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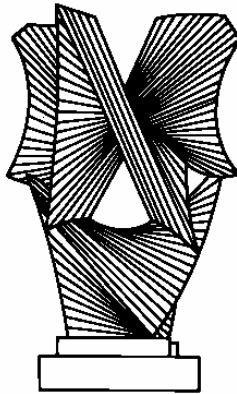
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## HUMAN WELFARE, NOT HUMAN RIGHTS

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## Human Welfare, Not Human Rights

Eric A. Posner<sup>\*</sup>

March 1, 2008

*Abstract.* Human rights treaties play an important role in international relations but they lack a foundation in moral philosophy and doubts have been raised about their effectiveness for constraining states. Drawing on ideas from the literature on economic development, this paper argues that international concern should be focused on human welfare rather than on human rights. A focus on welfare has three advantages. First, the proposition that governments should advance the welfare of their populations enjoys broader international and philosophical support than do the various rights that are incorporated in the human rights treaties. Second, the human rights treaties are both too rigid and too vague—they do not allow governments to adopt reasonable policies that advance welfare at the expense of rights, and they do not set forth rules governing how states may trade off rights. A welfare treaty could provide guidance by supplying a maximand along with verifiable measures of compliance. Third, the human rights regime and international development policy work at cross-purposes. Development policy favors the poorest states, while the human rights regime condemns the states with the worst governments: unfortunately, the poorest states usually have the worst governments. Various possible welfare treaties are surveyed.

### Introduction

The U.S. State Department annually publishes a list of nations that violate human rights.<sup>1</sup> Many NGOs do the same.<sup>2</sup> These lists identify states that torture dissidents, detain people without charging them, suppress religious minorities, and commit other abuses. The reports condemn violators of human rights and urge leading states to pressure human-rights abusers until they bring their conduct in line with international standards. Indeed, the United States imposes certain legal disabilities on human rights-abusing states,<sup>3</sup> and the European Union makes ratification of the European Convention on

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<sup>1</sup> See, e.g., Country Reports on Human Rights Practices for 2006, released by the Bureau of Democracy, Human Rights and Labor (2007), available at <http://www.state.gov/g/drl/rls/hrrpt/2006>.

<sup>2</sup> See, e.g., Human Rights Watch, World Report 2008 (2008); Amnesty Int'l, Amnesty International Report 2007: The State of the World's Human Rights (2007); Freedom House, The Worst of the Worst: The World's Most Repressive Societies 2007 (2007).

<sup>3</sup> See Henry J. Steiner et al., International Human Rights in Context: Law, Politics, Morals 936-37 (3<sup>rd</sup> ed. 2008)

Human Rights a condition of membership.<sup>4</sup> International organizations like the World Bank encourage recipients of aid to improve their human rights records.<sup>5</sup> And by ratifying human rights treaties, even the most powerful states promise to respect the human rights of their populations.

Most states have ratified most of these treaties.<sup>6</sup> The treaties bar genocide, torture, arbitrary detention, and other rights-violating activities.<sup>7</sup> Although the treaties lack an enforcement mechanism, nations appear to take the treaties seriously enough to defend themselves against accusations that they have violated their treaty obligations, both in public statements and before various international and regional bodies that monitor compliance with human rights treaties.

Now consider an alternative world. Suppose that the State Department and the NGOs published annual lists of “low-welfare” states. These are states in which the public suffers from low levels of utility. The reason for the misery of the public could be human rights abuse, of course, but there are many other reasons for misery as well. The state might not supply a sufficiently generous social safety net. Or the state might not enforce property and contract rights, so that individual initiative is discouraged and markets fail. The government might be inept or corrupt, and thus unable to protect people from natural disasters, insurgencies, crime, and the like. States that appear on the low-welfare lists would be subject to public criticism. Powerful states would pressure the governments of low-welfare states to improve the well-being of their populations, at least to the extent that low welfare can be attributed to the government’s unwillingness to provide adequate services. NGOs would join in.

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<sup>4</sup> In narrow circumstances foreign sovereign immunity is not granted to designated state sponsors of terrorism for acts that violate certain human rights. See 28 U.S.C. 1605(a)(7).

<sup>5</sup> See Joe E. Oestreich, *Power and Principle: Human Rights Programming in International Organizations* (2007).

<sup>6</sup> See Emilie M. Hafner-Burton, Kiyoteru Tsutsui, & John W. Meyer, *International Human Rights Law and the Politics of Legitimation: Repressive States and Human Rights Treaties*, 23 *Int’l Soc.* 115, 118 *tbl.* 1 (2008).

<sup>7</sup> See Convention on the Protection of the Rights of All Migrant Workers and Members of the Families, opened for signature Dec. 18, 1990, 30 *I.L.M.* 1517 (entered into force July 1, 2003); Convention on the Rights of the Child, opened for signature Nov. 20, 1989, 1577 *U.N.T.S.* 3 (entered into force Sept. 2, 1990); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 *U.N.T.S.* 85 (entered into force June 26, 1987) [hereinafter Convention against Torture]; Convention on the Elimination of All Forms of Discrimination against Women, opened for signature Dec. 18, 1979, 1249 *U.N.T.S.* 13 (entered into force Sept. 3 1981); International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, S. Exec. Doc. E, 95-2 (1978), 999 *U.N.T.S.* 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, opened for signature Dec. 16 1966, 993 *U.N.T.S.* 3 (entered into force Jan. 3, 1976); International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Dec. 21, 1965, 660 *U.N.T.S.* 195 (entered into force Jan. 4, 1969).

We could also imagine a parallel legal world. The human rights treaties are replaced or supplemented with human welfare treaties. The human welfare treaties oblige states to maintain a certain level of welfare among their citizens, or even to promote or maximize their welfare. The treaties could be more specific, requiring actions that are known to enhance welfare in broad circumstances, such as natural disaster relief. These treaties would overlap with existing human rights treaties to the extent that respect for certain human rights also tends to maximize welfare, but the treaties would give no priority to rights; they would instead recognize that rights would be trumped when they bar government actions that advance welfarist goals.

If the proposal to replace the human rights approach with a welfarist approach seems puzzling, considering the following. First, the proposition that all people enjoy a specified set of human rights—that is, rights grounded in universal moral principles that require governments to aid, protect, and refrain from abusing their own citizens—is highly controversial among philosophers.<sup>8</sup> The absence of a philosophical justification for human rights yields well-known difficulties: that states disagree about which rights are human rights, about which human rights should have priority, about how resources should be allocated for the purpose of correcting human rights violations, and about how much respect should be given to cultural variation. In the absence of a principled basis for human rights, these disputes cannot even in principle be resolved.<sup>9</sup>

Second, if great controversy surrounds the question of rights, most people agree that the well-being of other human beings is a matter of international concern.<sup>10</sup> In contrast to the anemic efforts to enforce human rights treaties, developed states have contributed massive amounts of aid to the poorest nations. Aid to victims of natural disasters is commonplace. Development aid is more controversial but still largely unquestioned. The commitment to aiding people who live in the poorest states is in tension with a human rights regime that envisions isolating the worst governments, because the worst governments usually govern the poorest states.

Third, many of the debates about human rights are implicitly debates about the role of welfare. Developing nations often resist pressure to improve their human rights

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<sup>8</sup> See, e.g., Joseph Raz, *Human Rights Without Foundations* 2–8 (Univ. of Oxford Faculty of Law Legal Studies Research Paper Series, Paper No. 14/2007), available at <http://ssrn.com/abstract=999874>; Jack Donnelly, *The Relative Universality of Human Rights*, 29 *Hum. Rts. Q.* 281, 292–93 (2007).

<sup>9</sup> Compare, e.g., Theo van Boven, *Distinguishing Criteria of Human Rights*, in 1 *The International Dimensions of Human Rights* 43 (Kard Vasak & Philip Alston eds. 1982) (arguing that there is a hierarchy of human rights), and Theodor Meron, *On a Hierarchy of International Human Rights*, 80 *Am. J. Int'l L.* 1, 21 (1986) (disputing this claim).

<sup>10</sup> Most philosophers, even deontologists, believe that states should be concerned with the well-being of their citizens. See, e.g., Shelly Kagan, *Normative Ethics* (1997).

records by asserting collective rights—rights to economic development, for example.<sup>11</sup> Vigorous disagreements about whether human rights are universal or not coexist with a general consensus that governments should enhance well-being by (among other things) reducing poverty and improving education: no one argues that in some countries governments should impoverish their citizens. Indeed, it is possible to believe that international human rights law has nothing to do with human rights in the philosophical sense: it refers instead to the limits on sovereignty imposed by international morality, whether or not international morality has anything to do with rights.<sup>12</sup> If this is correct, then we should directly inquire what international morality requires rather than try to defend or rationalize the existing rights regime.

Finally, recent empirical studies suggest that states that ratify human rights treaties do not improve their human rights performance, or, at least, that improvements are small and sporadic and hard to measure, perhaps limited only to certain types of states—democracies, for example.<sup>13</sup> These studies are controversial, but they raise the question whether a different type of treaty regime would produce better outcomes.

In this paper, I defend a welfarist alternative to international human rights law. Part I briefly surveys the human rights regime and its problems. It argues that the human rights treaties are both excessively rigid and excessively vague. Their rigidity consists in their refusal to allow states to trade off different values—for example, to allow states to

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<sup>11</sup> See Geoffrey York, Citing “Right To Development,” China Rejects Emission Cap, *Globe and Mail*, June 5, 2007, at A1. See also Information Office of the State Council of China, *Progress in China’s Human Rights Cause in 2003* at ch. I (The People’s Rights to Subsistence and Development), available at <http://www.china.org.cn/e-white/20040330/index.htm> (2004). The UN General Assembly declared the existence of a right to development in 1986. See United Nations General Assembly, Declaration on the Right to Development, Resolution 41/128 (1986).

<sup>12</sup> See Raz, *Human Rights*, *supra* note \_\_ at 14.

<sup>13</sup> See Beth Simmons, *Complying with the Law: The Case of International Human Rights Treaties* (2006) (unpublished manuscript, on file with author) (finding some but limited impact); Eric Neumayer, Do International Human Rights Treaties Improve Respect for Human Rights?, 49 *J. of Conflict Resolution* 925, 950–51 (2005) (finding that ratification of human rights treaties improves a state’s respect for human rights if it has a well developed democratic system of governance and a strong civil society); Emilie M. Hafner-Burton & Kiyoteru Tsutsui, Human Rights in a Globalizing World: The Paradox of Empty Promises, 110 *Am. J. of Soc.* 1373, 1395–1402 (2005) (concluding that the ratification of human rights treaties does little to reduce violation of a person’s right to security); Oona A. Hathaway, Do Human Rights Treaties Make a Difference?, 111 *Yale L. J.* 1935, 1998 (2002) (finding no positive statistically significant relationship between treaty ratification and human rights compliance); Linda Camp Keith, The United Nations International Covenant on Civil and Political Rights: Does it Make a Difference in Human Rights Behavior?, 36 *J. of Peace Res.* 95, (1999) (similar). See also Emilie M. Hafner-Burton & James Ron, Can the Human Rights Movement Achieve its Goals? 12–17 (2008) (unpublished manuscript, available at [http://www.princeton.edu/~ehafner/pdfs/achieve\\_goals.pdf](http://www.princeton.edu/~ehafner/pdfs/achieve_goals.pdf)) (reviewing the state of empirical research regarding the impact of human rights treaties on human rights violations).

violate political rights in order to enhance the overall well-being of the population. Their vagueness lies in their failure to provide mechanisms for evaluating a state's allocation of resources among projects that promote the public good. I argue that rather than trying to specify the obligations of government in terms of respecting specific rights, negative and positive, the treaties should require that states enhance the public welfare.

Part II sets out this welfarist alternative, including some ideas about how to implement it effectively with verifiable measures of human well-being. Part III discusses the relationship between the welfarist approach to human rights and foreign aid, arguing that welfarist treaties would help resolve the tension between the human rights regime and development policy.

## I. Diagnosis

### A. The Legal Regime

There are seven major UN-sponsored human rights treaties. These treaties ban torture, racial discrimination, and discrimination against women; and guarantee “civil and political” rights, “economic, social, and cultural” rights, the rights of migrant workers, and the rights of the child.<sup>14</sup> The treaties all enjoy a large measure of support, with participation rates ranging from 70 percent to nearly 100 percent of UN members.<sup>15</sup> The UN has also recently adopted a treaty to guarantee the rights of the disabled. In addition to these treaties, several regional human rights treaties exist. The most important is the European Convention on Human Rights, which has, uniquely, a highly developed judicial system.<sup>16</sup> There are also regional treaties in Africa and the Americas.<sup>17</sup>

Table 1 provides a rough picture of the landscape.

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<sup>14</sup> See supra note \_\_.

<sup>15</sup> See Hafner-Burton, Tsutsui, & Meyer, supra note \_\_, at 118 tbl. 1.

<sup>16</sup> See Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953), as amended by Protocol 11, opened for signature May 11, 1994, Europ. T.S. No. 155 (entered into force Nov. 1, 1998).

<sup>17</sup> See African Charter on Human and Peoples' Rights, adopted June 27, 1981 1520 U.N.T.S 217 (entered into force Oct. 21, 1986); American Convention on Human Rights, opened for signature Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July 18, 1978).

Table 1: Four Major Human Rights Instruments

Right	Civil and Political Rights	Economic, Social, and Cultural Rights	Universal Declaration of Human Rights	European Convention of Human Rights
<b>Negative Rights</b>				
Life	6		3	2
Torture, cruel punishment	7		5	3
Slavery	8		4	4
Liberty/detention	9–11		3, 9	5
Fair trial	14–15		8, 10–11	6–7
Privacy	17		12	8
Freedom of thought, religion, speech	18–19		18, 19	9–10
Association	21–22		20	11
Marriage/family	23		16	12
Political participation	25		21	Protocol 1, Art. 3
Equal protection	2, 26		2, 7	14
<b>Positive Rights</b>				
Work, fair wages		6–7	23	
Unionization		8	23	
Social security		9	22	
Family assistance		10	25	
Adequate standard of living		11	25	
Health care		12	25	
Education		13–14	26	Protocol 1, Art. 2

The two most important and comprehensive of the United Nations treaties are the International Covenant for Civil and Political Rights (column 2) and the International Covenant for Economic, Social, and Cultural Rights (column 3). The ICCPR is a charter of negative rights, while the ICESCR is a charter of positive rights. Negative rights are rights to be free of interference from other people and from the government; in particular, the government is prohibited from restricting the activities of the rights holders, activities like political debate and religious worship. Positive rights are rights to receive benefits from the government; the government is required to provide benefits such as health care or education. Negative rights are associated with the classical liberal tradition of natural law, especially as embodied in the social contract theories of Locke and his successors, including the founders of the United States of America, who were particularly concerned about governmental abuse of power. Positive rights are associated with a range of liberalism's critics, including Marxists. The Universal Declaration, a legally nonbinding document that was adopted by the UN General Assembly in 1948, and predated the ICCPR and ICESCR by several decades, contains both rights, as Table 1 shows. The cold war rivalry between the United States and the Soviet Union resulted in the bifurcated



treaty system—with negative rights contained in the ICCPR, which the United States championed, and positive rights contained in the ICESCR, which the Soviet Union championed.<sup>18</sup>

Today, most countries have ratified both treaties (the United States has not ratified the ICESCR, however). Nonetheless, it is clear that states take negative rights more seriously than the positive rights of the ICESCR. The priority of negative rights takes many forms. As Table 1 shows, the ECHR, which is the only human rights treaty that provides for routine adjudication of its provisions, and appears to enjoy widespread compliance, is mainly a charter of negative rights. Although many national constitutions contain positive rights as well as negative rights, for the most part only negative rights are justiciable.<sup>19</sup> NGOs recognize that they can most effectively draw attention to violations of negative rights; for that reason, the main human rights watchdogs largely ignore violations of economic, social, and cultural rights.<sup>20</sup> Thus, although most developed states do provide benefits to their citizens—health care, education, a social safety net, and so forth—they refuse to place these benefits outside the realm of democratic politics. By contrast, political rights in these states are outside the realm of democratic politics. I will return to this issue in Part I.B.

Scholars have advanced two types of theories that justify or explain the human rights regimes. Moral theories argue that human rights treaties are good; political theories argue that human rights treaties are in the interest of states or most states, or the most powerful states.

Moral theories typically hold that individuals have inherent human rights, derivable from the basic postulate of equal human dignity.<sup>21</sup> These rights are universal, held by all people by virtue of being human. Few philosophers seem willing to defend this position any more, though it is entrenched in the legal materials and rhetoric of human rights. The philosophical literature now focuses on contractarian and welfarist approaches. Contractarians derive human rights from a Rawlsian original position argument where the veil of ignorance deprives people of knowledge of their nationality. Not knowing which nation they would belong to, people in the original position would

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<sup>18</sup> Micheline R. Ishay, *The History of Human Rights 221-29* (2004).

<sup>19</sup> The major exceptions are India and South Africa. See Steiner et al., *supra* note \_\_, at 321-47.

<sup>20</sup> See Kenneth Roth, *Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization*, 26 *Hum. Rts. Q.* 63 (2004).

<sup>21</sup> E.g., Alan Gewirth, *Human Rights: Essays on Justification and Applications* (1982). For a survey of moral theories of human rights, see Allen Buchanan & David Golove, *Philosophy of International Law*, in *Oxford Handbook of Jurisprudence and Philosophy of Law* 808 (Jules Coleman & Scott Shapiro ed. 2002).

choose international institutions that protect the rights of all human beings.<sup>22</sup> Welfarists argue that everyone has moral worth, and that just international institutions would maximize a social welfare function that included the utilities of all people in the world.<sup>23</sup>

It is an understatement to say that these theories are controversial; an enormous literature debates them. It is less well known that none of the proponents of these theories pays much attention to the actual human rights treaty regime. The debate hovers at a theoretical altitude high above the facts on the ground. A few philosophers cite the Universal Declaration, which is a vague, hortatory document with no legal effect. Other philosophers pick and choose among provisions of national constitutions, singling out those provisions that they approve of. The debate is best understood as an argument about whether states should respect some, mostly undefined, set of human rights, not about whether the existing human rights treaty regime is morally justified.

Consider, for example, the work of Martha Nussbaum and Amartya Sen. Nussbaum and Sen argue that states should be required to advance the “capabilities” of their citizens, that is, their ability to enjoy various objective goods such as health, literacy, and political participation. Their approach differs from that of traditional development economists, who believe that states should maximize economic welfare—that is, the satisfaction of subjective preferences as measured by willingness to pay. Yet Nussbaum and Sen are both “welfarists” in the broader sense that they emphasize that states should advance the well-being of people. And both scholars argue that their approach is consistent with the traditional human rights agenda.<sup>24</sup>

Neither scholar, however, addresses the existing human rights regime—that is, the legal regime embodied in treaties such as the ICCPR and the ICESCR. Sen has declined to explain how exactly the capabilities approach would be implemented, arguing that

it is important to emphasize the catholicity that the approach has. The foundational affirmation of the importance of capabilities can go with various strategies of evaluation involving practical compromises. The pragmatic nature of practical reason demands this.<sup>25</sup>

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<sup>22</sup> See, e.g., Charles Beitz, *Political Theory and International Relation* (1979); Thomas Pogge, *Realizing Rawls* (1989).

<sup>23</sup> For a discussion, see Eric A. Posner, *International Law: A Welfarist Approach*, 73 *U. Chi. L. Rev.* 487 (2006).

<sup>24</sup> See Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* 284-91 (2006); Amartya Sen, *Development as Freedom* 226-48 (1999).

<sup>25</sup> *Id.* at 85.

A fair point, but then the question is why Sen would think that the existing human rights regime would be consistent with the capabilities approach. That regime does not embrace catholicity but takes a specific approach to human rights in order to avoid the type of fatal indefiniteness that renders treaties unenforceable.

Nussbaum similarly insists that the “language of capabilities ... gives important precision and supplementation to the language of rights.”<sup>26</sup> She argues that the capabilities approach resembles the human rights approach and concludes that therefore it “should not be seen as a rival of the human rights approach.”<sup>27</sup> From a legal perspective, these claims are puzzling. Either international law will continue to embody the existing human rights approach or it will be modified so as to reflect Nussbaum’s alternative approach. It cannot do both. As I have noted, the existing human rights approach, for all the talk of positive rights, gives priority to negative rights. But as Nussbaum acknowledges,<sup>28</sup> the emphasis on negative rights is inconsistent with the capabilities approach. In addition, the ICESCR, which insists on generous positive rights while allowing states to take their time before satisfying them, and does not provide a mechanism for allocating resources among rights, positive and negative, would be a highly unsatisfactory instrument for implementing the capabilities approach.<sup>29</sup> If a treaty is ambiguous, then states can easily comply with it without appreciably changing their behavior.

Unhappiness with moral theories of human rights has led to the growth of political theories of human rights. Political theories argue that states or groups within states have an interest in agreeing to human rights.<sup>30</sup> The human rights treaty regime rests on an overlapping consensus about the obligations of states with mostly different but not wholly incompatible interests and moral and religious commitments.

The Universal Declaration of Human Rights, created in the wake of World War II, expressed revulsion at the ideology and methods of the Nazis but it did not express a moral consensus beyond the rejection of fascism, as was acknowledged at the time.<sup>31</sup> This became unmistakable in the following years as governments attempted to reduce the ambiguous, hortatory provisions of the Universal Declaration to acceptably specific rules in legally binding treaties. Western states that initiated the treaty regime sought to

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<sup>26</sup> Nussbaum, *Frontiers*, supra note \_\_\_, at 284.

<sup>27</sup> *Id.* at 291.

<sup>28</sup> *Id.*

<sup>29</sup> See infra note \_\_ and accompanying text.

<sup>30</sup> See Jack Donnelly, *The Relative Universality of Human Rights*, 29 *Hum. Rts. Q.* 281, 292–93 (2007); Charles R. Beitz, *Human Rights as a Common Concern*, 95 *Am. Pol. Sci. Rev.* 269, 279–81 (2001) Charles R. Beitz, *What Human Rights Mean*, 132 *Daedalus* 36, 44–46 (2003).

<sup>31</sup> See Ishay, supra note \_\_\_, at 218–24.

publicize their commitment to liberal values, while drawing attention to the rejection of these values by the Soviet Union and its allies. They hoped that these values would appeal to people and governments around the world, who would reject the Soviet model. The eastern bloc championed social, economic, and cultural rights that, it claimed, were vindicated in communist, and not in western, societies.

Developing states have ratified the treaties for more diverse reasons. Some developing states succumbed to pressure from western states that tied aid and other benefits (such as EU membership) to treaty ratification. Other developing states may have ratified the treaties in order to show that they were “modern” or endorsed modernization or because newly empowered elites or other groups were committed to western values.<sup>32</sup> Governments of newly democratic states may have ratified the treaties in an effort to prevent future governments from reversing democratic reforms.<sup>33</sup>

## B. Problems

Why have the human rights treaties had such little effect on states’ human rights practices? Many people have emphasized the lack of enforcement mechanisms in the human rights treaties.<sup>34</sup> However, many successful treaties do not have enforcement mechanisms or have highly limited adjudication and enforcement systems. In the end, all treaties rely for enforcement on the initiative of member states. Although enforcement mechanisms can help improve compliance, the absence of effective enforcement instruments most likely reflects states’ lack of enthusiasm for human rights treaties rather than inadvertence or insufficient foresight. The enforcement-mechanisms theory just raises another question: why don’t states show more enthusiasm for ensuring compliance with the human rights treaties that they have negotiated?

A common answer to this question is that states are jealous of their sovereignty. But this answer is also not persuasive. States agree to all kinds of incursions on their sovereignty in return for the benefits of international cooperation. For example, all states have given up the right to discriminate against aliens on their territory. They have done so in order to obtain a reciprocal benefit—nondiscrimination against their citizens when they are on foreign territory. Why shouldn’t this logic apply to human rights?

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<sup>32</sup> See Donnelly, *Universal Human Rights*, *supra* at 135-38.

<sup>33</sup> See Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 *Int’l Org.* 217, 228 (2000) (arguing that newly established democracies seek to bind themselves to human rights treaties as a way to lock in democratic rule).

<sup>34</sup> See, e.g., Emilie M. Hafner-Burton, *Trading Human Rights: How Preferential Trade Agreements Influence Government Repression*, 59 *Int’l Org.* 593, 603 (2005); Hathaway, *supra* note \_\_, at 2006–07.

A more plausible explanation for the current state of affairs is that the developed nations perceive their interest in ensuring that other nations improve their human rights performance as real but limited. All else equal, developed nations are willing to incur costs to encourage or force other nations to improve human rights practices, but all else is not equal. Developed nations refrain from pressuring human rights abusers when they have strategic, trade, or other interests in maintaining a harmonious relationship. Human-rights abusing governments have no special interest in ending their human rights abuse except in response to carrots and sticks offered by the developed nations. If the carrots are puny and the sticks are flimsy, then these governments will not improve their respect for human rights.<sup>35</sup>

This view is roughly consistent with the political theory of human rights treaties. An overlapping consensus holds that human rights matter. It just turns out that governments are not willing to devote substantial resources to enforcing that consensus.

However, there is another possible view, which is that the human rights treaties do not reflect a political consensus, or that they reflect a consensus that is so shallow as to be practically meaningless. Nor do they reflect fundamental moral values that governments and populations support.

Consider the cases where states argue that their human rights obligations do not, or should not, bind them, because other values are equally important. Typically, states argue that national security or cultural tradition or even economic growth justifies violation of rights (or alternatively argue that the rights are defeasible or limited for these reasons). The currently defunct Asian values debate and the more recent challenge from Islam are versions of this argument.<sup>36</sup> Though these claims are invariably met with skepticism by the human rights community, it is worth understanding why governments make them. They argue that if (“western”) human rights treaties are respected in a given situation, the public will be worse off—thrown into civil war, vulnerable to insurgents, or, alternatively, unable to engage in practices that they value. In short, human rights obligations interfere with welfare-promoting activities of the government, and these welfare-promoting activities should be given priority.

Many commentators have interpreted the Asian-values challenge as a philosophical debate about the universality of human rights. On this view, the critics are

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<sup>35</sup> See, e.g., Ishay, *supra* note \_\_ at 218-24 (describing the cold war priorities of the superpowers, which was to support their client states irrespective of their human rights practices).

<sup>36</sup> See, e.g., Randall Peerenboom, *Beyond Universalism and Relativism: The Evolving Debates about “Values in Asia,”* 14 *Indiana Inter’l & Comp. L. Rev.* 1 (2003) (discussing the Asian values debate); Abdullahi Amed An-Na’im, *Human Rights in the Muslim World,* 3 *Harv. Hum. Rts. J.* 13 (1990) (describing the tension between Shari’a and human rights).

cultural relativists, and one can easily refute them by pointing out the well-known philosophical difficulties with moral relativism and precedents for western-style human rights in Confucianism, Islam, and other non-western traditions.<sup>37</sup> This critique misconceives the challenge, however. The better interpretation of the challenge is that virtually all governments concede that they have a (“universal”) obligation to advance the welfare of their populations, but, given local conditions and traditions, they cannot advance the welfare of their populations if they are constrained by the human rights treaties. The treaties do not allow governments to make the tradeoffs they need to make in order to advance the public interest.

The tendency has been to dismiss such arguments as pretextual or self-serving but they deserve a serious hearing. Nussbaum and Sen, for example, should agree with them in principle. A government with limited resources that seeks to enhance the capabilities of its population might correctly believe that investment in education, health, and infrastructure will do more for more people than an expensive and possibly futile crackdown on local police who detain suspected criminals without charging them. Governance unavoidably involves tradeoffs: money spent for primary education must be taken from health clinics or police forces. Although everyone agrees that governments should spend at least some money on education, some on health clinics, and some on the police, no one agrees how much money the government should allocate among these and other activities. Nor is there any reason to think that, beyond the barest minima, there are any universally proper ways to distribute resources. For a very poor country, a government might justifiably refuse to finance education because health and security needs are so pressing.

This point is not ignored by the human rights treaties but they recognize it only in a highly imperfect way. These treaties do, with several exceptions, give governments discretion to make legitimate tradeoffs. With respect to positive rights, the ICESCR recognizes that states should take steps “to the maximum of its available resources, with a view to achieving progressively the full realization of [those] rights ... by all appropriate means.”<sup>38</sup> This provision implicitly recognizes that states may not have the capacity to satisfy the positive rights immediately, as the UN Economic, Social, and Cultural Rights Committee has held.<sup>39</sup> Commentators agree that it is difficult to complain about states’ budgetary priorities, given the difficulty for outsiders of evaluating the competing

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<sup>37</sup> See Donnelly, *Universal Human Rights*, supra at 118-23.

<sup>38</sup> ICESCR, Art. 2(1).

<sup>39</sup> Committee on Economic, Social, and Cultural Rights, General Comment No. 3, UN Doc. E./1991/23, Annex III (1990).

demands on the government.<sup>40</sup> With respect to negative rights, the ICCPR frequently acknowledges “limitations,” which permit the rights to be balanced against other considerations. For example, the right to freedom of expression may be restricted “for the protection of national security or of public order . . . , or of public health or morals.”<sup>41</sup> In addition, the ICCPR allows states to derogate from certain rights “in time of public emergency which threatens the life of the nation.”<sup>42</sup> Other human rights treaties have similar provisions.

However, the treaties provide no way of evaluating the tradeoffs that governments actually make. Suppose that in two otherwise identical states, one government devotes \$10 million to retraining the police so as to reduce the amount of torture. Suppose further that this amount of training would cause the total number of torture incidents per year to fall from 10,000 to 5,000. Meanwhile, another government devotes \$1 million to retraining the police, and the amount of torture falls from 10,000 to 9,000 incidents per year. If the government’s budget is \$50 billion per year, do either or both governments violate the ICCPR? What if the government that spends only \$1 million per year uses the money saved to build health clinics in poor rural areas, whereas the government that spends \$10 million per year devotes much of its budget on lavish spending for the ruling class? Are these relevant considerations in evaluating the states’ overall compliance with the human rights treaties?

It is possible that a state might cite its positive-right obligation to supply health care under the ICESCR as a justification for its failure to fully respect the negative-right obligation not to torture under the ICCPR. However, the treaties themselves do not permit such an argument. The ban on torture is unqualified, and although the amount of resources that states must devote to implement the ban is unspecified, any argument that a state does better by devoting resources to health care than to eliminating torture would be met with skepticism by the human rights community. If such an argument were accepted, the treaty regime would be excessively vague: it would permit states to violate human rights under the cover of pretext.

The human rights treaties thus commit two types of errors. First, in some places they do not permit governments that seek in good faith to advance the general welfare of the public to make reasonable tradeoffs—devoting resources to acute problems and denying resources to problems that, in local context, are less pressing. Second, in other

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<sup>40</sup> See, e.g., Varun Gauri, *Social Rights and Economics: Claims To Health Care and Education in Developing Countries*, in *Human Rights and Development: Towards Mutual Reinforcement* 65 (Philip Alston & Mary Robinson eds. 2005).

<sup>41</sup> ICCPR, Art. 19(3)(b).

<sup>42</sup> ICCPR, Art. 4(1).

places they allow tradeoffs without supplying a mechanism for evaluating those tradeoffs. The treaty regime manages to sail both into the Scylla of excessive strictness and the Charybdis of excessive vagueness.

### C. An International Welfare Fund

One can better understand the problems with the current regime, and obtain an idea about how to reform it, by undertaking the following thought experiment.

Suppose that the populations of nations care, at least a little, about the well-being of people living in other countries. We can think of the degree or intensity of care in monetary terms as the amount that individuals would be willing to pay in taxes for the benefit of foreigners. No doubt this amount is much higher in wealthy nations than in poorer nations simply because wealthy people have more money to spare, but for the sake of simplicity we will imagine that each state, or many or most states, would contribute some amount,  $M$ , to a common fund that would be used to help those in the most need of aid. This fund is an analytic construct only; nothing I will say depends on the establishment of an actual fund.  $M$  can be thought of as the monetized value of in-kind contributions such as military support for an unstable government or for rebels who seek to overthrow that government; diplomatic pressure; sanctions; traditional aid; trade benefits; immigration privileges; and so forth.

Three straightforward but important points can be made about the fund. First, the contributions are likely to be higher, the more that the fund is used effectively for ends that people with diverse views and from different nations approve of. The more overlapping the consensus is, the more that can be done.

Second, the fund itself is best used in a manner that is coordinated, or internally consistent, for otherwise resources will be wasted.<sup>43</sup> For example, suppose that some people think that a government of a poor state should build hydroelectric dams in order to ensure a supply of electricity, while other people think that the government should not build such dams because they damage the environment, harm the fishing industry, and reduce tourism revenues. It would be a great mistake if money in the fund both financed the dam and financed local NGOs which oppose the dam. It would be much better to use the money for some other purpose that everyone agrees to.

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<sup>43</sup> This is a truism in the aid literature. See, e.g., Arbab Acharya, Ana Fuzzo de Lima, & Mick Moore, *Aid Proliferation: How Responsible Are the Donors?* (IDS Working Paper 214, 2004) (pointing out the costs to donee countries from dealing with multiple donors); Stephen Knack & Aminur Rahman, *Donor Fragmentation and Bureaucratic Quality in Aid Recipients* (World Bank Working Paper No. 3286, 2004) (providing empirical evidence); Simeon Djankov, Jose G. Montalvo, & Marta Reynal-Querol, *Aid with Multiple Personalities* (Universitat Pompeu Fabra Working Paper, 2005) (providing empirical evidence).



Third, the fund should be used to pressure states that are most likely to be vulnerable to pressure. Such states are typically poor and weak. Pressuring China, Russia, Canada, or the United States is likely to be futile, or, in any event, less effective for enhancing global welfare than pressuring Sudan or Zimbabwe.

The defects of the human rights regime can be redescribed with the help of the fund heuristic. States that seek in good faith to spend the fund in a manner suggested by the human rights treaties would withhold resources from reasonable governments that, faced with difficult choices, decide to reduce poverty rather than tackle negative rights violations committed by the police or military. At the same time, they would have no guidance as to how to treat states that allocate resources among health care, poverty relief, education, and other goods in wise or unwise ways. Hampered by the absence of a set of guiding principles, states would predictably respond inconsistently. Is there a better way?

## II. The Welfarist Treaty

### A. The General Approach

The challenge, then, is to construct a treaty regime that specifies how resources—defined broadly to include aid, military intervention, diplomatic pressure, sanctions, and the like—should be used for altruistic purposes.

A welfarist treaty would obligate states to promote the well-being of the global population. Given the constraints of the state system, which drives governments to give priority to their own populations and not to foreign populations, a viable welfarist treaty would not obligate states to equalize the wealth of individuals across borders—indeed, even the most egalitarian states do not go this far for their own populations. Instead, a welfare treaty might establish welfare floors or some other system of priority that identified the lowest-welfare states. These states would have a legal obligation to raise the welfare of their populations, or to try to do so, and other states would have the obligation to pressure or help low-welfare states to live up to their welfarist obligations.

As a practical matter, the effect of this treaty would be to divide the world into high-welfare states that comply with the law and low-welfare states that do not. The high-welfare states would pressure the low-welfare states to adopt better policies or reward them for doing so. Technically, the current human rights regime does not make such a clear demarcation between human-rights respecters and human-rights abusers. Human-rights respecters violate human rights treaties if they occasionally deviate from the law, whereas high-welfare states would violate the welfarist treaty only if they adopted disastrous policies. However, the pressure brought to bear on traditional human-rights

respecters who occasionally deviate is small, and so the differences between the two systems in this respect would be minimal. The advantage of the welfarist approach is that it would bring the legal regime into line with practice, as well as with the pragmatic assumption that scarce international resources should be used against the worst states, not states that are generally good or marginally bad.

Consider two examples of how the welfarist approach would change our thinking about the responsibilities of states for abuses that occur on their soil.

First, consider China. The Chinese government violates human rights. It suppresses political dissent, censors the press, deprives people of fair trials, and harasses religious minorities. Yet this authoritarian government is also responsible for the greatest enhancement of human welfare in recent history. Since 1978 hundreds of millions of Chinese moved from extreme poverty to a reasonably comfortable existence. As long as the Chinese government continues to improve the well-being of so many people, states that care about welfare should refrain from pressuring China to improve its human rights record. With respect to all the welfare indicators to be discussed shortly, China scores well.

Second, consider the current international controversy over the death penalty. Many countries have abolished the death penalty and criticize the United States for retaining it. Human rights organization also pressure the United States to abolish the death penalty. In terms of the analytic framework advanced by this paper, a portion of the common fund devoted to improving human rights practices is being channeled toward American death penalty abolition. Is this a good use of these resources?

The answer is no. First, capital punishment in the United States results in only a few dozen deaths per year—53 in 2006, down from a high of 98 in 1999 (over the last 30 years).<sup>44</sup> These executions might deter other killings, but even assuming that they do not,<sup>45</sup> the loss of life is trivial compared to the scale of other humanitarian catastrophes occurring around the world. For example, in Darfur there have been tens of thousands deaths per year.<sup>46</sup> Resources would be better used, at the margin, to set up refugee camps

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<sup>44</sup> See Death Penalty Information Center, Executions Per Year (2007), available at <http://www.deathpenaltyinfo.org/article.php?scid=8&did=146>.

<sup>45</sup> The evidence of deterrence is weak. See John Donohue and Justin Wolfers, Uses and Abuses of Empirical Evidence in the Death Penalty Debate, 48 Stanford L. Rev. 791 (2005).

<sup>46</sup> Estimates vary widely; the one authoritative study estimates 70,000 deaths over an eight month period in 2004. See World Health Organization (WHO) Media Centre, Mortality projections for Darfur, presented by David Nabarro (2004), available at [www.who.int/mediacentre/news/briefings/2004/mb5/en/](http://www.who.int/mediacentre/news/briefings/2004/mb5/en/). See also John Hagan & Alberto Palloni, Death in Darfur, 313 Science 1578 (2006) (estimating between 170,000 and 255,000 deaths occurred in Darfur over the thirty-one months of conflict up until August 2006).

and provide humanitarian relief in Darfur, than to pressure the United States to abolish the death penalty.

Second, the United States appears to be impervious to pressure from foreign countries to abolish the death penalty. Most executions are carried out by state governments, which play virtually no role in American foreign relations, and have a great deal of constitutional discretion over their criminal justice systems. One state—Texas—executed 24 people in 2006, nearly five times the number in the state with the next most executions.<sup>47</sup> Texas and other states can cater to xenophobic sentiments of their citizens without worrying about the foreign relations consequences. Resources used to pressure state governments to cut back on the death penalty, or to pressure the federal government to pressure the state governments, are thus unlikely to have any effect. By contrast, resources used to pressure smaller, weaker countries where significant human rights abuses occur are more likely to have an effect.

Human rights treaties do not distinguish between the United States and Sudan.<sup>48</sup> Both states have an obligation to comply with human rights norms. Because the treaties do not provide a formula for limiting or balancing human rights, they give no guidance to interested states as to how to allocate resources in a manner that maximizes their effect. As a result, human rights enforcement is largely ad hoc. By contrast, a welfarist treaty directs states to focus on particular states, those with the lowest level of welfare: Sudan, not the United States.

One might argue that a sufficiently specific welfarist treaty would not command universal assent because different societies have different notions of the good life. Of course, the same argument has been made about human rights, and, as I have argued, the problem seems to be more significant for human rights than for welfare. The welfarist approach, however, has an advantage over the human rights approach. If welfare can be specified at a high enough level of generality, then states are free to choose whatever mechanisms they believe will best promote welfare. Such mechanisms can draw on local traditions and practices that are at variance with human rights norms—as long as the government can make the case that they improve rather than diminish welfare.

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<sup>47</sup> See Death Penalty Information Center, *supra* note \_\_\_, available at <http://www.deathpenaltyinfo.org/FactSheet.pdf>.

<sup>48</sup> However, developing states have argued that compliance with human rights treaties should be judged in light of “capacities,” an argument reflected in, for example, the General Assembly resolution that created the Human Rights Council. See UN General Assembly, Resolution 60/251, para. 5(e) (2006).

## B. Approaches

### 1. Desiderata

The goal is to encourage states to pressure governments to improve well-being. This goal can be implemented in many ways. Here, I describe three desiderata.

*Government responsiveness to pressure.* States should put pressure—diplomatic, economic, military (in the extreme)—on other states that fail to adopt welfarist policies. States should *not* punish states that have miserable populations when their misery cannot be attributed to government policy. However, in practice it may be difficult to determine whether the population’s misery is due to government misconduct or to circumstances that are outside the government’s control. To the extent that governments can be responsive to pressure in general, then a “strict liability” approach is superior, one that looks only at the conditions of the population and not at the activities of the government. To the extent that governments cannot respond to pressure, then an approach that focuses on government behavior and motivations is more appropriate.

To capture this point, let us distinguish between responsive governments and nonresponsive governments. Aid should flow to nonresponsive governments as long as a large enough portion reaches the population. For responsive governments, low-welfare states should be pressured and marginally higher-welfare states should be rewarded. The reason is that the governments of low-welfare states must be given incentives to adopt welfare-promoting policies when officials, for personal or political reasons, or out of incompetence, are otherwise inclined. If governments know that they will receive aid (or avoid pressure) regardless of whether they adopt welfare-promoting policies, then they have no incentive to adopt such policies.

If this point seems paradoxical, one should understand that it is not special to the welfarist regime; it applies to the human rights regime as well. Governments pressure the worst human-rights abusers by depriving them of aid, imposing economic sanctions, and occasionally invading them—in all of these ways usually making the population worse off rather than better off, because human-rights abusing governments make sure that their populations feel the sting. As human rights improve, governments reward the country in question by extending aid, entering trade agreements, and so forth. Thus, the governments that engage in less human rights abuse, and whose populations are therefore better off from a human rights perspective, are rewarded.<sup>49</sup>

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<sup>49</sup> For empirical evidence, see Hafner-Burton, *supra* note \_\_, at 606 (members of preferential trade agreements that require compliance with human rights norms are expelled if they violate those norms).

*Precision.* It is sometimes argued that treaties with precise obligations are easier to enforce than treaties with vague obligations.<sup>50</sup> If obligations are vague, then governments can easily rationalize violations. Moreover, if governments that are injured by violations have trouble agreeing among themselves as to whether the violations actually occurred, whether they were serious, and so forth, they will be unable to respond with a united front. The goal of a welfarist treaty is to promote welfare. Welfare is a contested concept. Thus, a treaty that simply required states to promote the welfare of their citizens would be vague, and hence vulnerable to opportunistic breach. For this reason, it may be appropriate to choose more precise treaty obligations even though they do not fully capture whatever is meant by welfare.

*Availability of data.* A workable treaty regime requires behavior that is verifiable.<sup>51</sup> States do not enter arms control agreements unless they can verify that the other side is not producing the restricted arms. Many human rights treaties require government behavior that is relatively easy to observe, at least in open societies. If torture occurs, witnesses and victims can come forward with testimony and evidence. A welfarist treaty suffers by comparison: welfare is not directly observable. For a welfarist treaty to function, reliable proxies for welfare must be developed.

## 2. Welfare

A very simple treaty could provide as follows: “Each state party has the obligation to promote the welfare of its people.” Two objections can be made. First, no one can agree on what “welfare” means, and therefore the obligation would be empty. Second, it is impossible to tell whether a state has satisfied its obligation because promoting welfare would be an affirmative duty, and could not be discharged simply (as in the case of negative duties) by refraining from engaging in a particular act.

As to the first objection, a large philosophical literature on welfarism suggests that welfare can be understood in three general ways. *Mental state* theorists, like Bentham, argue that welfare refers to hedonic affect—the felt experience of being happy, satisfied, well-off, etc. For a long time, people argued that hedonic affect cannot be measured, but recent advances in psychology and economics suggest otherwise.<sup>52</sup> *Desire-based* theorists argue that welfare refers to the satisfaction of desires. Within this group, there is disagreement about whether satisfaction of desires improves welfare regardless of

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<sup>50</sup> See, e.g., Abram Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995).

<sup>51</sup> *Id.*

<sup>52</sup> See, e.g., *Well Being: The Foundations of Hedonic Psychology* (Daniel Kahneman, Ed Diener, & Norbert Schwarz, eds. 2003).

what those desires are (a view taken by most economists) or only if those desires meet further criteria—for example, being well-informed and undistorted by circumstances.<sup>53</sup> *Objective-list* theorists, like Martha Nussbaum, argue that welfare refers to the enjoyment of certain objective goods, such as health, education, personal relationships, and recreation.<sup>54</sup> Here, too, a great deal of disagreement exists about which activities count as objective goods.<sup>55</sup>

Despite the disagreement between and within the camps, a consensus about, at least, the minimum requirements of welfare probably exists. Nearly everyone agrees that basic health care advances welfare—because healthier people are happier, or because people desire good health, or because health is an objective good. The various approaches tend to come into conflict over more esoteric questions—for example, whether people who overeat and become obese should be counted as better off (they satisfy desires) or worse off (they do not satisfy informed desires, or they are not happy).

The second objection has been much discussed in the context of ordinary human rights treaties. Delicate judgments must be made as to how far a state must go in order to satisfy positive rights such as the right to work, which is contained in the ICESCR. Indeed, it is doubtful that the distinction between positive and negative rights has practical importance.<sup>56</sup> Consider the negative right not to be tortured. No state can reduce the incidence of torture to zero. Local police or soldiers will always contain rogue elements who torture even when torture is not official policy. To reduce the amount of torture, a government must not only pass laws against torture. It must instruct lower-level officials not to engage in torture, train them, monitor them, and make available resources to investigate, prosecute, and punish those who violate the law. Torture will always occur, so the relevant question is how much a government must invest in reducing torture before it can be deemed to comply with a rule against torture. The inquiry is no easier than the positive-right inquiry regarding how much a government must invest in promoting literacy before it complies with a right to education. Seen in this way, the distinction between negative rights and positive rights collapses.

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<sup>53</sup> For a discussion, see James Griffin, *Well-Being* (1986).

<sup>54</sup> See Martha C. Nussbaum, *Women and Human Development: The Capabilities Approach* 78–80 (2000); see also Sen, *supra*.

<sup>55</sup> For a discussion of the various camps, see Matthew D. Adler & Eric A. Posner, *New Foundations of Cost-Benefit Analysis* 28–39 (2006).

<sup>56</sup> See Cass R. Sunstein, *Designing Democracy: What Constitutions Do* 222 (2001) (arguing that the distinction between negative and positive rights cannot be sustained); Stephen Holmes & Cass R. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (1999) (pointing out that all rights, negative and positive, depend on government action for their vindication).

Nonetheless, the first objection is hard to quarrel with. No one, analogously, thinks that it would be better to have a single human rights treaty that required states to respect “human rights” than to have more complex treaties that spell out, with some detail, the various obligations, in terms of detention, speech, freedom of conscience, and so forth. For this reason, I will move on to more detailed welfare treaties.

### 3. Gross Domestic Product

I start with per capita GDP. Although per capita GDP is not a plausible measure of welfare, it is frequently used as a measure of well-being in academic research, and so it provides a useful baseline for thinking about welfarist measures. Table 2 lists the bottom 40 states by per capita GDP, plus that of the United States.

Table 2: Per Capita GDP<sup>57</sup>

Country Name	Per capita GDP
Liberia	366
Democratic Republic of the Congo	446
Eritrea	564
Cambodia	616
Afghanistan	626
Sierra Leone	630
Guinea-Bissau	639
Ethiopia	704
Somalia	731
Burundi	787
Madagascar	833
Togo	845
Niger	883
Central African Republic	952
Malawi	973
United Republic of Tanzania	991
Gambia	1000
Bhutan	1001
Chad	1037
Zambia	1065
Uganda	1183
Yemen	1185
Mali	1238
Burkina Faso	1240
Sudan	1254
Rwanda	1278
Kenya	1295

<sup>57</sup> See Alan Heston, Robert Summers, & Bettina Aten, Penn World Table Version 6.2, Center for International Comparisons of Production, Income and Prices at the University of Pennsylvania (2006). As of 2003, using purchasing power parity converted units.

Nigeria	1295
Iraq	1314
Benin	1374
Sao Tome and Principe	1471
Lao People's Democratic Republic	1512
Kiribati	1525
Democratic People's Republic of Korea	1527
Nepal	1537
Comoros	1629
Mongolia	1643
Republic of Congo	1680
Mauritania	1688
United States	37,313

Treaty designers would need to make some complex choices about how a welfarist treaty would use the per capita GDP measure. It would make little sense to require that all states achieve a certain per capita GDP, such as the world median. Very poor states would have no chance to comply with the treaty. Either the median would shift over time, condemning half the states to treaty violation, or the target would need to be fixed with reference to a particular year. Both approaches seem arbitrary. A possible alternative would require states to hit certain targets that take into account their starting point—for example, a moving average growth rate for per capita GDP over a period of years. States would have an obligation to improve welfare rather than to reach a certain level of welfare. States that comply with the treaty would eventually become wealthy enough that they could be released from further growth obligations unless per capita GDP again dips to an unacceptably low level. Further, by setting the target as an average over a period of years, one avoids penalizing states that are hit by random shocks such as economic downturns. States would be free to choose among methods that promote economic growth, which allow them to take into account local conditions. Some states might find it easy to reduce trade barriers; others might prefer to invest in infrastructure or to strengthen property rights.

Per capita GDP has some normative appeal and practical advantages. For the desire-based theorist who relies on raw preferences (the conventional economist's view), per capita GDP provides a rough measure of welfare. Higher per capita GDP means that more goods and services are being consumed; because people want goods and services, an increase in consumption of goods and services would seem to indicate an increase in welfare. A desire-based theorist who gives moral weight only to informed or otherwise restricted preferences would be more uneasy about per capita GDP but might be satisfied with this measure as long as laws ensure that people are sufficiently informed. Consumer protection laws, for example, might serve this function. Similarly, hedonic and objective-goods theorists might think that per capita GDP is a rough proxy for welfare as long as



people spend their money on improving their happiness (in the first case) or on objective goods (in the second). Again, laws can channel people's behavior in these directions. An important qualification of this argument is that if marginal utility declines with wealth, overall welfare will be higher in states with greater equality of income and wealth. For per capita GDP to be an accurate measure of welfare, it should probably be adjusted using a conventional measure of equality such as the Gini coefficient.

The main advantage of the per capita GDP measure is that data are readily available for most countries, which allow for easy comparison and ranking. On the other hand, uncertainty would be introduced for countries with large underground economies, which would need to be estimated. In addition, measuring equality is difficult; the Gini coefficient is only one of many possible measures; and even if it is accepted, there remains the question how much weight would be given to it. Thus, per capita GDP turns out to be unacceptably crude or must be supplemented with data that are extremely hard to find and measure.

Another objection to the use of per capita GDP is that it would make poor states the exclusive target of international pressure, which would be unfair. But if poor states are poor because of corrupt or incompetent governments, then such pressure is justified as a way of encouraging reform. Indeed, the same thing could be said about the international human rights regime, which, in practice, focuses on poor states because poor states are usually the worst human rights violators. Human rights campaigners frequently argue that foreign aid should be withheld from human-rights abusing states; as a practical matter, this would mean withholding foreign aid from very poor states that need it most. Further, the welfarist treaty would not require states to pressure poor states whose governments lack capacity to change. In such cases, a welfarist treaty would require aid, rather than pressure, as long as aid is likely to improve the well-being of the population in question.

#### 4. Happiness Measures

A second approach to drafting a welfarist treaty would exploit recent social science research on the measurement of subjective well-being. Economists and psychologists have discovered that people answer happiness surveys in a consistent manner that satisfies tests of external validity. A group of scholars argues that the results of these surveys provide a useful measure of subjective happiness.<sup>58</sup> A typical survey question asks the respondent how happy she is on a scale from 1 to 5 or 1 to 10. A random sample of the population of a country can be given the survey, and the average response provides a rough measure of the welfare level of the country as a whole. Table 3

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<sup>58</sup> See the essays in *Well Being*, supra note \_\_\_\_.

lists the bottom 40 countries. Note that most of the countries in Table 2, above, are omitted because of the absence of data, not because they are necessarily happy places; we do not know how they would rank if surveys had been conducted in those countries.

Table 3: Life Satisfaction<sup>59</sup>

Country	Satisfaction with Life	Year of survey
Tanzania	3.87	2001
Zimbabwe	3.94	2001
Armenia	4.32	1997
Bulgaria	4.41	2003
Ukraine	4.56	1999
Moldova	4.57	2000
Georgia	4.68	1996
Belarus	4.81	2000
Pakistan	4.86	2001
Russia	4.88	1999
Macedonia	5.12	2001
Iraq	5.23	2004
Egypt	5.36	2000
Azerbaijan	5.39	1996
Lithuania	5.41	2003
Latvia	5.54	2003
Turkey	5.59	2003
Serbia and Montenegro	5.62	2001
Uganda	5.62	2001
Jordan	5.65	2001
Algeria	5.67	2002
Slovakia	5.67	2003
Romania	5.75	2005
Bangladesh	5.77	2002
Bosnia and Herzegovina	5.77	2001
South Africa	5.81	2001
Estonia	5.85	2003
Hungary	5.94	2003
Portugal	5.97	2003
Morocco	6.05	2001
Poland	6.17	2003
Republic of Korea	6.21	2001
Iran	6.38	2000
Peru	6.44	2001
Croatia	6.46	1999
Japan	6.48	2000
Kyrgyzstan	6.48	2003
Czech Republic	6.49	2003
Vietnam	6.52	2001

<sup>59</sup> Source: [http://www1.eur.nl/fsw/happiness/hap\\_nat/nat\\_fp.htm](http://www1.eur.nl/fsw/happiness/hap_nat/nat_fp.htm). Happiness Surveys using Item Type: 122D / 10-step numeral Life Satisfaction. The survey question was: All things considered, how satisfied are you with your life as a whole now? 1- dissatisfied and 10 – satisfied.

The mean score was 6.5; Colombia enjoyed the highest score (8.2). The United States had a score of 7.6.

As a generalization, happier countries tend to be wealthier, but exceptions abound. Nigeria (6.87), for example, is very poor but has an average happiness greater than that of Greece (6.78), Poland (6.17), and Portugal (5.97)—all relatively wealthy countries. Uganda (5.62) is happier than Ukraine (4.56), Russia (4.88), and Turkey (5.59), which are middle-income countries. Thus, Uganda and Nigeria would probably be in compliance with a welfarist treaty that used happiness measures but not a welfarist treaty that used per capita GDP, while the opposite could be true for Ukraine and Russia. Tanzania is unhappy and poor, and would be in violation of either type of welfarist treaty. The United States, wealthy and happy, would violate neither type of treaty.

A happiness treaty, like a per capita GDP treaty, would need to have targets. States that have happiness levels above a certain level would be in compliance with the treaty; other states would be required to achieve a designated growth rate over a period of years.

Happiness studies are controversial and raise numerous questions. Some critics argue that self-reported happiness is not the same as real happiness; people's survey responses might reflect cultural norms rather than subjective well-being. There is also a great deal of controversy about the moral status of happiness or life satisfaction.<sup>60</sup> Still, the happiness measure has advantages. For the mental state theorist, happiness measures surely approximate welfare better than per capita GDP does. Even the desire-based theorist might endorse the happiness measure, especially if she fears that per capita GDP reflects distorted rather than restricted or ideal preferences. Although people with informed desires might prefer other things besides happiness, the happiness measure might be a sufficient approximation of desire-based welfare. For the objective-list theorist, the value of the happiness measure depends on whether people who enjoy objective goods tend to be happier than other people. If they do, a happiness measure might suffice; if not, it will not. The evidence suggests that happiness is correlated with many items on standard objective lists, including health, education, and life expectancy.<sup>61</sup>

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<sup>60</sup> See Matthew D. Adler & Eric A. Posner, *Happiness Research and Cost-Benefit Analysis*, *J. Legal Stud.* (forthcoming 2008), for a discussion.

<sup>61</sup> See Bruno S. Frey & Alois Stutzer, *Happiness and Economics* 24-44 (2002).

## 5. Objective Social Ills

Martha Nussbaum lists the following objective goods: life; bodily health; bodily integrity; senses, imagination, and thought; emotions; practical reason; affiliation (including the goods of both friendship and self-respect); play; other species; and control over one’s environment (including both political rights and property rights).<sup>62</sup> Others have provided similar lists.<sup>63</sup> For our purposes, the most significant challenge posed by such lists is that of converting them into standards against which a state’s activities can be measured.<sup>64</sup>

This challenge has two elements. First, each objective good must be converted into a scale. In some cases, this is not difficult. “Life” becomes mortality or life expectancy; “bodily health” can be captured with measures of morbidity or health care expenses. “Play” poses more difficult challenges, but could conceivably be approximated with measures of leisure time. Second, the goods need to be placed on a single metric. Otherwise, we have no way to compare a state that scores well on life expectancy and poorly on control over one’s environment and a state that scores poorly on life expectancy and well on control over one’s environment.

Various scholars and organizations have made progress with both these problems. Development agencies gather cross-country statistics on longevity, infant mortality, health, education, and other variables related to objective goods. Table 4 lists some of these development indicators for the 40 poorest countries, 10 middle-income countries, and 10 rich countries.

Table 4: Objective Indicators<sup>65</sup>

Country	GDP per capita	Human Development Index	Life Expectancy at Birth	Infant Mortality Rate	Adult Literacy Rate (% ages >14)	Net Primary Enrollment Ratio	Health Expenditure Per Capita (PPP US \$)
Liberia	366					66	

<sup>62</sup> See Martha C. Nussbaum, *Women and Human Development: The Capabilities Approach* 78–80 (2000).

<sup>63</sup> See, e.g., the WHO’s quality of life index; for a discussion see Matthew D. Adler, *Welfare Polls: A Synthesis*, 81 N.Y.U L. Rev. 1875, 1961–63 (2006).

<sup>64</sup> What follows is an extremely rough sketch. For much more sophisticated work in this vein, see Sabina Alkire, *Valuing Freedoms: Sen’s Capability Approach and Poverty Reduction* (2002). There is now a large literature on social indicators with its own journal entitled *Social Indicators Research*. For a recent critical survey, see Amal Kanti Ray, *Measurement of Social Development: An International Comparison*, 86 *Soc. Indicators Res.* 1 (2001).

<sup>65</sup> Source: United Nations Dev. Programme, *Human Development Report 2006: Beyond Scarcity: Power, Poverty, and the Global Water Crisis*, available at <http://hdr.undp.org/en/reports/global/hdr2006/>. All data are from 2004 except Health Expenditure Per Capita (2003). Blank cells where data were not collected by the cited sources.

Congo	446	0.391	43.5	129	67.2		14
Eritrea	564	0.454	54.3	52		48	50
Cambodia	616	0.583	56.5	97	73.6	98	188
Afghanistan	626				28.1		
Sierra Leone	630	0.335	41	165	35.1		34
Guinea-Bissau	639	0.349	44.8	126		45	45
Ethiopia	704	0.371	47.8	110		46	20
Somalia	731						
Burundi	787	0.384	44	114	59.3	57	15
Madagascar	833	0.509	55.6	76	70.7	89	24
Togo	845	0.495	54.5	78	53.2	79	62
Niger	883	0.311	44.6	152	28.7	39	30
Central African Rep.	952	0.353	39.1	115	48.6		47
Malawi	973	0.4	39.8	110	64.1	95	46
Tanzania	991	0.43	45.9	78	69.4	86	29
Gambia	1000	0.479	56.1	89		75	96
Bhutan	1001	0.538	63.4	67	47		59
Chad	1037	0.368	43.7	117	25.7	57	51
Zambia	1065	0.407	37.7	102	68	80	51
Uganda	1183	0.502	48.4	80	66.8		75
Yemen	1185	0.492	61.1	82		75	89
Mali	1238	0.338	48.1	121	19	46	39
Burkina Faso	1240	0.342	47.9	97	21.8	40	68
Sudan	1254	0.516	56.5	63	60.9	43	54
Rwanda	1278	0.45	44.2	118	64.9	73	32
Kenya	1295	0.491	47.5	79	73.6	76	65
Nigeria	1295	0.448	43.4	101		60	51
Iraq	1314				74.1	88	
Benin	1374	0.428	54.3	90	34.7	83	36
Sao Tome and Principe	1471	0.607	63.2	75	83.1	98	93
Laos	1512	0.553	55.1	65	68.7	84	25
Kiribati	1525					97	
North Korea	1527						
Nepal	1537	0.527	62.1	59	48.6	78	64
Comoros	1629	0.556	63.7	52		55	25
Mongolia	1643	0.691	64.5	41	97.8	84	140
Congo, Republic of	1680	0.52	52.3	81			23
Mauritania	1686	0.486	53.1	78	51.2	74	59
Mozambique	1700	0.39	41.6	104		71	45
<b> </b>							
Croatia	10,613	0.846	75.2	6	98.1	87	838
Argentina	11,438	0.863	74.6	16	97.2	99	1067
Slovakia	11,549	0.856	74.3	6	100		777
Latvia	11,739	0.845	71.8	10	99.7		678
Lithuania	12,085	0.857	72.5	8	99.6	89	754
Russia	12,218	0.797	65.2	17	99.4	91	551

Seychelles	12,641	0.842	72.7	12	91.8	96	599
Chile	13,263	0.859	78.1	8	95.7		707
Malaysia	13,318	0.805	73.4	10	88.7	93	374
Belarus	13,606	0.794	68.2	9	99.6	90	570
Netherlands	28,256	0.947	78.5	5		99	2987
Ireland	29,398	0.956	77.9	5		96	2496
Austria	29,722	0.944	79.2	5			2306
Canada	29,776	0.95	80.2	5		99	2989
Denmark	29,935	0.943	77.3	4		100	2762
Australia	30,591	0.957	80.5	5		96	2874
Switzerland	31,298	0.947	80.7	5		94	3776
United Arab Emirates	33,363	0.839	78.3	7		71	623
Norway	34,528	0.965	79.6	4		99	3809
USA	37,313	0.948	77.5	7		92	5711

Life expectancy, infant mortality, literacy, enrollment, and health expenditure per capita are all reasonable measures of life, health, practical reason, and other objective goods. But none can serve on its own as a measure of objective well-being, and thus an aggregative index would need to be developed. The Human Development Index (column 1) is a weighted average of per capita GDP, life expectancy, and enrollment in primary, secondary, and tertiary schools.<sup>66</sup> Some poor states, such as Cambodia and Madagascar, have higher scores for objective indicators than wealthier states, such as Benin and Mauritania—and so Cambodia and Madagascar could be in compliance with an objective-list welfarist treaty that Benin and Mauritania would violate.

Other combinations and weightings can be imagined, which leads to the fear that any such index would be arbitrary.<sup>67</sup> However, there is a great deal of consistency across categories of objective indicators, which creates hope that a reasonable index can be identified. It would then be necessary to establish a treaty obligation in terms of a state's location on the index or its progress toward a higher level. As I have discussed this point in connection with the per capita GDP and happiness measures, further discussion here is unnecessary.

## 6. Democracy

One might choose not to focus on indicators of a population's well-being and instead focus on indicators of government quality. Some states might be poor because of

<sup>66</sup> By including per capita GDP, the HDI combines the subjective (desire-based) and objective approach to well-being.

<sup>67</sup> See T. N. Srinivasan, *Human Development: A New Paradigm or Reinvention of the Wheel?*, 84 *Amer. Econ. Rev. Papers & Proc.* 239 (1994); and for Sen's response, Sen, *supra* note \_\_ at 79-81.

bad governments while other states are poor because of natural disadvantages, including a history of civil conflict or bad government, which the current government cannot overcome. Pressure should be put only on the governments of the first type of state. Thus, the human welfare treaty should oblige the world to pressure bad governments of low-welfare states (or perhaps bad governments of any state), while tolerating or aiding states that have relatively good governments even if low welfare levels.

What might such a treaty look like? A simple approach would be a democracy treaty, one that required all states to be democracies. Although I do not think that this approach has much to recommend it, it provides a useful baseline for examining more complex approaches.

The theory of such a treaty has two premises. First, democracy reliably leads to welfare improvements for the population. The argument for such a view is that democratic governments need the support of most of the population, while authoritarian governments rely on the support only of an elite or tribe or other small segment of the population. Therefore, democracies distribute welfare broadly, while authoritarian states distribute welfare narrowly.<sup>68</sup> However, the empirical evidence for this argument is slim.<sup>69</sup>

Second, pressure on authoritarian states reliably results in transitions to democracy. Although this proposition seems intuitive plausible, the evidence is even weaker than it is for the first proposition. The experience with Iraq provides a cautionary tale. Economic sanctions on Iraq during the 1990s did not weaken the authoritarian system; and the recent war in Iraq has not delivered a democracy. For these reasons, a welfarist treaty that required states to pressure authoritarian states with the view of encouraging democracy would probably be ill-advised.

Nonetheless, it is worth looking at the data. Political scientists have classified states according to their degree of democratization, with a score of zero signifying an authoritarian state and a score of 10 signifying the highest level of democracy. The United States and other western countries receive a score of 10; North Korea receives a 0. Among the 40 poorest countries, many (including North Korea) lack democracy: Eritrea, Gambia, Bhutan, Uganda, and Sudan receive 0; many others receive 1 or another low

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<sup>68</sup> See Casey B. Mulligan, Ricard Gil, & Xavier Sala-i-Martin, Do Democracies Have Different Public Policies Than Nondemocracies?, 18 *J. Econ. Perspectives* 51 (2004).

<sup>69</sup> *Id.*

score. Yet there are some democracies, including Mongolia (10), Kenya (8), Malawi (7), and Madagascar (7).<sup>70</sup>

An approach that stresses democracy, then, would require western states to provide aid to Mongolia and the other democracies, while denying aid to, and imposing pressure on, Eritrea and the other authoritarian states. Presumably wealthy democracies would receive no aid, but they would also receive no pressure even if they violate human rights. Other authoritarian states would receive pressure regardless of whether they are rich or poor, and regardless of whether they respect or violate other human rights.<sup>71</sup>

## 7. Government Corruption

Democratic states often have bad governments and authoritarian states can arguably have good governments. A treaty regime might thus focus not on the type of government but the quality of governance. Relevant indicators of quality might include the ratio of tax revenues to the value of government services, the speed and integrity of the legal system, and the level of government corruption. I will focus on this last indicator here.

The Corruption Perception Index (CPI) measures “the degree of public sector corruption as perceived by business people and country analysts.”<sup>72</sup> The score ranges from 0 (highly corrupt) to 10 (clean). A welfarist treaty would require states to pressure highly corrupt states, regardless of whether they are democracies (such as Mongolia (10 on democracy, 3 on CPI)) or authoritarian regimes (such as Eritrea, (0 and 2.6)); whether they are relatively wealthy (such as Belarus (3.3)) or poor; whether their people are happy (such as Nigeria (1.6)) or unhappy. Table 5 provides more data. If the world turned its attention from the 20 poorest countries to the 20 most corrupt countries, then Madagascar and Mali (among others) would be removed from the list, and Bangladesh, Azerbaijan, and Paraguay (among others) would be added to it. The theory is that corruption prevents welfare gains; so if countries were forced or encouraged to reduce corruption, welfare would increase.

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<sup>70</sup> See Monty G. Marshall & Keith Jagers, *Polity IV Project: Political Regime Characteristics and Transitions, 1800-2004*, available at <http://www.cidcm.umd.edu/polity/>.

<sup>71</sup> Some scholars appear to take this view, but it is unclear how they reconcile it with the human rights approach.

<sup>72</sup> Transparency International Corruption Perceptions Index 2007, available at: <http://www.transparency.org/content/download/24104/360217>.



Table 5: Corruption Perception Index<sup>73</sup>

Rank	State	CPI
1	New Zealand	9.4
	Denmark	9.4
	Finland	9.4
4	Singapore	9.3
	Sweden	9.3
6	Iceland	9.2
7	Netherlands	9.0
	Switzerland	9.0
9	Norway	8.7
	Canada	8.7
11	Australia	8.6
12	Luxembourg	8.4
	United Kingdom	8.4
14	Hong Kong	8.3
15	Austria	8.1
16	Germany	7.8
17	Japan	7.5
	Ireland	7.5
19	France	7.3
20	USA	7.2
150	Sierra Leone	2.1
	Kazakhstan	2.1
	Belarus	2.1
	Zimbabwe	2.1
	Côte d'Ivoire	2.1
	Tajikistan	2.1
	Liberia	2.1
	Rep. of Congo	2.1
	Ecuador	2.1
	Azerbaijan	2.1
	Kenya	2.1
	Kyrgyzstan	2.1
162	Bangladesh	2.0
	Papua New Guinea	2.0
	Turkmenistan	2.0
	Central African Republic	2.0
	Cambodia	2.0
	Venezuela	2.0
168	Laos	1.9
	Equatorial Guinea	1.9
	Guinea	1.9
	Dem. Rep. of Congo	1.9
172	Afghanistan	1.8
	Sudan	1.8
	Chad	1.8
175	Uzbekistan	1.7
	Tonga	1.7
177	Haiti	1.6

<sup>73</sup> Source: Id.

178	Iraq	1.5
179	Somalia	1.4
	Myanmar	1.4

Although many scholars believe that corruption interferes with development and hence well-being, this view is controversial.<sup>74</sup> Indeed, it seems perverse to pressure corrupt countries which do well on the various welfare indicators. At least for some countries, corruption might not interfere excessively with the delivery of public services to the population. A compromise approach would be to target only countries that are both corrupt and low in welfare.

#### 8. Aggregative Indices

If none of the measures described above seems satisfactory alone, one might propose combining them into an aggregate index. Doing so would be extremely difficult, however, as we would need to decide how much weight to give each measure (as well as other possible measures that I have not discussed). There is no a priori reason, for example, to give equal weighting to, say, corruption and happiness. And a person who believes that the happiness measure is the philosophically correct approach would reject weighting any of the objective measures, unless they happen to correlate with happiness. The Human Development Index, which gives weight to per capita GDP, life expectancy, and schooling, seems similarly arbitrary.<sup>75</sup>

Still, this problem can potentially be evaded. Suppose, for example, that we can identify a group of states that do poorly on all of our measures. These states might justifiably be considered the worst offenders against human well-being, and the governments of other states ought to pressure or help them to improve their performance.

Which are the lowest-welfare states in this sense? To compile a list, I examined the 20 poorest states, and among them chose those that appear in the bottom 20 (or more if there are ties) of the following indicators: democracy, corruption, life expectancy, and adult literacy. States that appear three or more times for these indicators are: Democratic Republic of Congo, Sierra Leone, Niger, Central African Republic, Bhutan, and Chad.<sup>76</sup>

So we might agree—in the sense of developing an overlapping consensus—that these states are plausible candidates for foreign pressure on welfarist grounds. They have low-welfare populations (on most measures) and they have bad governments (on most

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<sup>74</sup> See *International Handbook on the Economics of Corruption* (Susan Rose-Ackerman ed. 2007).

<sup>75</sup> For an alternative approach, see Ray, *supra*. Ray’s “social development index” includes additional factors and uses alternative weightings.

<sup>76</sup> However, Bhutan scores an impressive 7.26 on the happiness index, well above the mean of 6.5. See source for Table 2, *supra*.

measures). A welfarist treaty, then, might require states to pressure these states, or a larger group of low-welfare states.

## 9. Summary

The various welfare measures described above are offered more as a thought experiment than as a definite proposal for reform. If one or more of them seem plausible, then a case can be made for replacing human rights treaties with welfare treaties or (more realistically) amending the human rights treaties or construing them in a manner that allows states to maximize the welfare of their populations when formulating policy.

If the welfare measures instead strike one as absurd or perplexing, then the prospects of a welfare treaty may be dim. However, by the same token the ICESCR and other treaties that advance positive rights would need to be discarded. Treaties that require behavior that cannot be measured against a standard of conduct are empty vessels. And if I am correct that the negative right is just a species of the positive right, because complying with negative rights requires states to allocate resources to specific programs rather than simply refraining from doing some act, then the absence of such measures should discredit the negative rights treaties as well. For the ICCPR to function, for example, it must be possible for states to be able to complain that other states have not devoted enough resources to stamping out unlawful detentions. But to be able to make that complaint, states must be able to prove that those resources do not have a better use.

### C. A Pragmatic Defense of the Welfarist Approach

Human rights advocates, especially those committed to vindicating negative rights, will not be persuaded that a welfarist approach could be defensible. The notion that a government could legitimately put resources into economic growth or health care or security rather than eliminating torture is, at best, highly controversial. However, there is another argument in favor of the welfarist approach to which they should be more open, which is that a welfarist approach will have the indirect effect of promoting respect for negative rights.

The argument rests on a political science chestnut that people in wealthier societies have the means to demand that their government respect negative rights.<sup>77</sup>

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<sup>77</sup> See Steven C. Poe, C. Neal Tate, & Linda Camp Keith, *Repression of the Human Right to Personal Integrity Revisited: A Global Cross-National Study Covering the Years 1976-1993*, 43 *Int'l Stud. Q.* 291, 305 (1999) (finding economic standing and democracy to be associated with a statistically significant and effect on respect for human rights); Steven C. Poe & C. Neal Tate, *Repression of Human Rights to Personal Integrity in the 1980s: A Global Analysis*, 88 *Am. Pol. Sci. Rev.* 853 (1994) (similar); Claire Apodaca, *Global Economic Patterns and Personal Integrity Rights after the Cold War*, 45 *Int'l Stud. Q.* 587, 600

Whether the government approves or not, wealth brings education, literacy, familiarity with practices in foreign lands, better ability to organize, the development of civil society, and so forth—and these factors contribute to a rights-respecting culture. The evidence is consistent with this claim. Table 6 lists ratings states have received for political rights and civil liberties (Freedom House), and political terror (Amnesty International and U.S. State Department). The political and civil rights scores range from 1 to 7, with lower numbers representing greater freedoms. The political terror scores range from 1 to 5, with lower numbers referring to less political terror. These extremely crude ratings are the best approximation that we have of a state’s compliance with human rights norms in the area of civil and political rights.

Table 6: Political Freedoms<sup>78</sup>

Country Name	GDP (PPP) (2003)	Freedom House Political Rights	Freedom House Civil Liberties	Political Terror Amnesty Int'l Score	Political Terror US State Dept Score
Liberia	366	3	4	3	3
Dem. Rep. Congo	446	5	6	5	4
Eritrea	564	7	6	3	3
Cambodia	616	6	5	3	3
Afghanistan	626	5	5	5	5
Sierra Leone	630	4	3	2	3
Guinea-Bissau	639	4	4	2	3
Ethiopia	704	5	5	4	4
Somalia	731	7	7	4	4
Burundi	787	4	5	4	5
Madagascar	833	4	3		2
Togo	845	6	5	5	4
Niger	883	3	3	2	2
Central Afr. Rep.	952	5	4	3	4
Malawi	973	3	4	3	3
Tanzania	991	4	3	3	3
Gambia	1000	5	4		2
Bhutan	1001	6	5		1
Chad	1037	6	6	2	4
Zambia	1065	3	4	3	3
Croatia	10,613	2	2	2	2

(2001) (concluding that globalization serves as an engine of economic growth that in turn has a positive impact on states’ human rights records). Others have made the point that policies that increase the wealth of other nations will likely improve human rights in those nations as well; see, e.g., Fernando R. Tesón, Trade and Global Justice 14-15 (unpub. m.s. 2005) (arguing that free trade policies would improve human rights).

<sup>78</sup> Sources: Freedom House, available at: <http://www.freedomhouse.org/template.cfm?page=15&year=2007>. Political terror scales compiled from Amnesty International and State Department data by Mark Gibney and Matthew Dalton, available at: <http://www.unca.edu/politicalscience/images/Colloquium/faculty-staff/gibney.html>.

Argentina	11,438	2	2	2	2
Slovakia	11,549	1	1	1	1
Latvia	11,739	1	1	2	2
Lithuania	12,085	1	1	1	1
Russia	12,218	6	5	4	4
Seychelles	12,641	3	3		1
Chile	13,263	1	1	1	1
Malaysia	13,318	4	4	3	2
Belarus	13,606	7	6	3	2
Netherlands	28,256	1	1	1	1
Ireland	29,398	1	1	1	1
Austria	29,722	1	1	2	1
Canada	29,776	1	1	1	1
Denmark	29,935	1	1		1
Australia	30,591	1	1	1	2
Switzerland	31,298	1	1	2	1
UAE	33,363	6	5	2	2
Norway	34,528	1	1		1
USA	37,313	1	1	3	

The lesson of this table is that, with isolated albeit important exceptions, wealthier states have stronger political and civil rights and lower levels of political terror. Indeed, all of the welfare measures are highly correlated, and so wealth, happiness, objective measures of well-being, and democracy are also correlated with respect for human rights.<sup>79</sup> By contrast, ratification of human rights treaties does not appear to lead to improvement in human rights.

The limited empirical research that has been conducted establishes correlation, not causation.<sup>80</sup> Suppose that some omitted variable—“culture” or special historical circumstances or some such thing—causes some states both to become wealthy and to respect rights. If so, an international policy of pressuring states to improve welfare will have no effect on wealth, welfare, and human rights. The tentative case for focusing on economic growth and other welfare measures as a means for improving human rights, then, rests on an implicit theory that (1) aid and pressure can cause other states to become wealthier, and (2) increasing wealth causes populations to demand that their governments respect human rights. The case has not yet been made, but it may well be sound.<sup>81</sup>

<sup>79</sup> See Poe, Tate, & Keith, *supra* note \_\_, at 305.

<sup>80</sup> *Id.*

<sup>81</sup> This conclusion is, in fact, old-fashioned conventional wisdom that was influentially criticized by Sen, *supra*, and others. This wisdom deserves a second look.

### III. The Relationship with Foreign Aid

Most poor states, and many middle-income states, receive significant foreign aid—much of it intended to improve the well-being of the poor, and much of it designed to serve strategic or political interests of the donors. At one time, donor nations did not expect that recipient nations would necessarily comply with human rights treaties, but in recent years there has emerged a norm of “rights-based development” that insists that aid must be sensitive to the human rights practices of the recipient state.<sup>82</sup> When an aid recipient abuses human rights, advocates frequently argue that aid should be withheld. This response has been institutionalized: many international agencies, such as the IMF, condition assistance on adequate human rights performance.<sup>83</sup> Many countries take this position as well. The Millennium Challenge Corporation, a U.S. government entity, sends aid to countries that score above the median for a group of indicators for political rights, educational investment, economic freedom, and corruption.<sup>84</sup>

This approach is in tension with the usual justification for foreign aid, which is to help the worst-off populations. Most of the poorest people in the world live in states that violate human rights. When states withdraw aid from human-rights abusing governments, they risk further impoverishing the people whose rights are being violated.

This policy can be given two justifications. First, one might hope that the withdrawal of foreign aid will hurt government officials rather than the public. Unfortunately, it is very difficult to ensure that aid flows reach their intended recipients; they must usually go through government intermediaries who can skim off a portion of the proceeds. Thus, except in unusual circumstances, reducing aid will hurt populations and not (or not just) officials.<sup>85</sup>

Second, states will improve their human rights practices only if their governments believe they will be rewarded for doing so. If aid is given to poor states regardless of their human rights practices, then states will have no incentive to stop abuse. As an unfortunate

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<sup>82</sup> The idea appears to have originated with Sen, *supra* note \_\_, and it has since been endorsed by many scholars and international institutions. See, e.g., Peter Uvin, *Human Rights and Development* (2004); UNDP, *Human Rights and Development, Human Development Report* (2000); United Nations, *The Human Rights-Based Approach To Development Cooperation: Towards a Common Understanding Among UN Agencies*, in *Report of the Second Interagency Workshop on Implementing a Human Rights-Based Approach in the Context of UN Reform* (2003).

<sup>83</sup> See Hafner-Burton, *supra* note \_\_, at 603.

<sup>84</sup> See General Accounting Office, *Millennium Challenge Corporation: Progress Made on Key Challenges in First Year of Operations*, GAO-05-625T, at 7 (2005). See also *African Growth and Opportunity Act*, 19 U.S.C. 3701-3747 (2000).

<sup>85</sup> Cf. Albert H. Choi & Eric A. Posner, *A Critique of the Odious Debt Doctrine*, 70 *Law & Contemp. Prob.* 33 (2007).

but necessary consequence, poor people in at least some states will have to suffer both human rights abuse and a loss of foreign aid. For example, a sanctions regime imposed on Iraq between the first and second Gulf Wars was designed to pressure Saddam Hussein to step down or cooperate with other countries but mainly had the effect of immiserating the Iraqi people.<sup>86</sup> Even when foreign pressure works, people must suffer in the short term so that improvements will occur in the long term.<sup>87</sup>

However, it may sometimes be unrealistic to expect that the threat to withhold aid will cause a state to improve its compliance with human rights norms. The government may be too weak or corrupt to change. In such cases, the decision to grant aid requires a delicate tradeoff. On the one hand, aid will help alleviate the misery of the population. On the other hand, it will likely increase the power of human-rights abusing government and extend its hold on power.

At least in some cases, the tradeoff will favor foreign aid. Yet such an approach is in tension with a human rights regime that makes no concessions to welfarist considerations except in extreme cases. The result is that the human rights community and the foreign aid community work at cross-purposes. One arm of a government scolds a state for violating human rights law while another arm continues to dole out aid. One NGO places the state on its list of human-rights violators, while another sets up clinics and provides other benefits to the population that may reduce internal pressure on the government to reform. This tension between the human rights and foreign aids regimes threatens to derail progress toward the overlapping goal of both—to improve the well-being of people around the world.<sup>88</sup>

By contrast, a welfarist treaty would involve no such tension. The treaty could be drafted to oblige developed states both to pressure states that fail to deliver adequate welfare to their populations and to provide aid to states that show progress. When

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<sup>86</sup> Richard Garfield, *Morbidity and Mortality Among Iraqi Children from 1990 Through 1998: Assessing the Impact of the Gulf War and Economic Sanctions* (1999), available at <http://www.casi.org.uk/info/garfield/dr-garfield.html>; Mohamed M. Ali & Iqbal H. Shah, *Sanctions and Childhood Mortality in Iraq*, 9218 *The Lancet* 1851 (2000).

<sup>87</sup> Interestingly, the World Bank has been criticized for providing so much aid to middle-income countries. The World Bank's response—that middle-income countries use aid wisely and poor countries squander it—is reasonable but for obvious reasons not politically saleable. Similarly, the U.S. Millennium Challenge Corporation awards grants to countries that score above the median on a variety of objective indicators of political rights, educational investment, and economic freedom—with the unavoidable result that the very worst states are denied aid. See GAO, *Millennium Challenge Corporation*, supra at 7.

<sup>88</sup> There is also a basic tension between the method of economic analysis and rights-based approaches. See Varun Gauri, *Social Rights and Economics: Claims To Health Care and Education in Developing Countries*, in *Human Rights and Development: Towards Mutual Reinforcement* 65-70 (Philip Alston & Mary Robinson eds. 2005).

potential aid recipients have responsive governments, donor states should condition aid on welfarist improvement, and should threaten sanctions or other penalties if welfare does not improve, regardless of whether the government accepts aid. When potential aid recipients do not have responsive governments (and are unlikely to obtain responsive governments), then aid should be unconditional, as long as it reaches the intended beneficiaries among the population of the recipient state. Sanctions would be avoided.

Currently, states have no legal obligations to provide aid to low-welfare states. States nonetheless do provide such aid. Most wealthy states have foreign aid programs, and although much aid, perhaps the majority of aid, is used to promote strategic interests, at least some of it is used to help impoverished people in foreign countries, frequently the victims of natural disasters or civil war.<sup>89</sup> As noted above, the aid is not coordinated, and for this reason it is probably not distributed optimally. Recognizing this problem, states from time to time enter nonlegal agreements to coordinate the aid with a view of reaching a particular goal.<sup>90</sup>

Under the current system, then, states have no obligation to give foreign aid (though they do), while they do have an obligation to pressure states that violate human rights. As I argued above, the aid regime and the human rights regime work at cross-purposes: much aid goes to human rights violators precisely because their populations are so miserable. And states that feel diplomatic or public pressure to condemn the human rights violations of strategic allies can, in effect, compensate the allies for the diplomatic costs they incur by increasing foreign aid. In addition, some evidence suggests that aid can weaken government institutions and even exacerbate civil war<sup>91</sup>—with predictably unfortunate effects on human rights. A better system would coordinate aid and pressure—the carrot and the stick.

Whether a welfare treaty that contained obligations to give aid is possible is not a question I can answer here. Certainly, the obstacles would be significant; it may be impossible to write a treaty that directed aid flows in a manner that all donor states found acceptable. In addition, foreign aid has so far been largely unsuccessful for promoting economic growth.<sup>92</sup> It would be a mistake to freeze by treaty the amount or nature of

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<sup>89</sup> See William Easterly, *The White Man's Burden* (2006).

<sup>90</sup> See, e.g., United Nations General Assembly, United Nations Millennium Declaration, Res. 55/2 (2000), available at <http://www.un.org/millennium/declaration/ares552e.htm>.

<sup>91</sup> See Simeon Djankov, Jose G. Montalvo, & Marta Reynal-Querol, *The Curse of Aid* (Universitat Pompeu Fabra Working Paper, 2005).

<sup>92</sup> For pessimistic empirical assessments of the relationship between aid and economic growth, Simeon Djankov, Jose G. Montalvo, & Marta Reynal-Querol, *Does Foreign Aid Help?*, 26 *Cato J.* 1 (2006); William Easterly, Ross Levine, & David Roodman, *New Data, New Doubts: A Comment on Burnside and Dollar's "Aid, Policies, and Growth"*, 94 *Am. Econ. Rev.* 774 (2004); Robert J. Barro & Jong-Wha Lee,



foreign aid before academics understand how aid is optimally allocated (if at all). Still, the literature does not show that foreign aid has no short-term, positive welfare effects.<sup>93</sup> This means that minimal treaty provisions requiring high-welfare states to offer aid to states that improve their welfare levels might be appropriate.

## Conclusion

The inevitable objection to a welfarist treaty is that it would permit a state to commit atrocities while claiming that overall welfare will increase because the public benefits more than the victims lose—the kind of objection familiar from the endless dispute between utilitarians and deontologists. One can just as well point out that human rights treaties require governments to risk civil war rather than detain a potentially dangerous person. Both types of approaches are vulnerable to the risk of a catastrophic scenario. The superior value of the welfarist approach lies in its insistence that the government would have to prove that its policies enhance public welfare.

Another objection is that arguments based on rights have stronger motivating force than arguments based on well-being. It is easier for a person to complain that the government has violated her right to a trial than to argue that by failing to grant her a trial, the government failed to take seriously her well-being. However, the force of this objection depends on rights actually either having intrinsic deontological value or promoting well-being in a rule-utilitarian sense. Otherwise, rights-talk just plays off misunderstandings. And it is not clear that the objection is correct on its own terms.<sup>94</sup> People in the west spontaneously offer aid in response to natural disasters such as the recent tsunami in South Asia; they seem less motivated by reports of ordinary human rights violations such as the imprisonment of political dissenters than by reports of famine, natural disaster, and civil war.

These objections aside, the welfarist treaty has two advantages over the human rights treaties. It would advance an undeniable value—promoting the well-being of people in poor countries—rather than a controversial and philosophically suspect commitment to a bevy of rights. And it would use a common, simple, and transparent metric for evaluating states, rather than a set of incommensurable and ambiguous

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IMF Programs: Who Is Chosen and What Are the Effects? (NBER Working Paper No. 8951, 2002). Recent book-length treatments include Easterly, *supra* note \_\_; Paul Collier, *The Bottom Billion: Why the Poorest Countries Are Failing and What Can Be Done About It* (2007); Roger Riddell, *Does Foreign Aid Really Work?* (2007). All of these accounts are pessimistic.

<sup>93</sup> There is some anecdotal evidence of virtually all aid being taken by corrupt officials; but this seems to be an exception. A more serious problem is that aid can exacerbate civil conflicts. See Djankov, Montalvo, & Reynal-Querol, *supra* note \_\_.

<sup>94</sup> For doubts, see David Kennedy, *The Dark Side of Virtue* 3 (2002).

standards. As a result, it would create a system of priorities and ease coordination among states. Diplomatic pressure would be directed against low welfare states like Zimbabwe, Sudan, and Chad, and not against high-welfare states, such as the United States and China, which are in any event much more resistant to pressure. And foreign aid could be better coordinated so as to help those who need it most.

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