests (including domestic distributive justice) in multilateral agreements without concern for the impact on foreigners, but they may do so only *provided that* other states are similarly capable of ensuring domestic distributive justice.²⁶ This proviso does not hold in the presence of a “justice deficiency”. In their negotiations to establish multilateral cooperation, states can no longer presume that other states can by themselves secure internally just institutions, and therefore must, as a matter of justice, concern themselves with the domestic justice of their contracting partners.

A very similar position is defended by Miriam Ronzoni. She maintains that international relations may raise problems of what she calls “background justice”. Her argument is based on an analogy with market exchanges between individuals, where we generally accept the necessity of certain background conditions to ensure that market outcomes remain just over time—such as redistributive measures to limit socio-economic inequality. In the absence of such institutions, initially voluntary exchanges between individuals may give rise to distributions that severely restrict the range of options available to some of the individuals, thus rendering their subsequent exchanges involuntary. In the international context, Ronzoni suggests, background justice can be thought to require institutions that ensure that states are and remain “effectively” sovereign, which includes the capacity to secure domestic distributive justice.²⁷ The implication is that states have a duty of justice to engage in multilateral cooperation to protect effective sovereignty and establish conditions under which interactions between mutually self-interested states can be expected to be just over time. Peter Dietsch has applied this conception of justice to international tax policy.²⁸

Nagel expressly rejects this conception of international justice. He denies that international relations can be conceived in analogy to domestic exchanges between self-interested parties against just background conditions. He writes that,

24. Dagan, *supra* note 1 at 203.

25. *Ibid* at 188.

26. Dagan, *supra* note 1 at 211.

27. Miriam Ronzoni, “The Global Order: A Case of Background Justice? A Practice-Dependent Account” (2009) 37:3 *Philosophy and Public Affairs* 229 at 248.

28. Peter Dietsch, *Catching Capital: The Ethics of Tax Competition* (Oxford University Press, 2015); Peter Dietsch & Thomas Rixen, “Tax Competition and Global Background Justice” (2014) 22:4 *J Political Phil* 150.

... international treaties or conventions, such as those that set up the rules of trade, have a quite different moral character from contracts between self-interested parties within a sovereign state. The latter may be part of a just socioeconomic system because of the background of collectively imposed property and tax law in which they are embedded. But contracts between sovereign states have no such background: They are “pure” contracts, and nothing guarantees the justice of their results.²⁹

According to Nagel, in relations between states there are no moral constraints on what counts as an international agreement fairly arrived at. Dagan therefore needs an argument to show why Nagel is nevertheless committed to this view. The following passage ostensibly provides that argument:

Absent the ability to ensure justice for their constituents, states lack the legitimacy to apply coercive power. And since use of power requires justification, I contend that states cannot entrust the multilateral regime with anything more than the power to enable them to treat their constituents justly. In the absence of justice for their own constituents, the very ability of states to act as sovereigns—for our purposes—is undermined. Hence, states cannot be trusted to mediate justice when contracting with other states. Even assuming that states do not bear an independent duty of justice toward the citizens of other countries ... I hold that they cannot hide—in the name of justice—behind their unjust (and thus illegitimate) partners as mediators of justice. Unlike other agreements between legitimate sovereigns, a multilateral arrangement that provides legitimacy to one country by increasing the illegitimacy of another does not offer the necessary justification for the use of coercive power.³⁰

This passage raises a number of issues. The claim that states lack the capacity to be fully just does not imply that they lack either legitimacy or sovereignty (on any plausible understanding of these terms).³¹ Dagan appears to have concluded from Nagel's assertion that citizens can demand that coercively imposed institutions treat them as equals (that is, in accordance with justice), that if they fail to treat them justly, the state lacks the right to coercively impose these institutions. This does not follow. It may be the case that states have a right to impose institutions even if they are not fully just. However, even if it were correct that states burdened by unjust institutions lacked legitimacy, it is still unclear why the conclusion follows that outsiders therefore have a duty to further domestic distributive justice in those states. The passage certainly expresses the idea that in conditions where states lack the capacity to remain internally just, international background justice is undermined.³² But an argument is lacking in support of the crucial premise that foreigners living under unjust institutions have a claim on us to ensure they are treated as equals by their fellow citizens, and accordingly, that we have a duty of justice to promote just international background conditions. To say that an agreement that fails to promote just background conditions lacks “the

29. Nagel, *supra* note 3 at 141.

30. Dagan, *supra* note 1 at 209-10.

31. *Ibid* at 200, 209.

32. This is how I interpret Dagan's claim from the quoted passage that states “cannot hide—in the name of justice—behind their unjust ... partners as mediators of justice”.

necessary justification” begs the question, since what needs to be shown is that foreigners are owed a justification from us in the first place.

On Nagel’s view, co-citizens stand in justice relationships to one another (relationships mediated by the state) by virtue of being jointly subject to collectively enacted and coercively imposed institutions. These individuals can demand to be treated as equals by their fellow-citizens (and through extension by the state). If we assume that many states today are incapable of securing internally just institutions, except by engaging in multilateral cooperation, individuals can then demand from their fellow-citizens (and by extension from the state) that such cooperation is initiated, since that is what would be required for them to be treated as equals. Foreigners (and by extension other states) cannot make a similar demand. They cannot demand that their interests are taken into account as equals in the decision to cooperate with them and on what terms. According to Nagel, they cannot do so because they do not share the kinds of institutions that trigger duties of justice. Nothing of what Dagan says in the passage quoted shows that Nagel is wrong.

It is true that in some of what Nagel says it appears he accepts the existence of a duty to consider the effects of one’s actions on the capacity of foreigners to secure domestic distributive justice. He writes that “someone who accepts the political conception of justice may even hold that there is a secondary duty to promote just institutions for societies that do not have them.”³³ However, it is not clear that he is here expressing his own view. It is more likely that he has in mind Rawls who also defends what Nagel terms a political conception of justice and who accepts the existence of a duty of assistance on the part of relatively well-ordered states to assist burdened societies, incapable of securing internally just socio-economic political institutions on their own.³⁴ This is reinforced by the following passage that concludes an argument against Rawls’ version of the political conception of justice. Nagel objects to Rawls’s analysis of international relations as involving the requirement to respect societies as moral equals, as long as they are “decent”, which is to say, are not egregiously unjust. For Rawls this entails that states have (besides a duty of assistance) a duty of justice to tolerate illiberal but decent societies and refrain from trying to impose liberal institutions on them. Nagel denies that states have such a duty. “It is more plausible”, he writes, “that liberal states are not obliged either to tolerate nonliberal states or to try to transform them, because the duties of justice are essentially duties to our fellow citizens.”³⁵ According to Nagel, I have the right to live in a just society, but the correlative obligations of that right fall exclusively on my fellow-citizens, and my state that mediates those obligations.

Further, he admits that “people engaged in a legitimate collective enterprise deserve respect and noninterference, especially if it is an obligatory enterprise

33. Nagel, *supra* note 2 at 121.

34. John Rawls, *The Law of Peoples* (Harvard University Press, 1999) at 37.

35. Nagel, *supra* note 2 at 135.

like the provision of security, law, and social peace.”³⁶ But this duty is not properly speaking a duty of justice as Rawls argues, deriving from the duty to respect societies as moral equals. Rather, “we owe it to other people—considered as individuals—to allow them, and to some degree enable them, to collectively help themselves. So respect for the autonomy of other societies can be thought of as respect for the human rights of their members, rather than as respect for the quality of peoples, taken as moral units in their own right.”³⁷ This suggests that, on Nagel’s view, the “secondary duty” individuals have in relation to foreigners as they attempt to create and uphold just socio-economic institutions in their own societies, is not properly speaking a duty of justice but rather a duty of humanity—a duty to respect their human rights. As he puts it, “there are good reasons, not deriving from global socioeconomic justice, to be concerned about the consequences of economic relations with states that are internally egregiously unjust.”³⁸ If this reading is correct, Nagel’s rough characterization of the secondary duty—that we must enable foreigners “to some degree” to secure just institutions and that we must be concerned with states that are “internally *egregiously* unjust”—can be restated more precisely as follows: we have a duty to enable foreigners to create and uphold institutions that ensure that their human rights are protected. Foreigners have a right to live in minimally just societies, which is to say, societies with institutions that effectively prevent human rights violations. We commit a wrong if we fail to support or, worse, actively thwart, their attempts to ensure that their socio-economic institutions effectively prevent human deprivation in the form of poverty, hunger, lack of basic healthcare, etc. This, however, is ultimately a humanitarian duty and not properly speaking a duty of justice.

This leads me to conclude that Dagan has been unable to prove that Nagel is committed to accepting the existence of a duty of justice to engage in multilateral cooperation that preserves domestic distributive justice in cooperating states. In the remainder of this paper, I wish to suggest that there is an alternative argument available to her to demonstrate that the global justice sceptic is nevertheless committed accepting that moral norms apply to multilateral cooperation in international taxation. The argument is based on developing the implications of a universal humanitarian duty to prevent human rights deficits.

5. A Humanitarian Duty

Nagel identifies a “minimal humanitarian morality” that imposes a direct duty on individuals and an indirect duty on states to relieve acute human suffering.³⁹ He denies that this duty qualifies as a duty of justice because unlike duties of

36. *Ibid.*

37. *Ibid.* And again, Nagel offers “universal human rights rather than the equality of peoples or societies as the source of the constraints on the external exercise of sovereign power” (*ibid* at 136).

38. *Ibid* at 143 [italics removed].

39. Nagel, *supra* note 2 at 118, 131.

egalitarian distributive justice, this duty is non-comparative and concerns the absolute, rather than relative, level of need of individuals.⁴⁰ This point, however, appears more terminological than substantive. David Miller, for instance, responds that it is more plausible to include humanitarian duties in the domain of justice, such that “justice can take both comparative and non-comparative forms: sometimes it concerns how people are treated relative to one another, sometimes about how they are treated in absolute terms.”⁴¹ This is especially plausible if we accept, as Nagel certainly seems to, that the duty to relieve human rights deficits is not supererogatory but as stringent a duty as securing domestic distributive justice.⁴²

On this basis, we can identify an alternative principle: a multilateral international tax regime established through cooperation is just if, and only if, it promotes and protects the human rights of individuals globally. This is a principle the global justice sceptic (of the Nagelian type) can accept. This humanitarian duty places appreciable limits on the freedom of states to pursue their national interest when establishing multilateral cooperation, including on matters of international taxation. Insofar as states can facilitate the protection of human rights in other states by means of multilateral cooperation, they have a duty to engage in this cooperation, and do so on terms that further the interests of those who would otherwise be facing human rights deficits. Nagel explicitly accepts that discharging humanitarian duties may require institution-building.⁴³ In the context of international trade he considers how this may work in practice: “even self-interested bargaining between states should be tempered by considerations of humanity, and the best way of doing this in the present world is to allow poor societies to benefit from their comparative advantage in labor costs to become competitors in world markets.”⁴⁴ What speaks from this passage is a pragmatic and instrumental attitude towards international agreements. In the absence of new forms of multilateral cooperation, we should adjust existing institutions and agreements to increase the capacity of burdened states to better protect the human rights of their citizens.

Cooperation in the realm of international taxation can promote human rights by making available additional government revenue to countries that face difficulties preventing human rights deficits within their borders.⁴⁵ Such an argument

40. *Ibid* at 119.

41. David Miller, *National Responsibility and Global Justice* (Oxford University Press, 2007) at 256.

42. Although Nagel once describes humanitarian duties as involving ‘charity’ (Nagel, *supra* note 2 at 140) he also writes that the “urgent current issue is what can be done in the world economy to reduce extreme global poverty” and even suggests that, in the face of extreme poverty, domestic distributive justice may be “a side issue” (*ibid* at 118).

43. Nagel, *supra* note 2 at 131.

44. *Ibid* at 143.

45. See, e.g., Allison Christians, “Fair Taxation as a Basic Human Right” (2009) 9:1 *International Review of Constitutionalism* at 211-30; International Bar Association, “Tax Abuses, Poverty and Human Rights” (Report delivered at the International Bar Association’s Human Rights Institute Task Force on Illicit Financial Flows, Poverty and Human Rights, October 2013) at 2, 97, 103.

depends on two admittedly controversial empirical premises. First, it assumes that governments are unable to fulfil their human rights obligations, in part, because of a lack of revenue. Second, it assumes that if the governments in question are provided additional revenue, they will indeed use it to strengthen institutions to uphold human rights. Both of these claims are controversial.⁴⁶ One may note, however, that analogous worries can be raised about Dagan's argument as well. By making available additional revenue for low-income countries, the international community cannot be expected to *guarantee* domestic distributive justice if, as is inevitable given the state system, significant decision-making power is left to local rulers. When Dagan identifies a duty of justice to support just institutions abroad, she must admit that this does not obviate a duty of justice of local rulers to do their part in ensuring that their citizens are treated as equals. Dagan sometimes maintains that the problem is not merely that multilateral cooperation fails to increase justice, but that it actually "produces injustice" and "undermines justice" in some cooperating states.⁴⁷ This is not a problem that should be put without further argument at the feet of the international community. We have with Nagel conceived of multilateral cooperation as self-interested bargains between sovereign states. If multilateral cooperation indeed *causes* domestic injustices in some countries (compared to a baseline of non-cooperation), we should ask why the countries in question nevertheless engage in such cooperation.⁴⁸ They may be free not to, and insofar as local decision-makers willfully exacerbate injustices in their own society (for instance, because they stand to gain from it) it appears more plausible to say that those local actors, not the international community, have violated a duty of justice.⁴⁹

This is not the place to settle the limits of the obligations of foreigners when local rulers contribute to human rights deficits.⁵⁰ The purpose of this paper has been to show that global justice sceptics like Nagel accept that self-interested bargaining, when establishing multilateral cooperation, is constrained by a humanitarian duty to prevent human rights deficits. This duty, I have suggested, has concrete implications in the context of international taxation. It means that states must consider how they can reform the international taxation regime to ensure that (low-income) countries generate sufficient tax revenue to provide

46. Bar Association's Human Rights Institute 2013 at 59.

47. Dagan, *supra* note 1 at 210, 211.

48. Dagan, *supra* note 1 at 166 ff, rightly points out there may be a range of reasons why low-income countries cooperate against the interests of their populations, such as network effects of the treaty system and the agenda-setting influence of high-income countries.

49. The same argument applies to Dagan's observation that harmonization of tax rates may impede domestic distributive justice in some countries because "the government may be corrupt or captured and hence less inclined to use the funds for redistribution" (Dagan, *supra* note 2 at 210). On the basis of this observation the conclusion should be that corrupt or captured local government officials have violated a duty of justice. It does not entail, necessarily, that the international community has a duty of justice to pursue alternative policies.

50. See, e.g., David Miller, "Taking up the slack? Responsibility and Justice in situations of partial compliance" in Carl Knight & Zofia Stemplowska, eds, *Responsibility and Distributive Justice* (Oxford University Press, 2011) at 230-45.

programmes and strengthen institutions that give effect to human rights.⁵¹ On the sceptical position, states do not have to promote domestic distributive justice abroad, but they do have to a more minimal duty to ensure that human rights are protected. I recommend that Dagan recasts her argument based on this less controversial humanitarian duty.

51. I do not here mean to disagree with Dagan's claim that it may be best not to harmonize tax rates because, while it would shore up states' capacity to generate revenue, it may be offset by greater capital outflows, particularly in low-income countries. (Dagan, *supra* note 1 at 210). The point is that insofar as Dagan is concerned to defend the claim that the international taxation regime should promote capital flows to low-income countries she can rest her institutional proposal on a humanitarian duty rather than a duty of justice.