

# Refugee Rights and Global Justice in Religious Ethics

Carl-Henric Grenholm

Department of Theology, Uppsala University, Sweden

Problems concerning the meaning and implementation of refugee rights have been discussed with great intense within recent political philosophy. In her book on *The Rights of Others* Seyla Benhabib has argued that universal human rights should include not only persons with citizenship in sovereign states. All humans have rights and should be equally treated in virtue of their common humanity, not in virtue of citizenship. Therefore migrants and refugees should not be excluded from democratic processes in their host states. We should accept a human right to political membership as an important part of cosmopolitan federalism.

The rights of immigrants and refugees can be understood as a part of a theory of global justice. As Martha Nussbaum has shown in her book on *Frontiers of Justice* there are theoretical problems related to efforts to elaborate such a theory of global justice if we take our starting point within the social contract tradition. Here those persons who are supposed to reach an agreement under the veil of ignorance are supposed to be rational beings roughly equal in power. However, the subjects of justice include all humans. A theory of global justice which includes refugee rights should have a different starting point. The capabilities approach is an interesting alternative, and a principle of equal treatment and respect is important.

In this article a theoretical perspective on the rights of immigrants and refugees will be developed in a critical dialogue with Benhabib's discourse ethics and Nussbaum's capabilities approach. Of particular interest is whether a theory of global justice, which includes the rights of immigrants and refugees, presupposes a kind of cosmopolitanism and a revision of our understanding of state sovereignty. My thesis is that the principle of equal concern and respect is possible to defend as a primary principle, even if we respect borders between sovereign states. The main task, however, is to argue that human rights are moral imperatives to take seriously by all states in their process of self-legislation.

A main purpose of this article is to examine the contributions to these theoretical issues concerning refugee rights and global justice which have been given by two prominent representatives of different kinds of religious ethics. The Muslim philosopher Abdullahi Ahmed An-Na'im has in his interesting book *Muslim and Global Justice* discussed the contribution of Islam to a rights based theory of global justice. He is arguing in favor of a universal theory of human rights, even if he maintains that there are different arguments within various cultural contexts for the justification of these rights. One of his ideas is that this universality of human rights presupposes the possibility of global citizenship as the basis of equal treatment of all humans.

This theory will be critically examined and compared with the position taken by the Catholic political theologian David Hollenbach. In his book on *Refugee Rights* the protection of human rights of refugees and internally displaced people is defended from a natural law position. The pluralism across cultures and religious traditions should be respected, but universally it is possible to defend the dignity of all persons. This means that fundamental rights of refugees, such as the right to freedom of movement, can be affirmed on grounds internal to

Proceedings from the 49<sup>th</sup> Societas Ethica Annual Conference. Theme: Ethics and Migration, August 23–26, 2012, Lucian Blaga University Sibiu, Romania. Editor: Göran Collste.

[http://www.ep.liu.se/ecp\\_home/index.en.aspx?issue=97](http://www.ep.liu.se/ecp_home/index.en.aspx?issue=97).

(footnot: Some of the articles included in the Proceedings have been published in the academic journal *Revista Ecumenica Sibiu*, Vol IV:3, 2012, Vol. V: 1, 2013)

different traditions. However, in order to implement these rights it is necessary to question the sovereignty of the national state and to promote a responsibility to protect. This is a thesis that I will argue against in my article.

## The right to membership

In her influential book on *The Rights of Others* Seyla Benhabib has made quite clear that transnational migrations make us aware of a dilemma at the heart of liberal democracies. On the one hand we agree upon universal human rights, including the rights of refugees and aliens. The international human rights regime recognizes a right to emigrate, a right to enjoy asylum under certain circumstances, and a right to nationality. These are universal rights of all individuals as far as they are human beings, independent of whether they are citizens or not.<sup>1</sup>

On the other hand we regard the democratic sovereignty of individual states to be important. This sovereign self-determination of each state includes its right to control its border as well as to monitor the quality and quantity of admittees. The national state has to make its own decision to grant entry to immigrants and to uphold the right of refugees. Even if the right to seek asylum is recognized as a human right, it is obvious that the obligation to grant asylum can be jealously guarded by national states as a sovereign privilege. Thus there is a tension between universal rights and sovereign self-determination.<sup>2</sup>

According to Benhabib this can be described as a paradox of democratic legitimacy. The democratic sovereign draws its legitimacy both from its act of constitution and from the conformity of this act to universal principles of human rights. At the same time there is often a tension between the commitment to these universal rights and the will of the people as expressed in the act of national self-legislation. Democratic states require borders, which means that there is a difference between citizens and residents who do not enjoy full citizenship rights. In this situation the rights of refugees, migrants and foreigners need to be negotiated in a tension between universal rights and the sovereign self-determination.<sup>3</sup>

Seyla Benhabib gives a sharp analysis of this dilemma in a critical dialogue with Immanuel Kant and his vision of cosmopolitan rights in *Zum Ewigen Frieden*. She is also inspired by Hannah Arendt and her critique of totalitarianism and the nation-state system in *The Origins of Totalitarianism*.<sup>4</sup> In accordance with Arendt she argues that all human beings have “a right to have rights” and a right to belong to some kind of community. In order to respect these rights we need to reconsider different models of nation-state and democratic sovereignty, according to Benhabib.<sup>5</sup>

The main thesis of Benhabib is that a theory of global justice today should incorporate a vision of just membership. We should accept a human right to political membership, which means that we should respect the claims of immigrants, refugees and strangers, even if they are not citizens. According to Benhabib the status of alienage ought not to imply that a person’s fundamental human rights are not respected. Instead we should recognize the claim of refugees to first admittance, a regime of porous borders for immigrants, the right of every human being to be a legal person, and the right to citizenship on the part of the alien who has fulfilled certain conditions.<sup>6</sup>

From the position of discourse ethics Benhabib argues that we can justify such a human right to membership. This right entails a right to know on the part of the foreigner how

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<sup>1</sup> Benhabib, Seyla: *The Rights of Others. Aliens, Residents and Citizens*. Cambridge University Press, Cambridge 2011, pp 2 and 10 f.

<sup>2</sup> Benhabib, Seyla, op. cit., pp 2, 10 f and 69.

<sup>3</sup> Benhabib, Seyla, op. cit., pp 43 f and 46 f.

<sup>4</sup> Benhabib, Seyla, op. cit., pp 28 f and 50 f.

<sup>5</sup> Benhabib, Seyla, op. cit., pp 61 ff.

<sup>6</sup> Benhabib, Seyla, op. cit., p 3.

conditions of naturalization can be fulfilled. These conditions should be made publicly available to all and transparent in its formulations. The procedure should be clear and administered in a lawful fashion, and the immigrant and the foreigner should not be criminalized. Through this right to membership the sovereign discretion of the democratic community is circumscribed – once admission occurs the path to membership ought not to be blocked.<sup>7</sup>

Democratic self-governance is important for Benhabib, but she argues against a Westphalian model of sovereignty, according to which states enjoy ultimate authority over all subjects and objects within a particular territory. Instead she prefers a liberal international sovereignty, which means that the formal equality of states is dependent on their acceptance of common values and principles, such as the human rights.<sup>8</sup> The core of democratic self-governance is according to Benhabib the principle that those who are subject to the law should also be its authors. This ideal of autonomy should be defended, even if we today should accept that peoples are not homogeneous and that the territories over which they govern are not self-enclosed.<sup>9</sup>

According to Benhabib, citizenship is today disaggregated and we need to accept different forms of citizenship – transnational as well as subnational. However, she does not argue in favor of cosmopolitanism and global governance without borders. Instead she prefers what she calls a cosmopolitan federalism. This is a position which maintains that the borders should be porous rather than open. It regards first-admittance rights for refugees and asylum seekers to be important. However, it also accepts the right of democracies to regulate the transition from first admission to full membership.<sup>10</sup>

Seyla Benhabib has given a most important theoretical contribution to our reflections on refuge rights and democratic self-governance. I agree with her that the right to membership is important and should be incorporated in a theory of global justice. This means that we should respect the claims of immigrants and refugees, even if they are not citizens. The right to membership entails porous borders and a right to know on the right of the foreigner how conditions for participation in the democratic processes can be fulfilled. The basis for this right is the equal dignity of all human beings, independent of race, gender, cultural tradition or social position. To respect this dignity means to accept a principle of equal concern and respect, independent of citizenship.

At the same time Benhabib also gives strong arguments in favor of a respect for democratic self-governance. If we accept this idea, we should also respect the sovereignty of the national state. Both national sovereignty and the idea that those who are the subject of the law should also be its authors are important expressions of the autonomy of persons. In my judgment the right to this kind of autonomy should also be respected as a consequence of the equal dignity of all humans. Today we should accept that peoples are not homogeneous and that borders should be porous, but still we should respect democratic self-governance and state sovereignty. The principle of equal concern and respect is important as a universal principle of human rights and not only within a national state, but it is possible to defend even if we accept borders between sovereign states.

## Global justice without a social contract

The right to membership is thus an important part of a theory of global justice. This is a theory of justice that takes seriously the challenges of globalization and is relevant for human relations across national borders. Most efforts to elaborate such a theory have been based on a

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<sup>7</sup> Benhabib, Seyla: *The Rights of Others*, pp 139 f.

<sup>8</sup> Benhabib, Seyla, op. cit., pp 40 f.

<sup>9</sup> Benhabib, Seyla, op. cit., pp 216 f.

<sup>10</sup> Benhabib, Seyla, op. cit., pp 220 f.

social contractarian approach. From this perspective John Rawls, in his book *The Law of Peoples*, proposed some principles of rights and justice that can be applied to the global world order. These principles state that the world's peoples should respect human rights, and that peoples should assist other peoples who are suffering or living in difficult circumstances. However, they do not include the "difference principle", according to which a just distribution of welfare should be to the greatest benefit of the least advantaged.<sup>11</sup>

More promising efforts to elaborate a theory of global justice from a contractarian perspective have been made by Thomas Pogge and Charles Beitz. They think of the original position as applied directly to the world as a whole and argue in favor of a distributive principle applicable to the global economic system. According to them the difference principle is important within a theory of global justice and there are strong reasons in favor of social equality.<sup>12</sup>

However, as Seyla Benhabib has shown, these theories of global justice have been silent on the matter of migration and refugee rights. They have not questioned the fundamental cornerstone of state centrism, which is the protecting of state boundaries against foreigners and refugees. Therefore Benhabib proposes an alternative theory of global justice, which includes the human right to membership. It is aware of the interdependence of peoples in a world society, even if it regards democratic self-governance to be important.<sup>13</sup>

Benhabib delivers a sharp critique of John Rawls's effort to develop a view of international justice. One problem is that Rawls regards a democratic society to be a complete and closed system. Another one is that individuals are seen as members of peoples and not as cosmopolitan citizens. As a consequence, migration is not considered an aspect of the Law of Peoples. Migratory movements are regarded by Rawls to be episodic and not essential to the life of peoples. One of the legitimate grounds for limiting immigration is according to him to protect a people's political culture and its constitutional principles. In Rawls's vision of a static, dull world of self-satisfied peoples cosmopolitan justice is sacrificed in the altar of states' security and self-interest.<sup>14</sup>

According to Benhabib there are severe problems also with the liberal cosmopolitanism defended by Pogge and Beitz. There are difficulties to extend the difference principle to the global arena, since there is little consensus about who is to count as the least advantaged. It is also difficult to see whether this theory is compatible with democratic self-governance. According to Benhabib democratic peoples themselves must form judgments about economic priorities. However, some cosmopolitans tend to undermine this right to self-determination.<sup>15</sup>

A sharp critique of theories of global justice within the social contract tradition is also given by Martha Nussbaum in her book *Frontiers of Justice*. Since these theories take nation-state as their basic unit, they cannot provide adequate approaches to a global justice which addresses inequalities between richer and poorer nations, and between human beings whatever their nation. John Rawls's proposal is a two-stage contract, where the choice in the original position is made in two stages. First the individuals within a society make a choice under a veil of ignorance, and then representatives of peoples decide upon the principles of international relations. The social contract in both stages is made between parties who are roughly equal in

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<sup>11</sup> Rawls, John: *The Law of Peoples*. Harvard University Press, Cambridge 1999, p 37.

<sup>12</sup> Pogge, Thomas W (ed): *Global Justice*. Blackwell Publishing, Oxford 2007, pp 15 ff and 106 ff. For a critical discussion of the theories of Rawls, Pogge and Beitz, see Collste, Göran: *Globalisering och global rättvisa*. Studentlitteratur, Lund 2004, pp 119 ff and 151 ff. I have also discussed theories of global justice in Grenholm, Carl-Henric: "Justice, Sustainability, and Economic Globalization". Article in Niekerk, Kees van Kooten and Nissen, Ulrik: *Lidenskap og stringens*. Forlaget ANIS, København 2008, pp 179-194.

<sup>13</sup> Benhabib, Seyla: *The Rights of Others*, pp 2 f and 72 ff.

<sup>14</sup> Benhabib, Seyla, op. cit., pp 74 f, 87 ff and 92.

<sup>15</sup> Benhabib, Seyla, op. cit., pp 106 ff and 115 ff.

power and resources, and the contract is imagined as one made for mutual advantage, which is defined in economic terms.<sup>16</sup>

This approach to global justice has grave difficulties according to Nussbaum. One is that it fails to take cognizance of the global economic order and the disadvantages it imposes on poorer nations, since it is starting from the nation-state as its basic unit. Another problem is that the approach requires that all parties are roughly equal in resources and power and believe that they have something to gain by entering into a contract. This is not a realistic assumption given the situation of the world. There are important inequalities between the peoples, even among liberal democratic states, which makes it difficult to understand how all peoples can be participants in the contract.<sup>17</sup>

Martha Nussbaum finds difficulties also with the global contractarian theories of Thomas Pogge and Charles Beitz. In their theory the parties who are contracting for a just global structure are individuals, not representatives of peoples. The outcome is a global application of the difference principle and a list of human rights which is considerably thicker than the one defended by Rawls. This is a far more appealing use of a contractarian approach to global justice according to Nussbaum.<sup>18</sup>

However, it is not reasonable. One difficulty with this proposal is its vague and speculative nature. Pogge and Beitz do not give clear information about the design of the global original position. It is unclear what information the parties will have and the theory seems to presuppose so much ignorance that it is utopian in an unrealistic sense. A second problem is that this theory does not take a clear position on the role of the nation-state. The state as an important expression of human autonomy is not taken seriously enough. Finally, Pogge and Beitz do not give us clear information about the circumstances under which the social contract is made. If the point of the contract should be mutual advantages among rough equals, this seems difficult to reconcile with the fact that there are vast inequalities in basic life chances among individuals in a global perspective.<sup>19</sup>

The conclusion of Nussbaum is that we need an alternative approach to global justice than the ones elaborated within the social contract tradition. This is the capabilities approach. According to Nussbaum this is an account of core human entitlements that should be respected and implemented by all nations, as a minimum of what respect for human dignity requires. She proposes a list of central human capabilities and argues that each of them is implicit in the idea of a life worthy of human dignity. The basic idea of human dignity means that we should always treat every person as an end in herself and never treat her as only a means to another end.<sup>20</sup>

This capabilities approach of Martha Nussbaum is in many ways similar to the international human rights approach. She describes it as one species of such a theory of human rights. One similarity is its universalism, which means that a cross-national agreement on capabilities is assumed. Another similarity is its starting point in the ideas of human dignity and equality. According to Nussbaum equality of capability is an essential social goal as a prerequisite for the recognition of the equal dignity and respect of all human beings.<sup>21</sup>

Seyla Benhabib and Martha Nussbaum have in my judgment given important objections against contractarian theories of global justice. I agree with them that such a theory should not be elaborated from the perspective of a social contract. One reason is that contractarian theories

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<sup>16</sup> Nussbaum, Martha C: *Frontiers of Justice. Disability, Nationality, Species Membership*. The Belknap Press of Harvard University Press, Cambridge Mass. 2007, pp 225 ff, 232 ff and 240 ff.

<sup>17</sup> Nussbaum, Martha: *Frontiers of Justice*, pp 262 f, 263 f and 271 f.

<sup>18</sup> Nussbaum, Martha, op. cit., pp 264 f.

<sup>19</sup> Nussbaum, Martha, op. cit., pp 265 f, 266 f and 268 ff.

<sup>20</sup> Nussbaum, Martha, *Frontiers of Justice*, p 70.

<sup>21</sup> Nussbaum, Martha, op. cit., pp 78 and 292. The relationship between the capabilities approach and the idea of human dignity is also discussed in Nussbaum, Martha C: *Women and Human Development. The Capabilities Approach*. Cambridge University Press, Cambridge 2001, pp 70 ff.

presuppose a liberal view of human beings, according to which we can agree upon what justice means by making ourselves free from our social position and making a choice as individuals behind the veil of ignorance. However, people can never make such rational and independent choices, but are always formed by the particular social and cultural contexts in which they are embedded. Depending upon our social position, we will always have different perspectives of what justice means. This is particularly true if we are regarded to be representatives of a people or a cultural tradition in a global deliberation.

A more promising approach to a theory of global justice is the discourse ethics of Seyla Benhabib and the capabilities approach of Martha Nussbaum. These theories differ from each other, but they have one common starting point. This is a principle of the equal dignity of all human beings, independent of race, gender, citizenship or social position. In discourse ethics it is the basis of the principles of universal moral respect and egalitarian reciprocity. In the capabilities approach the idea of a life worthy of human dignity is the basis for the list of central human capabilities.

The idea of equal dignity of all humans can be interpreted in many ways, but one reasonable interpretation has been proposed by Ronald Dworkin. He argues that there are two basic ideas that justify that we take human rights seriously. One is the idea of human dignity, according to which all humans should always be treated as ends in themselves. The other one is the idea of political equality, according to which all humans are entitled to the same concern and respect. These two ideas justify the fundamental right to treatment as an equal, which is the right to be treated with the same respect and concern as anyone else. Dworkin argues as a legal philosopher, but I regard this to be also an important moral principle. Different from Dworkin I also regard this to be a principle for the treatment of all human beings, not only citizens in one particular state.<sup>22</sup>

## Muslims and Global Justice

So far my thesis has been that the rights of immigrants and refugees should be an important part of a theory of global justice. Such a theory should include a human right to membership. In agreement with Benhabib and Nussbaum I also maintain that a theory of global justice should not be elaborated from the perspective of social contractarianism. We need other approaches to global justice, such as the capabilities approach or the one that takes its starting point in discourse ethics. A primary basis for global justice and equal human rights is the idea of human dignity and equality.

In what ways can religious ethics contribute to such a theory of refugee rights and global justice? As Elena Namli has shown in a well-argued article on “Identity and the Stranger”, there are important resources within Judaism, Christianity and Islam to promote a more open attitude towards refugees and strangers than the one prevailing in contemporary European countries with their strict identity politics. The Torah, the Christian Bible, and the Qur’an describe a vulnerable stranger as either God himself or an instrument of God. In these texts we find strong support of the moral norm of unconditional hospitality, according to which we should welcome strangers and receive them with all the uncertainty that every estrangement bears within it. The idea of monotheism in Judaism and Islam as well as Christological patterns in Christianity support this duty of the stronger part to welcome the stranger.<sup>23</sup>

In his book *Muslims and Global Justice* the Muslim legal philosopher Abdullahi Ahmed An-Na’im has discussed the contributions of Islam to a rights based theory of global justice. His thesis is that human rights are the framework for global justice and that these human rights

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<sup>22</sup> Dworkin, Ronald: *Taking Rights Seriously*. Harvard University Press, Cambridge 1978, pp 198 f and 226 f.

<sup>23</sup> Namli, Elena: “Identity and the Stranger: A Christological Critique of Refugee Politics”. Article in *Political Theology*, vol 12, nr 6, Equinox Publishing, Sheffield 2011, pp 818 ff and 827 ff.

should be understood broadly, including economic, social and cultural rights, as well as civil and political rights. The human rights paradigm should include not only individual rights but also a dynamic and creative understanding of collective rights. Of great importance for An-Na'im is the universality of human rights. They are rights of every human being, everywhere, without any other requirement of status or location other than being a human being.<sup>24</sup>

The universality of human rights is according to An-Na'im problematic because of cultural relativity, which means that there are different perceptions of the world and different perspectives of a good human life within various cultures. However, An-Na'im maintains that this problem can be solved by a theory of overlapping consensus among religious and cultural traditions. Across different cultures we can reach a consensus on commonly agreed principles, even if we have different reasons for that commitment. We have some shared understandings of some values and norms, even if we do not have the same reasons for these convictions.<sup>25</sup>

From this position of ethical universalism and overlapping consensus An-Na'im argues that the implementation of human rights presupposes that the cultural legitimacy for these rights is developed. Such a cultural legitimacy of these standards can be promoted by an inclusive dialogue among and within different cultural and religious traditions. In this dialogue it is necessary to involve believers in various religions, who can reconsider the interpretations of their tradition in its relationship to the universal human rights. Religious beliefs can support these rights, but often a serious reinterpretation of traditional conceptions is necessary.<sup>26</sup>

This is obviously the case if Muslims would like to reconcile their understanding of Shari'a with the universal human rights. There are severe tensions between these rights and some ethical norms, principles and rules of public law that are included in traditional conceptions of Shari'a. According to An-Na'im several texts in the Qur'an and Sunna emphasize the inherent dignity of all humans in the sight of God. However, other texts establish a strict limitation of this equality since they support a hierarchy of status according to sex and belief. Shari'a family law is fundamentally premised on the notion of male guardianship over women, which obviously violates the human right of nondiscrimination on the grounds of gender.<sup>27</sup>

Therefore a reconstruction and reformulation of the constitutional and legal aspects of Shari'a is necessary. Muslims should reconsider their interpretation of Shari'a in the present context of their own societies, in such a way that it can be reconciled with the universal human rights. A part of this reinterpretation is to abolish the principle of male guardianship over females and to remove every feature of discrimination against women. An-Na'im argues that it is important to distinguish between Islam and Shari'a in this process. His rather controversial thesis, which is not shared by all Muslims, is that Shari'a is a human interpretation of Islam, which should not be identified with the totality of the religion itself.<sup>28</sup>

In his book Abdullahi Ahmed An-Na'im proposes a reasonable method for such a reinterpretation of Shari'a. The primary sources of Shari'a are the Qur'an and Sunna, and other sources include different forms of juridical methodology for developing principles out of these texts. However, according to An-Na'im it is important to remember that Shari'a is a human interpretation of the Qur'an and Sunna. It is elaborated by Muslim scholars and jurists, and this interpretation and implementation of the Qur'an and Sunna is the product of human comprehension in a particular historical and political context. Since Shari'a is a historically conditioned interpretation of the fundamental sources of Islam, alternative interpretations today are possible. A reconstruction of Shari'a in support of human rights would be fully

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<sup>24</sup> An-Na'im, Abdullahi Ahmed: *Muslims and Global Justice*. University of Pennsylvania Press, Philadelphia 2011, pp 6 f, 216 f and 230.

<sup>25</sup> An-Na'im, Abdullahi Ahmed, op. cit., pp 15 f, 72 ff and 236 f.

<sup>26</sup> An-Na'im, Abdullahi Ahmed, op. cit., pp 3, 27 f, 65 f and 266.

<sup>27</sup> An-Na'im, Abdullahi Ahmed: *Muslims and Global Justice*, pp 89 and 136.

<sup>28</sup> An-Na'im, Abdullhi Ahmed, op. cit., pp 29 f, 137 f and 192.

Islamic according to An-Na'im, because it would be based on the text of Qur'an as interpreted by Muslims in the present context.<sup>29</sup>

According to An-Na'im the universality of human rights is important as a framework for global justice. However, there are two paradoxes concerning the implementation of these rights. One is that the idea of equal rights of all humans is expected to be implemented by states with national sovereignty. The self-regulation of the state means that sovereign states are entrusted with the implementation of the universal human rights without any external intervention. The other paradox is that even if human rights are for all humans everywhere, the sovereignty of the states means that they take a particular responsibility for their own citizens and make a clear distinction between citizens and aliens.<sup>30</sup>

To handle these problems An-Na'im argues that global citizenship is needed to play the role for universal human rights that is played by national citizenship for domestic constitutional rights. Global citizenship is a complement to national citizenship, and it does not abolish all legal and political distinctions between citizens and noncitizens of a state. However, some human rights must be secured on a universal basis, and this assumes the possibility of global citizenship as the basis of the ability to enforce them. Some civil rights are based on national citizenship, and in a similar way universal human rights are based on global citizenship.<sup>31</sup>

An-Na'im is aware that there are serious objections to the idea of global citizenship. One is that true citizenship entails not only rights but also political duties and responsibilities such as participation in political debate and law making. Another is that global citizenship may presume shared cultural, social and moral conceptions, but the rich and enduring diversity of human cultures and traditions will not make this possible or desirable. However, An-Na'im does not find these objections convincing. He still believes that global citizenship is necessary in order to implement the universal human rights.<sup>32</sup>

In my judgment, Abdullahi Ahmed An-Na'im gives strong arguments in favor of a reinterpretation of Shari'a. If such a reinterpretation is possible, Islam can give an interesting contribution to a theory of human rights and global justice. There are important texts in the Qur'an and Sunna that emphasize the inherent dignity of all humans, and these can be taken as a starting point for a reinterpretation of such norms in Shari'a that seem to violate the human right of nondiscrimination. I also agree with An-Na'im that the universality of human rights presupposes that they are related not only to conceptions within Western liberalism but also to basic ideas in different religions, including Islam. A consequence of such a process might also be a reinterpretation of the meaning of human rights.

However, I do not agree with An-Na'im in his thesis that the implementation of universal human rights presupposes global citizenship. This idea does not take the moral importance of national sovereignty seriously enough. As Seyla Benhabib and Martha Nussbaum have shown, there are strong arguments in favor of democratic self-governance. It is an important expression of human autonomy and freedom, which means that those who are the subjects of the law should be its authors. This kind of autonomy is also important if we want to respect the human dignity of all humans. We should take the universality of human rights seriously, but this includes that we respect the right to self-governance and state sovereignty.

The thesis of An-Na'im is based upon an understanding of human rights as primarily legal standards and not as political and moral norms. From a legal perspective he believes that global citizenship is necessary in order to implement human rights, in a similar way as civil rights are

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<sup>29</sup> An-Na'im, Abdullahi Ahmed, op. cit., pp 88 f, 144 f, 154 f and 238. The interpretation of Shari'a is also discussed in An-Na'im, Abdullahi Ahmed: *Islam and the Secular State. Negotiating the Future of Shari'a*. Harvard University Press, Cambridge, Mass. 2008, pp 12 ff.

<sup>30</sup> An-Na'im, Abdullahi Ahmed: *Muslims and Global Justice*, pp 8 f, 231 f and 276 f.

<sup>31</sup> An-Na'im, Abdullahi Ahmed, op. cit., pp 19 f, 22 f, 273 f and 284 ff.

<sup>32</sup> An-Na'im, Abdullahi Ahmed: *Muslims and Global Justice*, pp 297 f.

based on national citizenship. However, I find it important to make a clear distinction between human rights as moral norms and human rights as legal standards. From a moral point of view the basis of human rights is not citizenship but the equal dignity of all human beings. This moral principle should be implemented in all national states, even if we respect their self-governance. A presupposition for this is not a different understanding of citizenship but recognition that human rights are moral imperatives that should be taken seriously by all states in their process of self-legislation. The most important task is to argue against legal positivism and a political process of legislation that does not take moral considerations seriously.

## A Christian theory of refugee rights

We have seen that Abdullahi Ahmed An-Na'im believes that the universality of human rights assumes the possibility of global citizenship. This is a position which is based upon an understanding of human rights as primarily legal standards and not as political and moral norms. One problem with this position is that it does not take the moral importance of national sovereignty seriously enough. It is necessary to respect democratic self-governance and the borders between sovereign states. The democratic sovereignty of individual states cannot be disregarded even if we find it important to implement universal human rights.

A similar problem is related to the theory of refugee rights that is elaborated by the Catholic moral theologian David Hollenbach. In his book *Refugee Rights* he makes us aware that refugee and internally displaced people are often the forgotten victims of human rights violations. This is particularly true of internally displaced persons who are not refugees in a strict legal sense, since they have not been forced across an international border. The human rights issues raised by displacement have not been addressed in the same depth as other grave human rights issues.<sup>33</sup>

David Hollenbach argues in favor of a human rights approach to the problems of refugees and internally displaced persons. These rights are moral as well as legal norms, why the law should be changed when existing legal standards fail to serve the moral imperative to respect the human dignity of refugees. The protection of these rights is defended from a natural law position. A basis is the idea of human dignity which is equal in every human being. This idea is deeply embedded in Christian faith and primarily the belief that every person is created in the image and likeness of God. At the same time it is compatible with reasoned reflections of human experience in many cultures. There are both Christian and rational arguments in favor of the equal dignity of all persons, which is the basis of a theory of human rights.<sup>34</sup>

There are strong grounds in the Christian tradition for providing hospitality to migrants and protecting the human rights of refugees. The Hebrew Bible contains imperatives to show a special concern for the aliens and strangers in the midst of the people of Israel. In Catholic social teaching it is also quite clear that the equal dignity of all persons is a strong reason to respect the human rights of refugees and displaced persons. At the same time there are also strong reasons in favor of these rights within other cultural and religious traditions. In the defense of universal human rights there is a convergence of the Christian tradition with a global humanitarianism.<sup>35</sup>

According to Hollenbach it is important to defend the idea that each individual state has the responsibility to protect its population from great crimes against human rights. This idea also

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<sup>33</sup> Hollenbach, David (ed): *Refugee Rights. Ethics, Advocacy, and Africa*. Georgetown University Press, Washington 2008, pp 1 f.

<sup>34</sup> Hollenbach, David, op. cit., pp 2 f and 4 f.

<sup>35</sup> Hollenbach, David (ed): *Driven from Home. Protecting the Rights of Forced Migrants*. Georgetown University Press, Washington 2010, pp 4. See also the article of Agbonkhianmege Orobator on "Justice for the Displaced: The Challenge of a Christian Understanding" in Hollenbach, David (ed), op. cit., pp 40 ff and 47 f.

entails that there is a duty of the international community to prevent such crimes when a state is unable or unwilling to do so. Hollenbach argues that the responsibility to protect includes forced migrants and refugees. National governments have the duty to protect their citizens from abuses such as internal displacement, and if they fail to do so, the international community should come to their assistance. The responsibility to protect refugees is based upon the human rights of all humans and includes an international duty to assist war victims and persons who are forced to leave their homes due to different kinds of oppression.<sup>36</sup>

Hollenbach argues that this responsibility entails two duties. First, a negative duty is the obligation not to commit grave evils such as genocide, ethnic cleansing or religious persecution. The states have a duty not to force people to become refugees or internally displaced. Secondly, a positive duty is the obligation of the international community to assist persons whose human rights are not respected. This means that economic interventions are sometimes necessary to meet human needs and reduce inequalities through development assistance. As an extraordinary measure military interventions are also possible to justify.<sup>37</sup>

One thesis of Hollenbach is that the responsibility to protect means that we have to rethink the meaning of the sovereignty of the state. The modern nation-state system is challenged by our responsibility towards refugees and internally displaced persons, which does not stop at national borders. From a general perspective it is obvious that universal ethical ideas and values such as human rights imply limitations of national state sovereignty.<sup>38</sup>

There are of course objections to this plea for a change of the nation-state system. One is that the primary objective of a country's foreign policy should be to promote the national interest, not to protect citizens in other countries. Another is that concern for order and stability in international affairs implies that we should respect territorial borders and national self-determination. Intervention in other countries will lead to dangerous international conflicts. According to Hollenbach these objections are not tenable. States have a responsibility to protect the citizens of their country, but the responsibility to protect humans from injustice and exploitation does not stop at the national border. It is also obvious that respect for sovereignty is not the only condition for peace in the world. Non-intervention can also have unacceptable consequences and imply that we accept oppression, injustice and violence.<sup>39</sup>

David Hollenbach defends a cosmopolitan approach, where the common humanity of all people is seen as the basis of a worldwide moral community. According to this position, which is also said to be defended by Martha Nussbaum, we have a common moral responsibility to respond to the needs of all members of the global community. Hollenbach argues that cosmopolitanism can be defended from a Christian perspective, where all human beings are regarded to be created in the image and likeness of God. This implies that all humans have a common dignity and worth that reaches across the borders between nation states. These borders are subordinate to the respect of the shared dignity of every person, and we are all members of a single human family.<sup>40</sup>

Even if he underlines the common humanity of all people, Hollenbach does not defend a radical cosmopolitanism which maintains that the moral and political significance of national borders should be challenged and reduced. National borders can play positive roles in the protection of human dignity, and we should resist interventions that turn a nation into the colony of another. We should also respect the differences among cultures, and distinctive identities of

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<sup>36</sup> Hollenbach, David (ed): *Refugee Rights*, pp 177 f. Hollenbach, David (ed): *Driven from Home*, pp 1 f and 8 f.

<sup>37</sup> Hollenbach, David (ed): *Refugee Rights*, pp 186 f and 188 ff.

<sup>38</sup> Hollenbach, David (ed): *Refugee Rights*, pp 180 f.

<sup>39</sup> Hollenbach, David, op. cit., pp 182 f and 183 f.

<sup>40</sup> Hollenbach, David, op. cit., p 184. Hollenbach, David: "Migration as a Challenge for Theological Ethics". Article in *Political Theology*, vol 12, nr 6, Equinox Publishing, Sheffield 2011, pp 808 f.

peoples should be respected within a cosmopolitan universalism. The principle of subsidiarity in domestic and international affairs is also important. However, it is quite clear that a cosmopolitan approach means an increased role for a global political organization and a challenge to modern ideals of nation-state sovereignty.<sup>41</sup>

David Hollenbach argues quite convincingly that there are strong grounds in the Christian tradition to protect the human rights of refugees and internally displaced persons. A primary reason to protect these rights is the idea of human dignity which is equal in every human being. This idea can be justified in many ways, but in Christian tradition it is based upon the conviction that every human being is created in the image of God. A Christian view of *imago Dei* implies that all human have a common dignity and worth that reaches across the borders between nation states. Therefore we should accept a principle of equal treatment and respect.

However, Hollenbach's argument against the sovereignty of the state is not convincing. The responsibility to protect universal human rights means according to him that national sovereignty is challenged and external interventions are possible to justify. This is a cosmopolitan approach which in my judgment does not take state sovereignty seriously enough. It is quite different from the kind of cosmopolitanism defended by Martha Nussbaum. Her opinion is that we have a common moral responsibility to respect the dignity and rights of all human beings. However, at the same time she argues that the respect of this dignity also implies that we should accept national sovereignty. I find this position more reasonable than the one of Hollenbach.

In her critique of the social contract tradition Nussbaum objects to the idea that we have a right to intervene militarily or through economic sanctions if another nation does not respect human rights. Instead she defends the national sovereignty of the individual state. This is important to protect human freedom, which includes the ability to join with others to give one another laws. Being autonomous in this sense contributes to a fully human life, and is ultimately based on the dignity of the individual human being.<sup>42</sup>

No existing state is just and human rights are violated by all nations. Our responsibility, Nussbaum argues, is to criticize every state that has violated important moral norms that can be justified. However, this does not mean that we should accept external interventions. We should work out international treaties protecting human rights and work to get the nations to implement these. We should also use diplomatic exchange as a way to draw attention to these issues. But we should respect the state and its sovereignty, The state is morally important, since it is an expression of human choice and autonomy.<sup>43</sup>

Even if she is said to promote a kind of cosmopolitanism, Martha Nussbaum is quite clear that a world state is not desirable. The differences of culture and language make communication difficult within a global state, and we should not promote the kind of cultural and linguistic homogeneity which it seems to presuppose. A world state would also be dangerous, since external critique and internal democracy would be difficult to obtain. Instead, Nussbaum argues that national sovereignty has moral importance as a way people have of asserting their autonomy.<sup>44</sup> This is an argument that I find convincing. A reasonable theory of global justice should include both a right to political membership for refugees and a right to national sovereignty and democratic self-governance.

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<sup>41</sup> Hollenbach, David (ed): *Refugee Rights*, pp 185 f. Hollenbach, David: "Migration as a Challenge for Theological Ethics", pp 808 ff.

<sup>42</sup> Nussbaum, Martha: *Frontiers of Justice*, pp 255 f and 257.

<sup>43</sup> Nussbaum, Martha, op. cit., pp 260 f and 261 f.

<sup>44</sup> Nussbaum, Martha, op. cit., pp 313 f.

## Conclusion

In this article a theoretical perspective on the rights of refugees has been developed in a critical dialogue with Seyla Benhabib's discourse ethics and Martha Nussbaum's capabilities approach. Seyla Benhabib has argued quite convincingly that a human right to political membership is important and should be incorporated in a theory of global justice. This means that we should respect the claims of immigrants and refugees, even if they are not citizens. At the same time Benhabib gives strong arguments in favor of a respect for democratic self-governance. National sovereignty is an important expression of the autonomy of persons which should be respected as a consequence of the equal dignity of all humans.

The right to membership should be an important part of a theory of global justice. However, as Seyla Benhabib and Martha Nussbaum have shown, efforts to elaborate such a theory within the social contract tradition have not been successful. Since these theories take nation-state as their basic unit, they cannot provide adequate approaches to global justice. The assumption that all parties who are supposed to reach an agreement under the veil of ignorance are roughly equal in resources and power is not realistic given the situation of the world. More promising approaches to a theory of global justice are therefore the theories of Benhabib and Nussbaum. A common starting point for these theories is a principle of the equal dignity of all humans. This principle justifies the fundamental right to be treated as an equal, which is the right to be treated with the same respect and concern as everyone else.

From this perspective a main purpose of this article has been to critically evaluate the contributions to the issues of refugee rights and global justice given by two representatives of different kinds of religious ethics. Abdullahi Ahmed An-Na'im has shown that Islam can give an important contribution to a theory of human rights, given a necessary reinterpretation of Shari'a. The universality of human rights presupposes that they are related not only to conceptions within Western liberalism but also to basic ideas in different religions, including Islam. An-Na'im argues that the implementation of universal human rights presupposes global citizenship. This is a complement to national citizenship and the basis of the ability to enforce human rights universally. I find it difficult to accept this idea. One problem is that it does not take the moral importance of national sovereignty seriously enough. Democratic self-governance is an expression of human autonomy which should not be disregarded, even if we find it important to implement universal human rights.

The Catholic political theologian David Hollenbach had argued quite convincingly that there are strong grounds in the Christian tradition to protect the human rights of refugees and internally displaced persons. A primary reason is the idea of equal human dignity, which in Christian tradition is based upon the conviction that all humans are created in the image of God. Hollenbach defends a cosmopolitan approach, according to which we have a common responsibility to protect all humans from violations against human rights. This means that national sovereignty is challenged and external interventions are possible to justify. In my judgment this position is not convincing, since it does not take the state sovereignty seriously enough. As Martha Nussbaum has shown we have a common moral responsibility to respect the dignity of all human beings, but this implies that we should accept not only the right of refugees but also national sovereignty. A reasonable theory of global justice should include both a right to political membership and a right to democratic self-governance which includes a respect for the sovereignty of the national state.

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