Migration, State Legitimacy and International Order on Liberal and Republican Internationalism

David Owen

In *Justice for People on the Move*, Gillian Brock offers what might be described as a *liberal internationalist* form of moral cosmopolitanism in order to provide a framework for addressing contemporary issues of international migration. It is important that what I am calling Brock's 'liberal internationalism' is grounded on her moral cosmopolitanism because this registers the point that the commitment to liberal internationalism is a pragmatic and contingent choice concerning the best available option for realising moral cosmopolitan commitments. In this article, I will put some pressure on Brock's argument from an alternative internationalist position, that of *republican internationalism*, in order to argue that on grounds of both people's interests in mobility rights and of sustaining conditions of background global justice, there are compelling reasons for her to favour a stance of republican internationalism over one of liberal internationalism.

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The argument proceeds in three stages. In the first section, I lay out Brock's argument and sketch the republican alternative. In the second section, I focus on the case of migration and mobility rights to argue that the autonomy-based reasons why people have an interest in migration and mobility rights are better accommodated by the republican alternative than Brock's liberal internationalism. The third section turns to address issues of global background (in)justice and the comparative ability of the two positions to cultivate and sustain background justice, where again I will argue that there are reasons to favour the republican view.

I

In her earlier work on global justice (Brock 2009), Brock proposed an account that stressed four key features: "(i) being enabled to meet our needs, (ii) protection for our basic liberties, (iii) fair terms of cooperation, and (iv) social and political arrangements necessary for supporting these key features" (Brock 2020, 21) In this book, she identifies (iv) with liberal internationalism as the best institutional arrangement of global governance for realising (i), (ii) and (iii). I will begin by considering how Brock develops her endorsement of liberal internationalism.

Her strategy starts from the claim that there are core basic needs that can be derived from considering the preconditions of moral agency, where moral agency encompasses the ability to formulate, reflect on, revise and pursue courses of actions directed at achieving chosen ends. The five basic needs she identifies are:

(1) Physical and psychological health,

(2) Security,

(3) Understanding,

(4) Autonomy,

(5) Sufficiently decent social relations. Brock 2020, 21-22)

The next step is to note that from this plausible list of core needs, there arise a range of "derivative needs" that must be met in order to secure the core needs such as the ability to acquire and exercise the skills needed for participation in an economy; the need for community (understood as an extended network of supportive personal relationships); and political self-determination, that is, the ability of individuals to participate in shaping the rules of a self-governing political community. (Brock, 2020, 23-24). Much of this involves life-plans that are located: formed, revised, pursued in particular places – which raises the issues of settlement, rights of occupancy and legitimate authority to exclude, but we are not yet at a point where such considerations are tied to states. For that move in Brock's argument, we need to turn to her defence of administrative structures. The basic thought here runs like this:

> Administrative structures are important in our quest to secure justice. … Securing such goals [of justice] requires considerable thought and planning in setting up institutions, policies, and practices that can deliver on what justice requires. Administrative arrangements are important in planning to meet needs, protect basic liberties, coordinate actions productively, regulate our activities in ways designed to promote harmonious living, and so on (2020, 28).

Moreover, Brock argues, given the centrality of settlement to enabling situated life-plans, we have reason to reject a borderless world (that is, a position of 'no borders' rather than one of 'open borders') because borders, as administrative structures, are

necessary for securing justice: "The right kinds of borders under the right kinds of conditions help us to achieve justice" (2020, 29). Furthermore, she argues, 'members of settlements have a duty to support institutional schemes already in existence that are either delivering effectively on core components of justice or are credible prospects for doing this here and now" (2020, 29). Since the State is the dominant administrative structure of contemporary global politics, the question therefore arises of whether it meets this threshold for duties of natural justice. Brock proposes that we have duties of natural justice towards an international order of states as a way of organising global governance that we have credible reasons to see as supporting justice given some realistic modifications to this system of governance. Notice then that whether we have such duties hangs on whether we have credible reasons to suppose that, here and now, this order of governance is capable of subjecting itself to certain normative constraints on state conduct and international state cooperation. But what kinds of normative constraints would represent appropriate modifications of the international state system?

To answer this question, Brock introduces human rights – and respect for, protection of, and fulfilment of human rights – as the relevant criterion for judging the international order of states. The basic thought is that if there can be a legitimate international order of states, it must be one that can reconcile this international order of governance with a cosmopolitan order of human rights. It is only if we have reason to believe that an international order of states can credibly realize global human rights that we have duties of natural justice to sustain this scheme of global governance. Thus, Brock offers a picture of liberal international order in which state rights to self-determination are conditional on the legitimacy of both the state and the international order of states in terms of realizing human rights.

Her claim is that states' enjoyment of a right to self-determination is conditional on three requirements which we can gloss thus (Brock 2020, 38):

> *LC1 Internal Requirement*: respecting, protecting and fulfilling their own citizens' (and residents) human rights.
>
> *LC2 System Requirement*: being part of a legitimate state system.
>
> *LC3 Contribution Requirement*: states' fulfilment of the positive obligations required for the cooperative project of sustaining a justified state system.

The key implications of this framework are:

> 1) When a particular state fails to meet the basic requirements of LC1 and LC3, this not only undermines the claim of that state to legitimately exercise rights of self-determination, it also undermines the legitimacy of the state system.
>
> 2) In order to address such legitimacy problems of the state system, this system needs to incorporate what Brock calls 'legitimacy correction mechanisms'. Brock proposes that we may need different mechanisms for LC1 breaches and LC3 breaches (Brock 2020, 39).

Hence in order for us to have duties of natural justice to sustain the international order of states, it must be credible that this order is disposed to, and capable of, governing its mode of governance by instituting fair practices of cooperation directed at securing global human rights and effective correction mechanisms for when the system fails.

Brock's liberal internationalism is, in many ways, an attractive picture of a legitimate structure of global governance not least as a way of negotiating the problems of 'statist' and 'globalist' responses to our current circumstances. It is not, however, the only 'internationalist' approach that has been advanced. A direct rival to Brock's view is the 'republican internationalism' proposed by Laborde and Ronzoni (2016). Let me sketch out this alternative.

It is a characteristic feature of modern republicanism that, as Laborde and Ronzoni put it, it conceives of a just order as "one that minimises the extent to which persons or groups are subject to domination – first and foremost by binding power and making it controllable by those who are subject to it (by legal, political and socio-economic means)" (2016: 280). Moreover, as Gaedeke observes, the republican tradition holds

> that individual freedom can only be safeguarded in a free state which in turn presupposes not only a particular non-dominating internal set up but also non-dominating relations vis-à-vis other states. In fact, it is precisely the emphasis on the close connection between individual freedom, domestic institutions and the structure of external relations that Skinner considers to be "perhaps the most important contribution that the republican tradition can make to contemporary political philosophy" (2016, 2).

Pettit sums up this point thus: "In a slogan, the state ought to be an internationally undominated, domestically undominating defender of its citizens' freedom as non-domination" (2012, 19).

The core thesis of republican internationalism can be stated thus:

> A free (non-dominated) polity is, for republicans, valuable because it enables the form of self-government that is necessary (though not sufficient) to secure individual freedom as non-domination. And there are, on balance, good reasons to consider the locus of such a polity to be broadly co-extensive with states. Therefore, a republican account of justice must assign significant (although not absolute) normative weight to states. … We therefore argue that institutionalised non-arbitrary interference – the subjection to supranational rules and institutions – is necessary to secure the joint and reciprocal non-domination of states. Rules and institutions, however, must be designed with the republican rationale of *protecting* free statehood, rather than *replacing* it with a full-blown cosmopolitan order. This is not a contradiction in terms, as republican freedom (of collective as well as individual agents) is obtained through non-domination rather than non-interference and is therefore compatible, in principle, with deep and extensive regulation. Non-dominated states, especially in a globalised world, are not states that enjoy unqualified Westphalian sovereignty (Laborde & Ronzoni 2016, 280-281).

The rationale for this internationalist stance is grounded in long-standing republican concerns that "the great accumulation and concentration of power in a *cosmopolis* would create grave dangers of global despotism and lack of accountability" (2016, 286).

> Keeping political power as close as possible to the people remains therefore essential to the republican project, even in a world where domination occurs across and not only within borders – call this the 'republican principle of subsidiarity'. This is why, especially given the existence of a self-ascriptive demos within (most) existing states, the ideal of the free state remains valuable to republicans even in a globalised world. We should pursue the political regulation of global dynamics when these constitute a threat to the non-domination of states, but

> subsidiarity and the danger of global despotism provide reasons to limit global governance to these areas and these areas only (2016, 286).

There are some striking similarities between this view and the liberal internationalism proposed by Brock as well as some significant differences. Both see states as the best available mechanisms for self-rule directed towards the delivery of justice and reject 'unqualified Westphalian sovereignty'. Both recognize that global justice will require mechanisms for addressing state failures of disposition or capacity. However, their relations to global regulatory regimes are distinct in that republican internationalism sees strong legally binding supranational regulatory regimes not a constraints on state self-determination but as constitutive conditions of securing such autonomy.

This brief sketch of republican internationalism as a contrasting form of internationalism will be fleshed out further in the following two sections addressing migration and background justice respectively to which I now turn.

II

In this section, I want to begin the comparison between these two forms of internationalism by considering liberal and republican versions of internationalism in relation to migration and mobility rights. I'll begin with Brock's account before developing a contrasting republican account.

At the heart of Brock's account of migration rights is a right to impartial consideration of the potential migrant's rights by the state to which entry is sought:

> Migrants have a right to a fair process of governing the determination of their rights. This should include a clear statement from the state indicating how they reasoned towards their determinations, and that reasoning must be human rights compliant. There must be opportunities for states to be held to account for that reasoning (2020, 208).

What does this entail? On the one hand, the collective duty of states to secure human rights globally means that migrants who have human rights-based claims for entry have a presumptive right of entry. So, for example, refugees, family reunion migrants (at least with respect to immediate family), and others who have claims grounded in human rights (Brock offers the example of treatment for a rare medical condition necessitating entry to a state where treatment is available) have a presumptive right of entry. This right – and its corresponding duty – is, however, only presumptive because the state also has human rights obligations to its existing population and can legitimately exclude if and when its capacity effectively to fulfil these obligations would be undermined by a given level of admissions over a particular period. Consider her discussion of article 29 of UDHR. The article reads thus:

> (1) Everyone has duties to the community in which alone the free and full development of his personality is possible.
>
> (2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by the law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Brock's initial use of this material to ground her claim that there are human rights reasons that justify states limiting numbers and rates of immigration; however, she also goes on to remark:

> It is important to note that article 29 (2) can also set a high bar, because in many cases of attempts to offer justifications for admissions decisions it will become quite clear that permitting entry of new members does *not* threaten new members. Consider, for instance, cases of labor migration. As one example, it is quite implausible that a migrant willing to do a job that no citizen wishes to do in an important sector in which employers cannot find enough people to do necessary jobs does indeed threaten general welfare (2020, 211).

Hence, appeal to article 29(2) would only suffice if the claim of such a threat could meet strict standards of empirical plausibility.

Does this mean that states enjoy what we may call 'human rights compliant discretion' concerning admission once we move beyond claims based on human rights? Brock imagines a case in which a state has an annual capacity to take 400,000 immigrants and has 200,000 potential spaces left after claims based on human right have been accommodated. She then considers how other admissions might be structured in terms of a human rights supporting agenda by envisaging a points-based system which would encompass temporary and undocumented migrants already present as well as those seeking initial entry (2020: 213-14). Because Brock only gives a single example of what she takes a human rights compliant policy to look like while acknowledging that there could be a diverse plurality of such policies, the implications of her stance are not fully apparent. So, for example, one issue that is underdeveloped concerns the obligation on states not to admit persons whose emigration from their home state may

undermine the human rights infrastructure of that state. This is a topic on which Brock has previously written (Blake and Brock 2015) but it is salient here. Thus, for example, we might propose that a human rights compliant policy is one that adopts a norm against admitting medical professionals (who are 'voluntary' migrants) from states with weak health systems unless equivalent value for the health system of the state of emigration is provided in exchange. However, the more important prior question concerning her example is whether there is any obligation on this state to admit (assuming relevant demand) to its full annual capacity? It is not clear to me that Brock has provided an argument for any such obligation. It is certainly true that admission to full capacity is one way in which a state may aim to support internal legitimacy requirements (e.g., where immigration enables greater human rights security in the admitting state) and contribution legitimacy requirements (e.g., where immigration supports the human rights-development nexus in sending states), but where this is not (as it is often not) a necessary way of meeting such requirements, it is quite unclear why a state would not be able legitimately to choose to limit its admissions to a point below, perhaps considerably below, its full capacity. Perhaps the thought is that in a world which is characterised by only partial or interim system legitimacy, states that are in high demand have an obligation to accept admissions up to their annual capacity in a way that supports global human rights? But if this is so, quite why this would be the case (as opposed to its simply being the case that migrants are not obliged to accept state restrictions under such conditions) is not made manifest. We can approach this point another way by noting that in a fully legitimate state system, on Brock's understanding of that condition, it would seem to be the case that states would enjoy considerable discretion concerning whether to admit anyone other than those with human rights claims such as family reunion migrants. While all persons would

enjoy the human rights not to be prevented from leaving a state or changing their nationality, their ability to exercise these rights would be conditional on being granted entry into, or naturalisation in, another state.

This last point marks a key juncture for distinguishing Brock's liberal internationalism from a republican internationalist view (at least as I will develop that position). For both liberal and republican internationalists, the following human rights are basic liberties that are core components of individual autonomy:

1. The right to a nationality.
2. The right to leave the territory of one's state.
3. The right to change one's nationality.

However, the understanding what securing these rights entails is distinct and elaborating the republican standpoint will draw this out.

The republican identification of membership of a free state as a necessary (but not sufficient) condition of non-domination points to the requirement that every human being has a right to a nationality and yet the possession of that right cannot be guaranteed in an order characterized by the unregulated discretion of states to determine their membership policies. Being stateless is a condition of domination in which individuals lack even that nominally equal political standing in the international order comprised of a state being accountable for, and to, them. It is also a condition that, in virtue of the fundamental role of states' in protecting citizens from domination, exposes such individuals to a wide variety of forms of private, social, and public domination. It follows from a republican standpoint that states' discretion

concerning the acquisition or loss of membership must be regulated to prevent the *possibility* of statelessness. In other words, protecting individuals from statelessness is a mandatory end for the international order and cooperating to create and sustain the establishment of such regulation on fair terms can be understood as a *constitutive duty* of states in the sense that it is a condition of the legitimate choice-making of states with respect to membership policies. In terms of political ethics, it should be understood not as a constraint on state agency but as a necessary condition of the legitimate exercise of such agency. States as members of an international order of states discharge this duty by collectively binding themselves to a mutually agreed scheme of regulation and subjecting themselves to an impartial authority.[1]

Such an institutionalized regime of global governance of state membership policies can be understood as part of the global basic structure needed to secure background global justice – and this way of thinking about it helps to draw attention to two further points. First, that the authority of such regulation is limited to securing the required end in ways that are non-dominating. In other words, it does not underwrite, for example, the authority to impose a uniform set of membership rules on states even when this might most efficiently realize the end; rather, each and every state must have a fair opportunity to shape and contest the form and content of the governance of membership to which it is subject. Second, the case for an international authority acknowledges that states are characterized by what we may call a 'perspectival bias' that arises from their functional role within the state system as agents who

[1] Notice that this is no way entails that states are required to have the same membership policies, only that the collective institutionalized operation of the membership policies of all states is designed to ensure full coverage of the human population.

have primary responsible to, and for, their own citizens. Gibney acutely notes that as "a consequence, the claims of outsiders are assessed by states, including liberal democratic ones, through a logic that deprecates the interests and needs of outsiders – a logic that is exceedingly sensitive to the potential damage to its own authority involved in forcing its citizens to incur costs for the sake of strangers" (Gibney 2004, 211), but we may also note that this same logic is one by which states are relatively insensitive to concerns about exporting costs onto outsiders. International regulation of state membership policies is required to secure every individuals' right to a nationality and to prevent states from adopting policies that export the costs of problems arising from compliance onto other states such as UK denationalization laws (Owen 2018).[2]

Let me turn now to (2) and (3). These rights are grounded in the recognition that, in a world of plural states who are entitled to regulate admission to their territory and their nationality, being tied by birth to a given territory or nationality is a relation of domination and one that we have prudential grounds as well as ethical reasons to resist in that the absence of reasonable exit options shapes the relationship between state and citizens in ways

[2] For an example of this perspectival bias, consider two policies adopted by the UK in recent years to address the problem of citizens who are judged to support or engage in terrorist actions outside the UK and that have been carefully crafted to comply with existing European and International law on statelessness. The first enables the denationalization of any citizen who, under the UK government's reading of the law of other states, has a genuine claim to the nationality of another state and hence would not presumptively be made stateless by being stripped of UK nationality. The second is the exile of UK mono-nationals achieved by stripping them not of citizenship (since this would make them stateless) but of their right to return to the UK. The former represents the unilateral exporting of responsibility for the individual to another state. The latter represents the unilateral exporting of the costs of a presumptively dangerous individual to any other state.

that enable – and perhaps encourage – dominating exercises of public power. In sum, the claim is that securing basic conditions of individual non-domination in an international order of states requires the option not merely of voice but also exit. However, for the republican internationalist, while not being subject to arbitrary interference by one's state in relation to leaving its territory or surrendering its nationality is necessary for an individual not to be subject to domination in respect of these choices, it is not sufficient. Having the negative rights not to be prevented from leaving one's state and not to be prevented from changing one's nationality simply exposes would-be migrants to the discretionary choices of other states concerning entry to territory or access to membership, and hence they remain in a condition of domination for which the relevant agent of dominion is not the state but the international order of states. Non-domination requires that individuals are entitled to an adequate range of valuable migration and membership options such that their choices of staying or leaving the territory of their current state, and maintaining or changing their nationality, are non-dominated choices. It is important to note that non-domination does not require a human right of freedom of movement, rather it requires that each state cooperates with others to secure for its citizens an adequate range of mobility choices. This can be done in a variety of ways, ranging from a state engaging in a multiplicity of bilateral agreements guaranteeing reciprocal mobility rights (for example, the UK and Eire since 1928) or a group of states engaging in a multilateral agreement to secure such rights for their citizens (for example, the EU); however this is done (and there are, no doubt, relevant considerations to be adduced concerning the comparative merits of different schemes), republican internationalism is committed to the view that securing migration and mobility rights should be seen as a core part of securing individual autonomy.

At this point, Brock may respond that her position is also committed to securing against statelessness through binding international law (she does not state this but it follows naturally from her view), that the obligation on states to offer an impartial human rights compliant justification for their self-chosen migration policy guards against the most egregious forms of discretionary action by states towards migrants, and that because migration can serve human rights supporting ends, states will have pro tanto reasons to consider using their full immigration capacities (and she also expresses support for the EU in this context). These are all welcome proposals that show, from a republican standpoint, how Brock's liberal internationalism represents a distinct advance in relation to unqualified Westphalian sovereignty in being a comparatively domination-reducing alternative. It does not, however, sufficiently secure conditions of non-domination by republican standards. Why though should this concern Brock, given her commitment to liberal views concerning freedom and autonomy? There are three immediate reasons why I think it should matter to her.

The first is that her view is potentially open to the objection that she locates impartiality in the wrong place given her commitment to moral cosmopolitanism and her general focus on the international state system. Whereas she sees the key site of impartiality as individual state decision-making, it might be contended that the primary site of impartiality should be the international state system as a whole and only secondarily that of individual states. This approach, which is powerfully developed in the work of Bertram (2018), would support the view that states have a presumptive obligation, given demand, to admit to their maximal level. Insofar as Brock is concerned to resist the pressure of this liberal egalitarian argument, republican internationalism offers a cogent alternative which pitches impartiality at the

international level without entailed a presumptive freedom of movement right.

The second is that the ability of citizens of a state to exercise both voice and exit strategies is likely to produce better governance and conduct by states, not least in terms of commitment to human rights, as it seeks to retain and perhaps also to recruit citizens. It also provides strong reasons for states who are bound in relations of reciprocal mobility to cooperate in developing each states capacity to respect, protect and fulfil human rights as an indirect way of regulating migrations flows.

The third reason is that the republican position weakens considerably many of the problems that 'people on the move' confront in moving in a world in which entry to other states may not be available. These include problems that increasingly underwrite forms of unlawful commercial enterprises of human smuggling (and the forms of abuse that typically accompany such enterprises) and also include the problems that states face in confronting the challenges to constitutional democracy of significant populations of undocumented migrants as an excluded and exploited class, challenges that have motivated increasing draconian border policies that extend into the interior of the state with negative effects for both citizens and migrants (Cohen 2020).

Together these considerations suggest there may be compelling reasons for liberal internationalists such as Brock for whom this institutional commitment is grounded on her moral cosmopolitanism to embrace republican internationalism as a superior alternative.

III

The second issue through which I want to address the comparison of liberal and republican internationalism pertains to global background justice. Let me briefly introduce the issue at stake by reference to Rawls' remarks on the basic structure as the primary subject of justice. Thus, in "The Basic Structure as Subject," he remarks:

> Suppose we begin with the initially attractive idea that social circumstances and people's relationships to one another should develop over time in accordance with free agreements fairly arrived at and fully honored. Straightaway we need an account of when agreements are free and the social circumstances under which they are reached fair. In addition, while these conditions may be fair at an earlier time, the accumulated results of many separate and ostensibly fair agreements, together with social trends and historical contingencies, are likely in the course of time to alter citizens' relationships and opportunities so that the conditions for free and fair agreements no longer hold. The role of institutions that belong to the basic structure is to secure just background conditions against which the actions of individuals and associations take place. (Rawls 1993, 265-266, cited in Ronzoni 2009, 235).

As Miriam Ronzoni (2009, 232-242) has argued, Rawls' point is that, in contexts of pure or quasi-pure procedural justice, just interactions between the subjects of justice (i.e., individuals, corporations, states, etc.) cannot be assumed to be self-sustaining, rather these interactions can themselves give rise to conditions in which background justice is undermined. It is this which triggers the requirement of a basic structure that secures conditions of background justice; a basic structure is not an existence condition for social justice, rather it is background injustice that requires the construction of a just basic structure in order to maintain

conditions of just interactions, whether this entails creating institutions and practices where none currently exist, reforming existing institutions and practices, or some combination of the two. It is important to be clear here that Rawls' point is that background justice can be undermined even if all participants fully comply with the norms of fairness internal to their local interactions. He writes:

> Fair background conditions may exist at one time and be gradually undermined even though no one acts unfairly when their conduct is judged by the rules that apply to transactions within the appropriately circumscribed local situation. … We might say: in this case the invisible hand guides things in the wrong direction. (Rawls 1993, 267, cited in Ronzoni 2009, 241)

As Ronzoni acutely notes:

> This is a recognition of the fact that, independently of the motivations of individuals or other noninstitutional actors in their various transactions, there is no feasible set of rules that can be applied to them directly and succeed in preventing the erosion of background justice. For the effects of accumulated, overlapping, and crisscrossing transactions are "so far in the future, or so indirect, that the attempt to forestall them by restrictive rules that apply to individuals would be an *excessive* if not an *impossible* burden." There are tasks that individuals simply cannot fulfill. Due to problems of collective action and epistemic limits to how much one can foresee the consequences of one's actions, no society can be just if no suitable institutions protecting background justice are in place. (2009, 235)

The main point that Rawls is making is that background injustice calls for the establishment of a basic structure. But there is a second, more subtle point that Ronzoni draws from Rawls' discussion, namely, that the kind of basic structure and principles of justice that regulate it which are required in a given context of background injustice are dependent on the kind of background injustice that is liable to arise out of the interactions in question. As Ronzoni (2009) argues, two points matter here. First, the same general point applies to background injustice at the transnational level in respect of the relations between the various kinds of global political actors. Second, the principles of justice that are relevant at a transnational level will be distinct from those that apply at a state level if the forms of injustice that are to be addressed are distinct. For example, it may plausibly be argued that in a world of states committed to the norm of state sovereignty, international background justice concerns the conditions under which all states can enjoy effective powers of self-rule, that is, powers of self-rule sufficient to maintain internal background justice and to engage as equals in cooperative process of international norm-making (Ronzoni, 2009). Indeed, both liberal and republican forms of internationalism may be understood as expressions of such a view. The issue that arises concerns whether they are equally capable of sustaining international background justice.

At a general level, this issue concerns the fact that under contemporary conditions of globalization that generate, extend and deepen relations of interdependence between and across states, states are exposed to unregulated global dynamics that pose serious challenges to the state's ability to be responsive to, and act on behalf of, its citizens (while also giving due respect to the legitimate justificatory claims of those non-citizens affected by its decision-making or subjected to its laws). However, our focus is on migration and hence we can address this issue through the question of global migration governance, that is, whether such

governance requires supranational institutions and regulations by bind and limit state autonomy or whether it can be effectively conducted through international cooperation. We can consider this issue by focusing on two examples. The first is the *Global Compact for Safe, Orderly and Regular Migration* (GCM). The second is the international refugee regime.

Brock introduces GCM as of interest for several reasons:

> The fact that 85 per cent of states have adopted it is at least one kind of rather compelling answer to the worry that states will not be inclined to bring into being the kind of institutional architecture required [for global migration governance]. The Compact also describes numerous responsibilities in connection with managing people's beliefs and attitudes around migration. And it shows how to create the proper authority while allowing adequate scope for self-determination in a legitimate state system. (2020, 201)

Recall that, for Brock, the right of a state to self-determination is conditional on its cooperation with other states to general conditions of human rights – and insofar as GCM can be seen as concerned with both securing the human rights of migrants and supporting the conditions of human rights more generally by linking migration and Sustainable Development Goals, it stands as a clear example of the kind of cooperative enterprise that states are obliged to support.

We may start by noting that a key feature of GCM:

> Art. 7 This Global Compact presents a non-legally binding, cooperative framework that builds on the commitments agreed upon by Member States in the New York Declaration for

> Refugees and Migrants. It fosters international cooperation among all relevant actors on migration, acknowledging that no State can address migration alone, and upholds the sovereignty of States and their obligations under international law. (https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/73/195)

The first point to note is thus that the only reason that 85% of states signed up to the Compact is that it is legally non-binding. This allows states to choose whether and how to comply in a context in which there is no legal accountability for non-compliance. Turning to the objectives of GCM, as Brock notes the Compact has twenty-three stated 'Objectives for safe, orderly and regular migration':

> 1. Collect and utilize accurate and disaggregated data as a basis for evidence-based policies
>
> 2. Minimize the adverse drivers and structural factors that compel people to leave their country of origin
>
> 3. Provide accurate and timely information at all stages of migration
>
> 4. Ensure that all migrants have proof of legal identity and adequate documentation
>
> 5. Enhance availability and flexibility of pathways for regular migration
>
> 6. Facilitate fair and ethical recruitment and safeguard conditions that ensure decent work
>
> 7. Address and reduce vulnerabilities in migration
>
> 8. Save lives and establish coordinated international efforts on missing migrants

9. Strengthen the transnational response to smuggling of migrants

10. Prevent, combat and eradicate trafficking in persons in the context of international migration

11. Manage borders in an integrated, secure and coordinated manner

12. Strengthen certainty and predictability in migration procedures for appropriate screening, assessment and referral

13. Use migration detention only as a measure of last resort and work towards alternatives

14. Enhance consular protection, assistance and cooperation throughout the migration cycle

15. Provide access to basic services for migrants

16. Empower migrants and societies to realize full inclusion and social cohesion

17. Eliminate all forms of discrimination and promote evidence-based public discourse to shape perceptions of migration

18. Invest in skills development and facilitate mutual recognition of skills, qualifications and competences

19. Create conditions for migrants and diasporas to fully contribute to sustainable development in all countries

20. Promote faster, safer and cheaper transfer of remittances and foster financial inclusion of migrants

21. Cooperate in facilitating safe and dignified return and readmission, as well as sustainable reintegration

22. Establish mechanisms for the portability of social security entitlements and earned benefits

23. Strengthen internation
partnerships for safe, orderly a
198-99)

These objectives can be seen a
Newland (2018, 658) notes:

Should not be indented and in normal font

- Specific and relatively uncontroversial measures (e.g., 1, 4, 14, 20)
- Specific but controversial measures (e.g., 5)
- Very broad and aspirational goals (e.g., 2, 7, 16, 17)

In general, GCM can be seen as presenting "a broad set of consensual guidelines for international cooperation" which, much like 'the 2030 Agenda for Sustainable Development and its Sustainable Development Goals', is 'at best, the softest of soft law' (Newland, 2018: 660). It does, however, firmly establish migration as a key international priority and in providing these guidelines serves as a basis for advancing the agenda of state cooperation while recognizing that states have different priorities in relation to these objectives and while a few of the objectives are, and were, already in the process of being realized (e.g., 1, 6, 20), that most of the more immediately realizable objectives (e.g., 5, 11, 12, 21) 'will require further negotiation, commitment of resources, and summoning of political will' and much of GCM refer to rather abstract long-term goals (Newland, 2018: 658). The second point to note is, then, that Brock is rather overstating the case when she claims that this provides compelling evidence that states are committed to bringing into being the institutional architecture for global migration governance. What we have is, at best, the beginnings of a way of linking bottom-up practices of global migration governance as represented in bodies like the *Global Forum for Migration and Development* with top-down processes within

the framework of the UN and its institutions such as IoM. We should also note that there is no recognition in GCM by states that their right to self-determination is in any sense conditional on cooperation on migration; on the contrary, this right is re-affirmed as a grundnorm of the international system.

But even if Brock's optimism proves justified, there is a more general problem for liberal internationalism with regard to securing "safe, orderly and regular migration" as a global public good which can be illustrated by considering a different global public good, namely, refugee protection.

The international refugee regime is a context in which we already have strong legally binding obligations in international law, but it is also an example of liberal internationalism because it does not have a supranational regime of regulation that specifies the division of responsibilities between states, rather it has a basic default norm of *non-refoulement*. The duty of *non-refoulement* is a binding obligation on any state to which a claim to asylum is made not to return persons who, on the basis of an impartial process of adjudication, are found to satisfy the criteria of refugeehood to the state from which they have fled or to another state in which they would lack protection of their human rights. More formally, the duty of *non-refoulement*

> encompasses any measure attributable to the State which could have the effect of returning an asylum seeker or refugee to the frontiers of territories where his or her life or freedom would be threatened, or where he or she is at risk of persecution, including interception, rejection at the frontier, or indirect *refoulement* (Feller et al. 2008, 178-179).

An important implication of this principle is that the current regime places no restrictions on the numbers of refugees to whom a state owes a duty of *non-refoulement* other than the type of human rights limit discussed earlier. This does *not* entail that refugees have a right to asylum in the state to which they make application (a possibility advocated, discussed and rejected in the drafting of both Article 14 of the UNDHR and the 1951 Convention on Refugees). On the contrary, as long as the duty of *non-refoulement* is not breached, states can come to bilateral, multilateral or omnilateral arrangements with one another concerning the distributions of the presence of refugees and responsibilities for the costs of refugee protection. This point is important because it points to the fact that responsibility for the protection of refugees is specified by the current regime in a way that is maximally consistent with respect for the liberal autonomy of states. Under this current legal structure, it is up to states, jointly or collectively, to work out terms of reasonable cooperation for the fair distribution of refugees; if, or to the extent that, they fail to do so, the duty of *non-refoulement* entails that the default condition is that the state to which application is made bears the responsibility of ensuring the provision of asylum. However, the practical upshot of this liberal internationalist structure is twofold.

The first is that that "protection, assistance, and durable solutions are provided to refugees at levels that fall well below needs, and responsibility is allocated based on proximity" and "despite the fact that this state of affairs has persisted for decades, no adequate institutional mechanisms – whether legal, political, or operational – have been created to ensure more equitable and predictable responsibility-sharing" (Betts et al. 2017, 16) This is the case precisely because refugee protection exhibits features of a global public good in the sense that the legitimacy-correction work it performs is *non-excludable* (i.e., all states derive the benefit of this work towards repairing the legitimacy of the international order of

states) and *non-rivalrous* (i.e., the benefits enjoyed by one state do not reduce the benefits enjoyed by other states). If we focus on this aspect of refugee protection, then it is unsurprising that it gives rise to a collective action problem since while all states have an interest in the global provision of refugee protection, each state has an interest in minimizing its own contribution or 'free-riding' on the work of others. This is so given the presumptive costs to its own citizens of providing protection and since it will enjoy the benefits of legitimacy-work performed by others. The second is that precisely because the major constraint on states in this context is provided by the norm of *non-refoulement* which makes states where refugees arrive generally reluctant to bear the reputational harm of turning them away (even where they have the capacity to do so), the burdens of protection falls unequally. The effects of this logic can be seen at both regional and global levels:

Regional: The failure of the EU's *Common European Asylum System* which was designed to assign responsibilities for refugees between Member States. It did so by way of the Dublin Regulation which made the Member State where a refugee arrived responsible for that refugee. The entirely predictable outcome of this rule in the context of the Syrian crisis was that Member States that lay on refugee routes via the Balkans or via the Mediterranean were expected to bear the bulk of the responsibility. This led fairly rapidly to deliberate non-compliance with the rule by some states (Hungary and Italy) – and, despite several efforts recognising the need, the EU has failed to secure agreement of its members on a fair 'quota' system of responsibility-sharing.[3] The effect of this failure has been a re-focused effort on making access to the EU for refugees even more difficult than it already was by undermining

[3] See Bauböck 2018 for salient discussion.

and criminalizing civil society actors seeking to help refugees gain entry to the EU.

Global: 85% of the world's refugees are hosted in states in developing regions of the world that are proximate to refugee-producing states because, given 'their usually porous borders and strong normative obligations to offer asylum', these states 'face very little alternative other than to open their borders to refugees.' However, "those richer states further afield face only a discretionary duty to contribute through responsibility-sharing, assuming that their access barriers work, and they are able to prevent refugees from arriving spontaneously" (Betts et al. 2017, 30). Hence, the latter have no incentive to engage in fair responsibility-sharing.

The dilemma faced by liberal internationalism as a response to provision of a public good such as refugee protection is that it perpetually faces the challenge of trying to find ways of aligning state's self-interests with their moral obligations in order to secure provision. It is not that this is impossible; rather it is that it is difficult to do and maintain in the face of ongoing incentives to act otherwise.

This problem is complicated further in the case of "orderly, safe and regular migration" as a global public good because specific types of migration have different characteristics when considered by themselves. Thus, for example, low-skilled labour migration can be seen as a global club good and high-skilled labour migration as a global private good. The former is well-suited to bilateral or multilateral agreements between groups of states that share an interest in the provision of the good (for example, the need for low-skilled migrant workers in hospitality or social care in the receiving state, on the one hand, and the need for remittances in the sending state, on the other hand); whereas the latter more naturally aligns with forms of unilateral governance (Betts 2011) in

a competitive global environment that strongly encourages states to prioritize their own interests.

In sum, under conditions of contemporary global dynamics, it is very unclear whether liberal internationalism can plausibly secure conditions of background justice in any stable way. By contrast, republican internationalism endorses the construction of a binding global regulatory regimes as ways to securing the provision of public goods such as orderly, safe and regular migration or refugee protection. As Laborde and Ronzoni note:

> In the contemporary state system, inequalities of power are veiled under an international legal system founded upon the idea of formal equal sovereignty. Equal sovereignty often provides a legitimising framework within which powerful states are capable of influencing the domestic and foreign policy of weaker ones without much cost. This makes current forms of interstate domination less visible, and more insidious, than historical ones. Nor have all institutions of global governance necessarily helped reduce domination. Supranational institutions often act as channels that amplify, rather than bind, interstate power. Powerful countries have been able almost unilaterally to shape those very institutions – whose self-declared aim is to promote a more multilateral form of global governance – to their advantage (2016, 281-282).

We can see this in the unequal operation of international refugee regime to which I have already drawn attention. In order to address this general condition, republican internationalism proposes that 'republican statehood under conditions of globalisation is best protected by a multifaceted strategy based on a suitable policy mix, including: (1) power countering, (2) distribution, (3) democratisation, (4) constitutionalisation and (5)

regulation' (Laborde & Ronzoni 2016, 291). I have stressed the point about regulation, but it is important to see that this is one dimension of a wider range of policies that will be differentially salient to distinct potential sources of domination of free states. Particularly important in relation to migration is the role of constitutionalism:

> The establishment of *some* global constitutional essentials is also congenial to republican internationalism. Global constitutionalism is the idea according to which international law should be (at least partly) interpreted as based on a core of fundamental law delineating a list of fundamental rights (possibly for global actors of various kinds: individuals, non-state actors and states) and setting limits to the international exercise of political power on the basis of such rights. Constitutional conditions, even if restricted in competence … require the establishment of (some) juridical powers and ultimate (binding and non-optional) authority in their area of competence (Laborde & Ronzoni 2016: 293).

Indent as quote

In relation to issues of statelessness, migration rights, and refugee rights, global constitutionalism provides a crucial mechanism for holding states to account. Notably Brock comes close to endorsing such a view when she commends the role that regional international courts can play in preventing states from interpreting international agreements (such as refugee law) in their own interest, but I submit that she would be on firmer ground with respect to securing conditions of background justice if she endorsed the establishment of global constitutionalism.

Conclusion

In this paper, I have focused on Brock's defence of liberal internationalism as the best institutional expression of her moral cosmopolitan commitments and proposed the counter-claim that

republican internationalism may offer a superior alternative. I make this case on two grounds. First, that republican internationalism offers an account of migration and mobility rights that Brock has reason to prefer to the liberal internationalist account. Second, that republican internationalism offers a more compelling account of how to secure global background justice. If this case is cogent, we may see Brock's defence of liberal internationalism not as the ideal but as a waypoint on the route to a republican international order of free states.

University of Southampton

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