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Just Annexation

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Abstract: Fabre defends a human rights-focused cosmopolitan theory of peace. One would expect that, given this view, she would be in favour of human rights-promoting annexations by liberal states. However, she distances herself from this view, adopting the common-sense view that annexing states ‘act *ultra vires*’. I argue that her core cosmopolitan view motivates a different and, in principle, much more positive view of four types of annexations. In the course of defending this view, I take a critical look at her appeal to perverse moral incentives and the notion of a cosmopolitan ethos.

1. Introduction

In *Cosmopolitan Peace*, Cécile Fabre takes her reader on a captivating tour de force through the complexities of a cosmopolitan account of *jus ex bello* and *just post bellum*.¹ Fabrean cosmopolitanism holds that the ‘primary *loci* for moral concern and respect’ are human beings (p. 2; cp. Fabre 2012, p. 16) and that ‘sovereignty rights are largely instrumentally valuable as a way to bring about justice’ (p. 207). On this view, ‘all human beings, wherever they are, have [rights to the resources and freedoms they need to live a flourishing life] against all other human beings, irrespective of borders’ (p. 3; cp. Fabre 2012, p. 33). Fabrean ‘cosmopolitanism is more hospitable than other moral and political theories to loosening states’ normative grip, as it were, on a wide range of practices’ (Fabre 2012, p. 10). This shows up in Fabre’s embrace of some

forms of mercenarism, i.e., her rejection of a moral state monopoly on supplying combatants, and in her defence of some forms of military occupation and transitional foreign administrations against the will of the states being occupied or administered (Fabre 2012, pp. 208-238; pp. 53-88, 218-245). However, it does not show up in Fabre's views on annexations; at least, this is what I shall argue.

On Fabre's cosmopolitanism, the basic moral question to ask in relation to annexations is how they affect the satisfaction of the human rights of *all* individuals, not just of those individuals who live in the annexing state and in the state being subjected to annexation. One would expect that, on this view, some annexations are desirable (cf. Fabre 2012, p. 7n9). However, 'there is some degree of consensus in contemporary war ethics...[that] victorious belligerents must aim to restore the political sovereignty and territorial integrity of their defeated enemy' (p. 2; Fabre 2012, p. 5) and Fabre thinks this is basically right. Indeed, she considers what appears to be a hard case for cosmopolitans: liberal and human rights-respecting A invades and annexes human rights-violating B. In doing so, Fabre submits, 'it seems that...A would act *ultra vires*' and, accordingly, she tries to show why cosmopolitans can endorse the pertinent common-sense view despite the fact that liberal annexation may seem like a good thing human rights-wise.²

I think such efforts are in vain. Fabrean cosmopolitanism is incompatible with the common-sense view and implies that annexations can be justified in a fairly wide range of cases. This paper identifies four types of annexations that are justified given Fabrean cosmopolitanism: humanitarian annexations by unjust aggressors (Section 2); preventive annexations (Section 3); compensatory annexations (Section 4); and, finally, paternalistic annexations (Section 5).³ While this paper offers a number of challenges to Fabre's view on annexations, they are put forward in a constructive

spirit, i.e., as part of an exploration of what Fabrean cosmopolitanism implies regarding annexations, and not in the spirit of a *reductio*.

By ‘annexation’ I mean an act whereby one state occupies territory presently controlled and claimed by another state; declares it to be part of its territory; and treats it as such in a sufficiently large number of respects, e.g., it asserts the validity of its laws over the territory and collects taxes. Annexation so defined is a unilateral thing. However, it is not the case that, by definition, annexations challenge the international order, and other states might recognize the new borders being drawn through annexation. While an annexation might end a war, it sometimes does not, viz., Russia’s annexation of Crimea. I shall only discuss war-involving annexations. Finally, annexed territory might be unpopulated, e.g. an atoll in the South China Sea, but often it is not. Because the latter cases involve more complex moral issues, these are the ones I focus on.

Fabre distinguishes between just peace and justified-all-things-considered (justified_{ATC}) peace. A peace is just if, and only if, ‘all individuals actually enjoy their human rights to the freedoms and resources they need to lead a flourishing life’ (p. 312). A peace is justified_{ATC} if, and only if, it represents the right ‘compromise between ensuring that individuals’ human rights are secure and acknowledging that realizing a just and peaceful world is simply not possible’ (p. 13). The latter, unlike the former, is sensitive to constraints of (moralized) feasibility (p. 19) and is one in which, at a minimum, individuals enjoy their basic human rights – those the non-violation of which is necessary for leading ‘a life worthy of a human being’ (p. 3) – even if they do not enjoy their non-basic human rights (p. 20) – those the non-violation of which is necessary for leading a ‘flourishing life’ (p. 4). I focus on justified_{ATC} peace-cum-annexations.

2. Humanitarian annexations by an unjust aggressor

Consider the following case: Country A unjustly invades Country B, making no effort to distinguish between combatants and non-combatants. A huge proportion of B's population is killed. Even so, A's offensive comes to a halt at a time at which A occupies a certain part of B's territory, T_B . A can only barely feed its fast-growing population, while, because of the mass killings of B's citizens, B now has much more land than it needs to feed its citizens. Predictably, if A does not annex T_B , future citizens of A, who bear no responsibility for A's unjust aggression, will not have the resources they need for the satisfaction of their basic human rights, whereas there is no danger that citizens of B will suffer from such a shortage if A annexes T_B . Assuming that future people matter and matter equally from a cosmopolitan point of view, Fabrean cosmopolitanism implies that the humanitarian annexation by A of T_B for the sake of its own future citizens would be justified_{ATC} from the very beginning and not just later, Waldron-style, when the relevant future citizens of A have come into existence.⁴ The mere fact that the relevant future persons whose satisfaction of basic human rights are at stake 'belong to the [unjust] enemy' does not reduce the moral weight of their claims (cp. p. 44).

In my view, this claim is an implication, not a *reductio*, of Fabre's account. However, for reasons to be explained shortly I also believe this is a case where there is a divergence between the morality of war and morally justifiable laws of war, the latter of which should rule out annexation by unjust aggressors.

How might a Fabrean cosmopolitan resist the view that she is committed to endorse humanitarian annexations by unjust aggressors? First, Fabrean cosmopolitans might argue that if A annexes T_B , thereby ensuring that future citizens of A will be

able to enjoy their basic human rights, then future citizens will be beneficiaries of injustice and one has a duty not to bring others into a situation where it is very costly for them not to violate justice.⁵ Fabre also defends the ‘No-Unjust-Benefit Principle’, according to which ‘someone...who benefits from the commission of an injustice done to another person V is under a duty to pay reparations to V unless she is already benefiting her’ (p. 160).

However, the present scenario is one in which future citizens of A will not have their basic human rights satisfied in the absence of annexation, and Fabre acknowledges a restriction on morally required sacrifice, which says that individuals ‘cannot be expected to provide assistance to others if they would have a less than flourishing life as a result’ (p. 3). While Fabre does not discuss this restriction in relation to the duties of innocent beneficiaries of justice towards victims who live lives that are better than merely flourishing, the most natural application of this restriction to the present case implies that future citizens of A are not under a duty to give up the benefits of past unjust aggression, i.e., the satisfaction of their basic human right to sustenance.

A second argument for why Fabrean cosmopolitans are not committed to permit humanitarian annexations by unjust aggressors builds on Fabre’s discussion of moral hazard (cp., pp. 49, 71-72, 137). The idea is this: If F grounds a certain moral right desirable from A’s point of view, and if A can bring about F through unjust means, there is a moral hazard in the sense that morality rewards, and thus creates an incentive for, injustice. Other things being equal, this is an unattractive feature of a theory of justice.⁶ In the case at hand, if annexations by unjust aggressors are justified_{ATC} this creates a moral incentive to conduct genocidal warfare with the aim

of justifiably annexing B's territory later on, and this is one reason to believe that annexation by unjust aggressors is not justified_{ATC}.

There are two reasons why this appeal to moral hazard does not work. First, it is not a *pro tanto* reason to think that a moral norm is not a valid norm simply because, given that the world is a certain way, it implies the existence of moral incentives for injustice. There are many norms which imply moral hazard and whose existence we have no reason to deny because they involve moral hazard. Suppose that I have a choice between saving my friend and 100 strangers from a ship disaster. (Call the case *Shipwreck*.) I am morally required to do the latter. But if I kill the 100 strangers, it will now be permissible, indeed morally required, for me to save my friend. That, it seems to me, is no reason – not even a *pro tanto* or *prima facie* reason – to reject the view that having impermissibly killed the 100 strangers, I then have a moral duty to save my friend. Note that this view is consistent with the claim that it is impermissible for me to kill the 100 strangers now with a view to its being permissible to save my friend later (and impermissible to kill the strangers full stop).

Second, moral incentives are a strange thing. Something is an incentive for doing a certain action if it is a feature that makes it more attractive to perform that action than it would be if, *ceteris paribus*, the action did not have this feature. If we adopt a subjective account of attractive features, i.e., for something to count as an attractive feature it must be a feature that the agent sees as desirable – if not, there is no connection to motivation – then the agent must see the fact that an action is permissible as a desirable feature. But an agent who is inclined to do so is also inclined to see it as a disincentive to perform a certain action that it is impermissible. Hence, in *Shipwreck*, presumably, an agent who would think that its being permissible to save his friend is an attractive feature of the action would also see it as

a strongly unattractive feature of the killing of 100 strangers that it is impermissible. More generally, often it is unclear how, from the relevant agent's perspective, putative moral incentives are supposed to favour a certain course of action.

If our concern is with the *morality* of war, we should not worry about the problem of moral hazard. However, if our concern is with the *rules of regulation* of war, e.g., international conventions about war, worries about *rules of regulation hazard* – that is, that rules are such that states have an incentive to violate some of them, because they thereby acquire legitimate claims according to other rules which will then be respected – are an important concern. So if certain international rules of war involve rules of regulation hazard, that is a reason to revise the rules, since states are known to act opportunistically in relation to such rules. However, pointing out that certain principles of the morality of war involve moral hazard is not a reason to think that these are not the true principles of morality of war; and Fabre's primary concern is the morality of war and peace (cp. Fabre 2012, p. 12).⁷

3. Preventive annexations

Consider now a case where B repeatedly engages in an unjust war against A. Suppose that in all cases B uses T_B , i.e., a particular part of what prior to the conflict was recognized as part of B's 'own territory', as a springboard for aggression. Exercising sovereignty over T_B gives B a significant military advantage over A. There is some reason to think that B's repeated unjust aggressions result in B's forfeiting its sovereignty rights over T_B . Given that wars generally involve massive violations of human rights, which, *ex hypothesis*, in this case can be prevented by annexation, Fabre's cosmopolitanism implies that preventive annexation of T_B by A is justified_{ATC}. It is an advantage of Fabre's view that it has this implication.

Consider, however, what she says about an analogous domestic case: ‘Let us...assume that B is g’s rightful owner but that she forfeits her right over it. For example, she starts using her gun to shoot at some defenceless bystander. In this case, A is justified in seizing the gun at t_1 ; likewise if B shoots at him. But even so, A is under a duty to return g at t_2 if he does not have a justification for holding on to it’ (p. 123; cp., p. 66, 130). The analogous conclusion regarding T_B in my example is that A is entitled to occupy T_B and to retain it for as long as there is a justification for so doing, e.g., that B will use the territory as a springboard for attacks on A. However, while Fabre’s claims about the domestic case support preventive occupations, in the international case it falls short of supporting preventive annexations, since seizing a gun is different from declaring that one is now the rightful owner of the gun.

I think preventive annexation can be justified under some circumstances, e.g., for the foreseeable future B will use strategically located T_B to pose a serious threat to A. Much here hangs on what sovereignty involves. Generally, when a state declares that a certain piece of territory falls under its sovereignty, the implication is that the sovereignty is unconditional and no future circumstances are such that claims to sovereignty would be recalled. Hence, actual claims to sovereignty are strong claims. However, weaker claims are possible, e.g. sovereignty claims being made conditional on B’s persisting in its unjust aggressive ways etc. My claim is that if occupying T_B is justified, then so is annexation, at least when it takes the form of a declaration of suitably conditional sovereignty over T_B .⁸ Admittedly, in many cases something other than A’s annexation of T_B might do the trick when it comes to safeguarding A’s future military security, e.g., limiting B’s sovereignty by imposing militarily relevant restrictions on its use of T_B . Suppose, however, that such measures will not work.⁹

Absent other morally relevant considerations, in that case annexation would seem justified_{ATC} on Fabre's view, since human rights-wise this is the best feasible option.

4. Compensatory annexations

Suppose B unjustly aggresses against A. In the course of war, B destroys A's limited arable land, with the aim of starving A into submission. The attempt is unsuccessful and A emerges victorious and ends up occupying T_B – i.e., again a particular part of what, prior to the conflict, was considered B's territory. T_B is fertile land and annexing it is the only way to compensate citizens of A for their losses other than leaving A at the mercy of B's willingness to provide A with foodstuff on a permanent basis. It might be justified_{ATC} for A to annex T_B against the will of the people living there, provided they supported the unjust war.¹⁰ This follows from Fabre's reparative principle: 'individuals who have violated or justifiably infringed the human rights of some other party in or during war are under a duty to compensate their victims for the wrongs which they have done to them, and to assist in the reconstruction of their community' (p. 145). Usually, compensation need not involve annexation, but in some cases it must and in those cases it should.

Someone might object that compensatory annexations will result in displacement of people and that this in itself involves a violation of human rights, given that leading a flourishing life depends on stable residence. In response, I claim that in certain fairly realistic non-ideal circumstances, cosmopolitans should adopt a more positive view on population displacements. Fabre implies that the right of occupancy is tied to the interest in 'stable occupancy of the land' on which one has been living for some time (p. 139; Fabre 2012, p. 43; cp. Stilz 2011, pp. 582-587). However, the interest in stable occupancy might sometimes best be served by leaving

the land which one has been occupying for a long time. This is so in cases where one is unlikely to enjoy stable occupancy in the future in the absence of displacement, and where being relocated to somewhere else will result in one's future enjoyment of stable occupancy. In such cases the interest in stable occupancy might not speak against annexations possibly involving the displacement of people – especially if people can be displaced without 'being torn asunder from the interconnected networks of relationships' (Fabre 2012, p. 43). Take Cyprus immediately before the Turkish intervention and the resulting partition of the island involving displacement of Greek and Turkish Cypriots. It seems likely that, from a forward-looking perspective, an annexation by Turkey (which, nominally at least, was not what happened) of some part of Cyprus and a displacement of people of the sort that actually resulted – for all the other horrors involved – left Cypriots enjoying greater stability of occupancy than they would have enjoyed had they continued to live together under the constant threat of civil war. In short, the interest in stable occupancy and the interest in staying on the land that one has been living on for a long time are distinct interests, and while population displacements by definition are uncongenial to the latter interest, in some cases they might serve the former.

5. Paternalistic interventions

Suppose that in a just war A occupies T_B . Returning T_B to B will result in non-satisfaction of the human rights of people living in T_B . Like other citizens of B, many of them subscribe to a totalitarian ideology, which results in widespread human rights violations. Moreover, people in T_B are strongly nationalistic and they want T_B to be returned to B. However, if A annexes T_B and does so solely with the paternalistic aim of protecting the human rights of people living in T_B , this will result in greater

satisfaction of basic human rights of the people living in T_B than if A does not annex. Given Fabre's view on political legitimacy, she appears committed to embracing such paternalistic annexation. After all, on her view, the legitimacy of a state depends on the extent to which it promotes and respects the human rights of those who are subjected to the directives of that state (p. 33; p. 234), as well as the human rights of others (pp. 227, 311; Fabre 2012, pp. 7, 46).

Fabre, however, rejects paternalistic annexations as impermissible. She argues that 'it is a necessary condition for an individual permissibly to be given that to which she has a right that she consents to it' and that a similar point applies to 'a community of individuals who are already bound together by a shared history of cooperation' (Fabre 2012, p. 48).

There are three reasons why this view is non-satisfactory. First, it fails to address what is the most likely case, i.e., one where some people living in T_B consent, since they are the ones whose human rights will be respected given annexation and not respected in its absence, but other people in T_B do not consent, since they are not the ones primarily targeted in human rights violations.

Second, it is not generally true that to be permissibly given something to which I have a right, I must consent to being given it. This is especially not so if my refusing to receive that to which I have a right results in others having their rights violated. Suppose my bike has been stolen and without trespassing you can now return it to me by placing it on my property, where it was located when someone else stole it. Do you need my consent to do it? I think not. Perhaps you need to believe that I would consent?¹¹ But suppose you reasonably think I would not because, falsely, I would not believe that it was my bike (the thief painted it a different colour). But then is what matters the fact that you reasonably believe I would consent if I knew the

facts? If so, perhaps people in an annexed territory who do not consent would consent if they fully grasped the facts about their situation. In short, it becomes a tricky question whether, in some cases at least, paternalistic annexations might not satisfy a plausible version of the consent constraint. It seems that in some such cases refusing consent might have no moral force, e.g., because of the objectionableness of their grounds for withholding consent to annexation.

Third, and most basically, Fabre's reply fails to take into account what I want to call a cosmopolitan ethos. Cosmopolitanism rightly construed involves being so disposed that in the case of a paternalistic annexation one would not harbour nationalistic feelings of the sort my scenario involves (and which typically render it difficult for the paternalistic annexing state to achieve its aim of promoting the human rights of people living in the annexed territory).¹²

According to Fabre, cosmopolitans recognize a jointly held human right to collective self-determination. This means that, in a number of cases, cosmopolitans want to respect sovereignty of state as a way of respecting a group of individuals' right to self-determination (Fabre 2012, pp. 7, 43). However, people can have a right and voluntarily permit others to act in a way that they could forbid them from acting in virtue of that right; they can relinquish their right to self-government altogether; and people can adopt different views as to which group of people they are part of such that when this group makes binding laws for its members they exercise self-determination, e.g., annexees could choose to see themselves as exercising collective self-determination when, together with annexers, they make laws.

Suppose T_B people are infused with a cosmopolitan ethos. In that case, being annexed does not involve unreasonable sacrifice on their part, i.e. loss of the opportunity to live a flourishing life, and provided annexation promotes the human

rights of those living in T_B , the following is true of individuals adhering to a cosmopolitan ethos living in T_B : either they abstain from pressing their right to self-determination; or relinquish it altogether; or revise their view as to which group of people they belong such that if, together with other members of that group, they determine the laws etc. to which they are subjected, their right to self-determination is respected.

This argument does not show that paternalistic annexations are often justified_{ATC}.¹³ Indeed, people almost always unjustly fail to act in their daily lives in the ways required by cosmopolitanism. Hence, in most cases where paternalistic annexation of T_B would be justified_{ATC} if people living in T_B were justly motivated in their daily lives by Fabrean cosmopolitanism, as a matter of fact paternalistic annexations are not justified_{ATC} in view of how, generally, annexations result in violence and harmful conflicts. But this is not because of any flaws of paternalistic annexations *per se*, but because of the widespread unjust, non-cosmopolitan actions of people in their daily lives.

6. Concluding reflections

At the very end of *Cosmopolitan Peace*, Fabre writes: ‘Cosmopolitan peace admittedly offers only limited scope in the end for patriotic partiality and political self-determination. If this is the political and moral price of a commitment to the inherent value of every human being wherever he or she is, I for one am more than happy to pay it’ (p. 315). In my view, the antecedent in the previous sentence is true, but the ‘the political and moral price’ to which Fabre refers might be higher than she suggests, since cosmopolitan annexations may well be part of a justified_{ATC} peace.

However, justified_{ATC} cosmopolitan annexations are not too high a price to pay for ‘a commitment to the inherent value of every human being’ either.¹⁴

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¹ All references without an author name are to Cecilé Fabre, *Cosmopolitan Peace* (Oxford: Oxford University Press, 2016).

² Fabre 2012, op. cit., p. 48; cp. Anna Stilz, ‘States and Territory’, *Ethics*, 121, 3 (2011): 572-601, pp. 590-601.

³ The list is not meant to be exhaustive.

⁴ Admittedly, this use of ‘humanitarian’ deviates from the standard use in just war theory, where it designates action by a state for the benefit of civilians of another state.

⁵ To accommodate the non-identity problem one might add: and a duty not bring into existence people for whom it is very costly not to violate justice.

⁶ It is not clear exactly how strong Fabre thinks this objection is (cp. op. cit., p. 49, 71).

⁷ Admittedly, her main concern in *Cosmopolitan Peace* is with moral principles regarding a justified_{ATC} peace in mind. In my view, moral hazard might affect the content of these principles, but the fact that a principle, whose content has been determined in part thereby, involves moral hazard is not, I think, a reason to reject it.

⁸ Note that a state can intend to occupy a territory indefinitely.

⁹ Similar claims can often be made with regard to military occupation, which Fabre finds justified_{ATC} under some circumstances.

¹⁰ Indeed, assuming that citizens of B forfeit their right to hold on to T_B due to their support for the unjust war, a stronger claim – that the annexation is just *simpliciter* – might be true.

¹¹ Cp. Cecilé Fabre, *Cosmopolitan War* (Oxford: Oxford University Press, 2012), p. 175 on presumptive consent.

¹² Fabre does not discuss in relation to annexations, paternalistic or not, whether cosmopolitan justice requires a cosmopolitan ethos. However, she does discuss the difference between individualistic and institutionalist approaches to cosmopolitan justice, arguing that in some, e.g., the realm of reconciliation, but not all contexts, e.g., the context of distributive justice, the former approach is the correct one (p. 266; cf. pp. 246, 299; cp. Fabre 2012, pp. 17-18, 28-29). I thank Fabre for reminding me of this.

¹³ This is so even if we take the stern view that citizens of B forfeit their right to the land they live on due to their failure to act as the cosmopolitan ethos dictates.

¹⁴ I thank Cecile Fabre, Jonathan Parry, and Jeremy Williams for excellent written comments.