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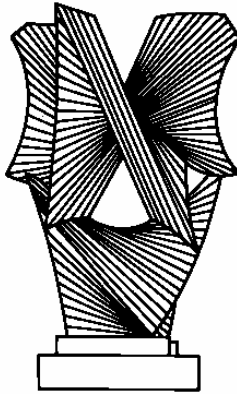
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## International Law: A Welfarist Approach

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## **International Law: A Welfarist Approach**

Eric A. Posner<sup>1</sup>

September 6, 2005

*Abstract.* This paper evaluates international law from a welfarist perspective. Global welfarism requires that international law advance the well being of everyone in the world, and scholars influenced by global welfarism and similar cosmopolitan principles have advocated radical restructuring of international law. But global welfarism is subject to several constraints, including (1) heterogeneity of preferences of the world population, which produces the state system; (2) agency costs, which produce imperfect governments; and (3) the problem of collective action. These constraints place limits on what policies motivated by global welfarism can achieve, and explain some broad features of international law that otherwise remain puzzling. These features include the central place of state sovereignty in international law despite the moral arbitrariness of borders; the weakness of multilateral treaties; the limited role of individual liability in international law; the predominantly legislative nature of international institutions and the weakness of executive and judicial institutions; and the absence of redistributive obligations in international law.

### INTRODUCTION

International law scholarship lacks a well defined and broadly accepted normative framework that can be used to evaluate the doctrines of international law and to generate proposals for reform. Scholars debate the merits of particular doctrines either by appealing to other doctrines or broad principles said to be immanent in international law, or by claiming to derive their conclusions from normative assumptions that are rarely articulated or justified with any precision. The first approach is circular, the second leaves the debates mired in uncertainties about first principles. What is needed is a framework that is rooted in political morality while being precise enough to allow sufficiently defined conclusions. This paper argues that a useful framework would have two elements: welfarism and a realistic understanding of institutional constraints. The argument, in brief, is that institutionally constrained welfarism shows the advantages of the state system

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and some other important features of international law, and suggests problems with many proposals for international legal reform that can be found in the literature.

As an illustration of the problem with current scholarship, consider the debate about NATO's intervention in Kosovo in 1999. Nearly everyone recognizes that this intervention violated international law. Under the UN charter, crossborder military force may be used in self-defense or with the authorization of the UN Security Council;<sup>2</sup> neither of these conditions was met in Kosovo. At the same time, the intervention probably saved thousands of lives, even a genocide. Was it justified? Some commentators condemned the intervention because it violated international law but did not address the question whether international law that prohibited states from preventing a genocide was worth defending.<sup>3</sup> Others concluded that the war was "illegal but legitimate."<sup>4</sup> This conclusion concedes that an illegal act can be morally justified, but then the question is, How should the law be changed so that "legitimate" action is permitted?

Several possibilities have been discussed in the literature. One argument is that states should have the unilateral right to engage in humanitarian intervention.<sup>5</sup> This argument has raised a concern about pretext: if such a right exists, won't some states use humanitarian goals as a pretext for aggressive war? To prevent reliance on pretexts, some scholars argue that only the United Nations Security Council should have the power to authorize humanitarian intervention.<sup>6</sup> But that is the status quo, and anyway the Security Council is controlled by powerful states which will not act in the global interest. For this reason, the United Nations system must be revised so that it will be more democratic: a democratic United Nations would authorize justified humanitarian interventions. But giving each state one vote would not be consistent with democracy, since some states are huge and others are tiny. Therefore, voting must be based on population, and, further, authoritarian states must be deprived of voting rights in the United Nations if they do not allow their citizens to vote for delegates.<sup>7</sup> But, as these considerations show, the state system is arbitrary anyway, and sovereignty should be

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<sup>2</sup> UN Charter art. 51.

<sup>3</sup> See, e.g., Jonathan I. Charney, Anticipatory Humanitarian Intervention in Kosovo, 93 *Amer. J. Inter. L.* 834, 840-41 (1999) (condemning the intervention as a violation of international law); Richard I. Falk, Kosovo, World Order, and the Future of International Law, 93 *Amer. J. Inter. L.* 84, 856 (similar).

<sup>4</sup> See Independent International Commission on Kosovo, *The Kosovo Report* 10 (2000).

<sup>5</sup> Fernando Tesón, *The Liberal Case for Humanitarian Intervention*, in *Humanitarian Intervention: Ethical, Legal, and Political Dilemma* 53 (J.L. Holzgrefe and Robert O. Keohane eds. 2003).

<sup>6</sup> E.g., Charney, *supra*.

<sup>7</sup> See Peter Singer, *One World* 144-48 (2002).

“decentralized,” so that there is a system of overlapping jurisdiction based on the consent of the governed.<sup>8</sup> Or, a world government is the only really effective way to ensure that human rights atrocities can be addressed or prevented.<sup>9</sup> But a world government is not realistic, nor is UN reform; therefore, the European states (but not the United States, which cannot be trusted) should form a pact obligating members to cooperate in humanitarian interventions when necessary.<sup>10</sup>

For all of the philosophical sophistication of the scholars involved, this debate has a fruitless and ungrounded quality. Why exactly is a world government off limits, if it indeed is?<sup>11</sup> And if it is off limits, because unrealistic, then why should UN reform or the European compact or the decentralization of sovereignty be considered within limits? The scholars all agree on the larger end of preventing atrocities.<sup>12</sup> Their proposals differ radically not because of disagreement on ends, but disagreement about what is institutionally possible. But none of the authors cited for the views described above provides even a cursory theory of institutional constraints. So their main source of disagreement is not even discussed.

The larger point is that reform of international law is possible, and normative arguments can be brought to bear, but there are, in Jack Goldsmith’s words, “plausibility constraints” that limit the universe of possible reforms.<sup>13</sup>

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<sup>8</sup> See Thomas Pogge, *World Poverty and Human Rights* 190-94 (2002).

<sup>9</sup> Kai Nielsen, *World Government, Security, and Global Justice*, in *Problems of International Justice* (Steven Luper-Foy ed. 1988).

<sup>10</sup> See Allen Buchanan, *Justice, Legitimacy, and Self-Determination* 453 (2004).

<sup>11</sup> But see Alexander Wendt, *Why a World State Is Inevitable*, 9 *Eur. J. Int’l Relations* 491 (2003). Wendt’s argument is positive rather than normative, but he makes clear that he believes that a world government would be desirable (as well as inevitable). *Id.* 529. Wendt is in a very small minority, and as he puts off the world government for another century, the possibility has no relevant short-term implications even if he is correct.

<sup>12</sup> Philosophical disagreement, to be sure, is genuine. The debate between Michael Walzer and his critics turns, in part, on a disagreement about whether universal moral principles forbid governments from abusing their citizens and authorize other governments to intervene to stop such abuse. Compare Michael Walzer, *Just and Unjust Wars* (1977) and David Luban, *Just War and Human Rights*, 9 *Philosophy & Pub. Affairs* 161 (1980). However, on closer inspection the philosophical disagreement is overwhelmed by what seem like empirical disagreements. Walzer is willing to allow states to intervene when foreign governments are massacring, enslaving, or expelling nationals (Michael Walzer, *The Moral Standing of States*, 9 *Philosophy & Pub. Affairs* 216-18 (1980)), whereas Luban would allow states to intervene in order to protect basic human rights (Luban, *supra* at 25). Walzer cares about the rights and well being of foreigners, Luban concedes the importance of local culture, history, and the other determinants of political community. So the disagreement seems mainly about the relative importance of these factors.

<sup>13</sup> Jack L. Goldsmith, *Liberal Democracy and Cosmopolitan Duty*, 55 *Stanford L. Rev.* 1667, 1673 (2000); see also Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* ch. 8 (2005).

Goldsmith argues that people are essentially self-interested, or at least not willing to make the sacrifices demanded by the philosophers; that governments and other institutions, by design, advance their interests, and especially when these institutions are democratic; and therefore institutional reform that could address global problems in a cosmopolitan spirit is not possible. Still, reform of international institutions is possible and has occurred from time to time, and there must be some reforms that are better than other reforms. The question is, what constrains reform of international law; what makes some reform proposals realistic and others unrealistic?

In this paper, I try to answer this question. I argue that for proposals of international legal reform to be institutionally plausible, they must assume the existence of (1) heterogeneous preferences among the world population, which give rise to the state system, (2) agency costs, which give rise to the imperfection of governments, and (3) the collective action problem. In such a world, international legal reform is possible but highly limited. For expository convenience, I assume that international legal reform is justified to the extent that it enhances global welfare – the well being of everyone living in the world. I argue that even if we all have a moral obligation to advance global welfarism, the implications for international law are limited. Some frequently criticized features of existing international law can be defended on global welfarist premises, within the constraints created by heterogeneity of preferences, agency costs, and collective action problems.

In brief, the argument is this. Populations have, over the centuries, divided themselves up into political groupings that today take the form of nation states. The size and scope of nation states reflect much historical contingency, but beyond this is a basic tradeoff between the heterogeneity of populations and economies of scale.<sup>14</sup> Increasing economies of scale, driven by technological change, give advantages to people who are members of large self-regulating populations, but when people's tastes and values are too heterogeneous, sovereignty is impossible. Thus, the world is divided among dozens of independent states. When people divide themselves into groups such as nation states, regional and global public goods are not created, and instead nation states have an incentive to externalize costs on people living outside their borders. The function of international law is to correct these problems and enable people to obtain public goods of regional and global scale. But international law can exist only as long states support it, and thus, standard doctrine acknowledges, all, or nearly all, states must consent to a rule before it can be deemed to be a part of

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<sup>14</sup> Alberto Alesina and Enrico Spolaore, *The Size of Nations* 18-23 (2003).

international law. Several things follow from this. Because people have no interest in transferring significant resources to those living in other countries, international law does not require wealthy states to aid the poor; it only requires states (rich and poor) to cooperate. Further, cooperation for the purpose of creating public goods is limited by agency costs and collective action problems. Because citizens cannot easily monitor and sanction governments that act against their interest, governments will not always agree to international law that benefits their own citizens. And because there is no world government, international law can exist as an effective constraint only when states can overcome the collective action problem. The latter suggests that narrow international agreements, involving few states, are likely to be more effective than large multilateral conventions.

The plan of the paper is as follows. Part I discusses the philosophical literature in more detail, and shows how radically different reform proposals flow not from philosophical disagreement but from unstated assumptions about institutional constraints. This discussion helps motivate my focus, in the rest of the paper, on institutions.

Part II discusses my main assumptions: (1) that international law should maximize global welfare; (2) that preferences are heterogeneous; (3) that agency costs exist and therefore governments are imperfect; and (4) that enforcement is limited. The first assumption is likely to be controversial but it is mainly an analytic convenience, and the argument does not turn on it in any substantial way. The other three assumptions are about the institutional constraints on welfare maximization, and I discuss the extent to which they are accurate, and how they might be varied.

Part III discusses the implications of these assumptions for international law. I discuss some general features of international law, including sovereign equality, state responsibility, the central importance of sovereignty, and the predominantly legislative nature of the international legal system (and lack of adjudicative and executive resources). It is not my claim, however, that international law as it currently exists is welfare-maximizing or largely welfare-maximizing beyond its very general contours; too many empirical questions and other imponderables would make such a conclusion hasty.

## I. THE LITERATURE: HUMANITARIAN INTERVENTION

The literature on international legal reform is vast; for expository convenience, I will discuss a small subset dealing with the problem of

humanitarian intervention. The government of a small state commits atrocities against its own citizens, perhaps even genocide. The state could be Uganda in 1971-79, Cambodia in 1975, Serbia in the 1990s, Somalia in 1993, Rwanda in 1994, or Sudan today. The government is impervious to diplomatic and economic pressure; indeed, economic pressure might further harm the victims of the government without affecting its leaders. Under international law, a foreign government has no right to launch a military invasion in order to stop atrocities from occurring in another state. What should the governments of other states do?

One possible answer is that foreign governments should do nothing because they have no right to interfere with the domestic policy of the state in question. This answer is, today, accepted by virtually no respectable philosopher or lawyer. All of the disagreement concerns the extent of the humanitarian catastrophe before intervention is justified. Walzer thinks there must be mass murder, enslavement, or expulsion; others think that intervention may be justified if human rights are violated on a large scale or democracy does not exist.<sup>15</sup> These disagreements reflect philosophical and empirical disagreement that are not of concern here.

Most debate today concerns legal and institutional reform. The reason is that there are many cases where everyone agrees that humanitarian intervention should occur, and yet it does not occur, or it does occur but illegally, as in Kosovo.

The most common position among international lawyers appears to be that the status quo is acceptable.<sup>16</sup> Under the current system, humanitarian intervention can occur only if authorized by the Security Council of the United Nations. However, the Security Council has never authorized a military intervention to stop genocide or other crimes against humanity. So staying with the status quo implicitly accepts this state of affairs, presumably on the ground that more permissive rules would permit unjustified military interventions. These unjustified military interventions would, perhaps, be worse than the humanitarian interventions forgone because of the strict rules currently in place.

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<sup>15</sup> Compare Walzer, *Just and Unjust Wars*, supra; Walzer, *The Moral Standing of States*, supra; and Lubban, supra.

<sup>16</sup> See, e.g., Michael Byers and Simon Chesterman, *Changing the Rules About Rules? Unilateral Humanitarian Intervention and the Future of International Law*, in *Humanitarian Intervention: Ethical, Legal, and Political Dilemma* 177 (J.L. Holzgrefe and Robert O. Keohane eds. 2003). Thomas Franck takes an intermediate position. See Thomas M. Franck, *Interpretation and Change in The Law of Humanitarian Intervention*, *Humanitarian Intervention: Ethical, Legal, and Political Dilemma* 204, 227 (J.L. Holzgrefe and Robert O. Keohane eds. 2003) (discussing the intervention in Kosovo: "Was the NATO action unlawful? Yes and no."). Other citations are in supra note \_\_.



Philosophers and philosophically inclined lawyers do not approve of the status quo, however. They have proposed various imaginative reforms.

Brian Barry argues that military intervention for humanitarian reasons is sometimes justified but the problem “with the current statist system is that decisions are taken in an ad hoc way, and this is equally true whether the action is unilateral or taken under the auspices of the Security Council.”<sup>17</sup> To solve this problem and related problems, what is needed is a world government or, if that is impossible, “the creation of an international legal system that takes precedence over those of individual states.”<sup>18</sup> Barry does not describe this legal system or explain how it would be possible if a world government is not.

Peter Singer argues that states should engage in humanitarian intervention because national sovereignty has no moral weight and rescuing individuals from human rights atrocities does. However, he believes that if states were permitted to decide for themselves whether humanitarian intervention is justified, they would use humanitarian intervention as a pretext for aggressive war, plunging the world into chaos. Therefore, an independent institution such as the United Nations must have the responsibility for deciding whether humanitarian intervention is justified, and states must be bound to comply with the United Nations’ judgment. The problem with this suggestion, Singer continues, is that the United Nations is not a democratic body; indeed, authoritarian states have veto power. Singer concludes that the United Nations must be reformed so that it is more democratic. In particular, he argues that all states should send delegates to the United Nations in proportion to their population; these delegates would be democratically elected, and thus would be representatives of people rather than of states; the United Nations would supervise the elections; and authoritarian states that refuse to allow such elections would be limited to one delegate.<sup>19</sup>

Allen Buchanan agrees that states should engage in humanitarian intervention. However, he has little faith in the United Nations and does not believe that in the near future it can be reformed. Instead, he argues that the wealthy liberal democracies (except the United States, which lacks international

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<sup>17</sup> Brian Barry, *Statism and Nationalism: A Cosmopolitan Critique*, in *Global Justice*, 41 *NOMOS* 12, 39 (Ian Shapiro and Lea Brilmayer eds. 1999).

<sup>18</sup> *Id.*, at 40; see also Jonathan Glover, *State Terrorism*, in *Violence, Terrorism, and Justice* 272 (R.G. Frey and Christopher W. Morris eds. 1991) (arguing that international courts should have jurisdiction over complaints brought against states by citizens who complain of human rights violations).

<sup>19</sup> Singer, *supra*, 135-49.

legitimacy, in his view) should enter a treaty that compels them to engage in humanitarian intervention when human rights violations in a target country exceed a threshold. “Of course any attempt to construct a coalition of democratic, human-rights respecting states for humanitarian intervention would require the richer European states to do something they have not done in fifty years: make a serious investment in military capacity rather than depending upon the United States.”<sup>20</sup> Nonetheless, Buchanan’s main worry is not that the Europeans would refuse to form such a coalition but that the United States would block the formation of such a coalition.

Thomas Pogge does not address humanitarian intervention in any detail but seems willing to consider it, if it takes place under the auspices of a multilateral body (p. 153). But he thinks that human rights atrocities would be a much less significant problem in a world that looked like the following:

What we need is *both* centralization *and* decentralization – a kind of second-order decentralization away from the now dominant level of the state. Thus, persons should be citizens of, and govern themselves through, a number of political units of various sizes, without any one political unit being dominant and thus occupying the traditional role of the state. And their political allegiances and loyalties should be widely dispersed over these units: neighborhood, town, county, province, state, region, and world at large. People should be politically at home in all of them, without converging upon any one of them as the lodestar of their political identity.<sup>21</sup>

Pogge promises to develop this proposal but never does, instead limply admitting that “nothing definite can be said about the ideal number of levels or the exact distribution of legislative, executive, and judicial functions over them.”<sup>22</sup> Pogge also argues that various international institutions should be set up that would have the power to ensure that only democratic governments would be able to issue sovereign debt, and not authoritarian governments. Democratic governments would pass constitutional amendments that prohibit future unconstitutional governments from borrowing; in case of dispute about whether a future government is unconstitutional, the matter would be referred to an independent Democracy Panel acting under the auspices of the UN; and, lest creditors be unwilling to lend to democracies because they fear that future unconstitutional governments will renege on debts if they cannot borrow more, an International

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<sup>20</sup> Buchanan, *supra* at 453.

<sup>21</sup> Pogge, *supra* at 178 (footnotes omitted).

<sup>22</sup> *Id.*, 189.

Democratic Loan Guarantee Fund would ensure that outstanding debt is serviced until a democratic government is reestablished.<sup>23</sup>

Fernando Tesón takes the simplest view; he argues that international law should permit unilateral humanitarian intervention.<sup>24</sup> If such a norm existed, then states would be more willing to intervene in order to stop atrocities in other states. Tesón does not believe that the pretext problem is severe. All of international law is vulnerable to pretext and yet it functions adequately because states that violate international law under a pretext risk being deemed lawbreakers by other states.

Why do Barry, Singer, Buchanan, Pogge, and Tesón come to such different conclusions, even though their normative premises are largely similar? All of them reject the old fashioned view that the borders of a state are sacrosanct; all agree that human rights violations in one country ought to concern people living in others; and all of them acknowledge that the use of military force in order to stop atrocities may be justified.

The divergence in their positions is due to unstated institutional assumptions. Buchanan and (probably) Tesón do not believe that the United Nations can be reformed, so as to be more democratic or more likely to authorize humanitarian interventions, but Buchanan thinks that the Europeans would take up the slack. Barry thinks that a world government is possible or, if not, an international legal system that takes precedence over national laws (unlike the current system). Singer does not think that a world government is possible but does think that radical reform of the UN is. Pogge thinks that a world government would be inferior to his regime of overlapping jurisdictions.<sup>25</sup>

There are good reasons for doubting the more institutionally ambitious claims. A world government is not a realistic possibility, and Barry does not explain how an international legal system would be possible without a world

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<sup>23</sup> Id., 155-60.

<sup>24</sup> See Tesón, *supra*; see also John Yoo, *Using Force*, 71 U. Chi. L. Rev. 729, 793-94 (2004) (discussing whether unilateral humanitarian intervention can be justified); Eric A. Posner and Alan O. Sykes, *Optimal War and Jus Ad Bellum*, 93 Geo. L.J. 993, 1014 (2005) (defending humanitarian intervention).

<sup>25</sup> For other proposals, see Iris Marion Young, *Inclusion and Democracy* 265-75 (2000) (advocating greater authority for the UN in the short term, global democracy in the long term); David Held, *Democracy and the Global Order* (1995) (advocating stronger international institutions in the short term, global democracy in the long term); and the essays in *Re-imagining Political Community: Studies in Cosmopolitan Democracy* (Daniele Archibugi, David Held, and Martin Köhler eds. 1998) (various proposals).

government to create and enforce it.<sup>26</sup> Singer's proposal requires amendment of the UN charter, but amendment requires a supermajority in both the General Assembly and the Security Council, and can be vetoed by the permanent members.<sup>27</sup> Singer assumes that states like China (which has the veto), Nigeria, and Iran would acquiesce in a system under which they must either give their citizens a vote (which they would not do) or else enjoy voting power equivalent to, or less than, that of Nauru (population 13,000) or Iceland (population 300,000). In Singer's system, if India, a democracy, permitted its citizens to vote for UN delegates, it would have the voting power of more than 100 other countries; yet most of these countries would also have to acquiesce in Singer's reform proposal even though they know that their voting power would be swamped by that of a single state.<sup>28</sup> Buchanan imagines that the Europeans would take on the burden of humanitarian intervention, even though no European country has shown the slightest interest in humanitarian intervention in the past (with the ambiguous exception of the Kosovo intervention, which was largely the work of the United States), nor any inclination, as he notes, of shouldering the cost of an effective military.<sup>29</sup> He also imagines that, American obstructionism aside, states like China and Russia would not have any objection to the European force, even though both countries, which routinely violate the human rights of internal minorities, have made their skepticism about humanitarian intervention clear in the recent past. Pogge cavalierly dismisses the concern that must be in every reader's mind – that his proposal is a recipe for chaos – by observing that in modern federalist states like the United States, the location of ultimate authority is often confusing and vague. But the identification of ultimate authority does matter – it matters, for example, whether the Arkansas national guard obeys President Eisenhower or Orval Faubus, just as it matters whether Yugoslav army units obey President Milošević of Serbia or President Tudjman of Croatia. The reason that such conflicts do not happen more often in countries like the United States is that

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<sup>26</sup> Barry acknowledges the existence of “institutional constraints” (Barry, *supra* at 40) but does not bother to explain what they are, or how they influence his argument.

<sup>27</sup> UN Charter art. 27.

<sup>28</sup> Singer's is merely a more elaborate version of a recurrent theme in philosophical work on international justice, namely, that one needs to “strengthen the United Nations,” with little or no attention to the question whether states will consent to a strengthened United Nations. See, e.g., Young, *supra* at 265-75. Indeed, today the evidence suggests the opposite – that the United Nations will become weaker as more states demand permanent status in the Security Council and a veto. See Joel Brinkley, *As Nations Lobby to Join Security Council, the U.S. Resists Giving Them Veto Power*, N.Y. Times, May 15, 2005, at sec. 1, p.14 (describing disagreement over the distribution of vetoes).

<sup>29</sup> He also ignores the extremely important political and logistical problems of managing an international military force, problems that would, in the foreseeable future, render an European military coalition far weaker than the sum of its parts.

lines of authority, while not always clearly described in constitutional documents, are well understood and enjoy consensus.

Lack of attention to institutional problems does not only explain the disagreements among these theorists; it also leads to internal inconsistencies. In a discussion of secession, Barry says:

If the breakup of an existing state would make the maintenance of liberal institutions easier (or at least no less likely) and is desired by those in the area (without any division about its desirability between different groups within it), there is no reason for a cosmopolitan to oppose it.<sup>30</sup>

Note the tension between this claim and the argument in favor of a world government or international legal system that takes precedence over national law. Barry's argument implicitly travels in a circle: a world government is needed to solve global problems like climate warming; but a world government might mistreat regions or sections; so these regions or sections must have the right to secede; but then they might secede so as to avoid the world government's climate control laws; and we are back to our interstate system that cannot solve the global warming problem. It is hard to see how one could both support a world government and an expansive right to secede. There might be some way to resolve this tension, but Barry does not tell us what it is. Pogge similarly approves international rules that would encourage separatist movements that would break up states<sup>31</sup> while assuming that the resulting centrifugal forces would not affect the large liberal democracies on which he depends to enforce other elements of his ambitious program.<sup>32</sup>

Only Tesón's argument seems plausible. Although most countries support the status quo, some states, such as Britain and possibly the United States, support a rule permitting humanitarian intervention.<sup>33</sup> Such a rule was endorsed in a recent UN report on reform of the UN, although that report envisioned a continuing requirement of Security Council authorization.<sup>34</sup> In addition, Tesón can point to precedents – that is, unilateral or coalition-led humanitarian

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<sup>30</sup> See Barry, *supra* at 56.

<sup>31</sup> See Pogge, *supra* at 190-91.

<sup>32</sup> *Id.*, 208. Despite the fact that we can observe such forces already in countries like Britain, Spain, and Italy.

<sup>33</sup> See Straw: War Won't Change UN Charter, Press Ass'n, Mar. 30, 2004, available at <http://politics.guardian.co.uk/iraq/story/0,12956,1182177,00.html>.

<sup>34</sup> Report of the Secretary-General, In Larger Freedom: Towards Development, Security and Human Rights for All paras. 125-26 (2005), available at <http://www.un.org/largerfreedom/contents.htm>.

interventions that did not meet substantial world opposition, including interventions in Cambodia by Vietnam, Uganda by Tanzania, and Kosovo by NATO – that bolster his claim that a rule permitting humanitarian intervention is sustainable as international law.<sup>35</sup> The upshot is that although the status quo may prevail, a moderate revision of the law is possible.

What makes Tesón’s argument seem more realistic than the others? In part, the answer is that Tesón’s argument depends on a well understood mechanism of international legal reform – the development of customary international law – and it draws on empirical evidence about the attitudes and practices of states. But this answer is partial and unsatisfactory. What is needed is a more general framework for evaluating the realism of proposals for international legal reform, where “realism” refers to their consistency with what we know about human psychology and the problems of institutional design.

## II. ASSUMPTIONS

There has long been the view that international law should advance global justice, not merely serve the interests of states, but this view is in tension with the traditional basis of international law – the consent of states. Nonetheless, improvement of international law through reform is surely possible. The question is how to distinguish reform proposals that are possible and reform proposals that are not possible. To do that, one needs a theory that explains the institutional constraints on international lawmaking.

In this Part, I discuss my assumptions. I make one normative and three positive assumptions. The normative assumption is that the goal of international legal reform should be to maximize global welfare. The positive assumptions are that (1) the preferences of the world population are heterogeneous; (2) governments try to maximize the welfare of their citizens or a subpopulation of their citizens (elites, government supporters), and ignore the welfare of noncitizens; and (3) international legal organization and enforcement are constrained by the collective action problem.

### A. *Welfarism*

Welfarism is the theory that an action is good if it maximizes the welfare of relevant individuals; global welfarism is the theory that all individuals, rather

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<sup>35</sup> For discussions, see Tesón, *supra*; Franck, *supra*.

than the members of a particular group or society, are counted in the social welfare function. The welfare of all individuals counts equally.

Welfarism is a version of consequentialism – the idea that the goodness of actions depends on their consequences rather than their intrinsic nature. By contrast, deontologists believe that individuals have certain duties that are not exhausted by their consequences; for example, one must tell the truth in cases where truth telling reduces welfare rather than increases it.

There are many different theories of welfare. Economists generally assume that a person's welfare is a function of preference satisfaction. The best way to enhance a person's welfare is by giving her what she prefers – or, better yet, money, which she can use to buy what she wants. Philosophers reject this view and offer various alternatives. Some philosophers agree that a person's welfare increases when his preferences or desires are satisfied but further stipulate that only certain preferences or desires (informed, non-distorted, etc.) count. Others argue that welfare is a function of mental states: a person's welfare increases when he has the mental state that corresponds to happiness or other positive feeling. Still others argue that welfare increases when a person acquires certain objective goods – health, friendship, education – regardless of whether he or she wants these goods or these goods provide him or her with a positive mental state.<sup>36</sup> I do not express a view about which of these versions of welfarism is correct; my argument is compatible with all of them, within reasonable limits.

Why should international law reform be based on global welfarism? The main reason is that nearly everyone agrees that the welfare of human beings is, at least, a relevant consideration for governments. Authoritarian governments, theological governments, and liberal governments all agree that they should be concerned about improving the well being of their citizens, even if they agree on little else. Because international law is based on the consent of states, it can reflect only their areas of agreement, and not their areas of disagreement. Thus, welfarist premises are an attractive starting point for understanding and evaluating international law.

There are two plausible alternatives to the welfarist approach. The first view is that the purpose of international law is to advance the interests of states, not the people who live in them. After all, international law is based on the consent of states, and states will not consent to international law reform that does not advance their interests. This view is an old one and implicit in much

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<sup>36</sup> For a discussion, see James Griffin, *Well-Being: Its Meaning, Measurement, and Moral Importance* (1986).

traditional scholarship, but it confuses normative and positive.<sup>37</sup> States themselves are not moral agents; state interests are just constructs based on the interests and values of people living within states. Modern moral theories agree that the relevant moral agents are people, not nations or other collectivities. To make an argument based on political morality, one must appeal to the values and interests of people, not collectivities.<sup>38</sup>

The second view is that international law should advance human rights or democratic institutions. This view is consistent with the consensus assumption that individuals, not groups, matter, but it rejects welfarism in favor of a social contract or rights-based perspective.<sup>39</sup> Although I have doubts about this position, my purpose is not to criticize it. As I noted above, most contractarians such as Rawls agree that governments should concern themselves with the public's welfare. The argument in this paper focuses on institutional constraints on international law reform, and it will generally not matter, for purposes of the argument, whether the constraints limit reform for welfarist purposes or reform for the sake of vindicating human rights. In many cases, one might, without affecting the argument, replace "welfare" with "welfare subject to human rights constraints," as the maximand. So although I will assume that welfarism is the right criterion for evaluating reform, the assumption is mainly for expository convenience, and the argument would, for the most part, remain unaltered if I focused on human rights instead.<sup>40</sup>

## *B. Heterogeneous Preferences and the State System*

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<sup>37</sup> See Hedley Bull, *Anarchical Society* 307 (1995) (defending the state system); Louis Henkin, *How Nations Behave* 337-39 (1979) (defending international law).

<sup>38</sup> See Charles R. Beitz, *Political Theory and International Relations* (1979). This is the overwhelming consensus in moral theory; even authors who take seriously nationalism and the nation state base their views on the importance of collectivities for the well being or dignity of individuals. See, e.g., John Rawls, *The Law of Peoples* (1999); Michael Walzer, *The Moral Standing of States*, *supra* (defending his views against the charge of statism); David Miller, *On Nationality* (1995). For a survey and critique of nationalist theories such as Miller's, see Barry, *supra*. For a slightly dated discussion of the literature on "communitarian" versus "cosmopolitan" approaches to international relations, see Chris Brown, *International Relations Theory: New Normative Approaches* (1992).

<sup>39</sup> Buchanan is an example of this view; others include Beitz, *supra* at 129-36, and Pogge, *supra*. This view has its origin with Kant, see Immanuel Kant, *Perpetual Peace and Other Essays on Politics, History, and Morals* (Ted Humphrey trans., 1983). Singer, by contrast, is a welfarist, although in *One World* he makes nonwelfarist "fairness" or casuistic arguments as well as welfarist arguments. Another welfarist is Robert E. Goodin, *Utilitarianism as a Public Philosophy* 265-87 (1995) (discussing responsibilities toward fellow citizens versus foreigners).

<sup>40</sup> I will note when welfarist and nonwelfarist assumptions lead to different conclusions.



A state is a political entity that joins a territory and a population. People on the territory are in the state, and subject to its jurisdiction. The state acts through a government, which may change over time, even as the state itself remains constant. The government typically has a monopoly on force within the territory of the state.

Because the government of a state has a monopoly on force, it can provide public goods to its citizens. It finances the public goods by taxing citizens, and it prevents foreigners from free riding by controlling its borders. The standard list of public goods includes security, environmental quality, the provision of market institutions, education, and social insurance. The larger the state, the more cheaply it can provide public goods, as it can spread the cost over a larger population.

Why, then, is there not a single world state? A world state would be able to spread the fixed costs of public goods over the largest possible population, and thus supply them more cheaply than any smaller state. There is no reason in principle why a world state cannot exist, but history suggests that the problem is that as the territory controlled by a government increases in size, the government experiences increasing difficulty providing public goods to the increasingly diverse people within the territory. People in remote areas realize that they can improve their well being by separating from the existing state and either starting a new state or joining a neighbor. The government is not wealthy enough to bribe them to stay, or powerful enough to prevent them from leaving. Thus, the fundamental reason for the existence of multiple states is the heterogeneity of preferences (defined broadly to include interests, values, and so forth).

The world is divided among a large number of states. The governments of the states recognize, for the most part, the existence of all the other states. This means that each government has absolute or nearly absolute power to govern people on its territory, and also that each government acknowledges that it has no power to govern people on the territory of other states. This is generally what is meant by “sovereignty.”<sup>41</sup> There are some limits on sovereignty. Most important, in principle all UN members except veto holders could find themselves legally obliged to obey a Security Council resolution that restricts their control of their territory, but this restriction is more formal than real because the vetoholders rarely agree and most non-vetoholders can claim one of the vetoholders as a

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<sup>41</sup> There is an enormous literature on this topic. See, e.g., Stephen Krasner, *Sovereignty* (1999); John J. Jackson, *Sovereignty-Modern: A New Approach to an Outdate Concept*, 97 *Amer. J. Inter. L.* 782 (2003). The word is used in many ways, often inconsistently; however, the core meaning I identify is, I think, uncontroversial.

patron.<sup>42</sup> European nations have yielded some sovereignty to the European Union, but this sharing of sovereignty provides no other states with authority over the European nations. And although all states are subject to treaty obligations, the populations of those states retain the formal and real power to direct their governments to violate the treaties, and so in this respect treaty obligations are consistent with the existence of sovereignty. Sovereignty is based on the beliefs and attitudes of populations, and cannot be lost or given away unless the relevant population acquiesces.

A few more assumptions should be mentioned. First, preferences cluster in a territorial fashion: people who live in France are more similar to each other than they are to people who live in Germany or Indonesia. Second, the clustering of preferences cannot be easily changed by policy. Although states try to instill uniformity through education, propaganda, and so forth, there are limits to what they can do. Third, it is not practicable to have different governments providing different public goods at different levels unless there is a single hierarchical authority that can resolve disputes.<sup>43</sup>

A state exists only as long as its government can maintain control of people on its territory and prevent other states from encroaching. A state ceases to exist when it is annexed by another state; this can happen simply because the original state's population prefers to be a part of the larger state. States can also divide as a result of secessionist movements, and new states come into existence when separatists establish control over a territory, exclude the government of the original state, and manage to obtain the recognition of other states.

### *C. Agency Costs and Governments*

#### 1. Perfect Government

Governments determine how the state's power is used to regulate people. It is useful to consider first an "ideal" government which, I will assume, is a perfect agent for the citizens of the state. Such a government chooses policies that maximize the welfare of its own citizens but ignores the welfare of citizens of

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<sup>42</sup> See Michael J. Glennon, *Limits of Law, Prerogatives of Power: Interventionism After Kosovo* (2001) (describing UN paralysis).

<sup>43</sup> The reason for this is that there are great economies of scope in government; see Alesina and Spolaore, *supra*, at 27. If this assumption is abandoned, then conceivably various overlapping jurisdictions would be possible. See Bruno Frey and Reiner Eichenberger, *The New Democratic Federalism for Europe: Functional, Overlapping and Competing Jurisdictions* (2004) (proposing a scheme of voluntary, overlapping jurisdictions).

other states. Typically, this means that the government creates public goods – including defense, internal security against crime, environmental protection, enforcement of property and contract rights, and so forth – and redistributes wealth. These sorts of policies benefit the government’s citizens, but this framework does not exclude the possibility that the citizens of one state care about the well being of citizens of another state. If this is the case, the perfect government of the first state will choose policies that benefit the citizens of the other state. But in any event the government does not choose policies that are globally welfare maximizing.<sup>44</sup>

This point is worth emphasizing, as many of my conclusions will follow from it. To see its importance, imagine a hypothetical perfect world government that does choose policies that maximize global welfare. Such a government would transfer a great deal of wealth from rich people living in North America, Australia, Japan, and Europe to poor people living in Africa, South Asia, and South America. It would also adopt policies that create global public goods such as control of the world climate – even if the optimal policies have asymmetric distributive impacts – for example, reducing the welfare of people in some richer areas a little while increasing the welfare of people in other poorer areas a lot.

Now imagine that the world consists of  $n$  states whose governments maximize domestic welfare. It is clear that the governments of wealthy states will not consent to massive redistribution of wealth to poor states, though they may agree to provide moderate aid in order to satisfy any altruistic impulses of their citizens. It is also clear that the governments will agree to climate change policies only if they enhance the welfare of all states. Thus, the state system creates an implicit Pareto criterion: world policies, reflected in international law, will exist only when they make all states better off. The policies that satisfy the Pareto criterion will be a subset of the policies that are welfare-maximizing because all welfare-maximizing policies with strong distributive impacts (that is, they make the population in at least one state worse off) will be excluded. Thus, international law will supply fewer public goods than would a hypothetical ideal world government.

## 2. Imperfect Government

Compounding this problem, all governments are imperfect to varying degrees. The officials and bureaucrats who operate governments may choose to maximize the welfare of themselves, their friends and relatives, their tribes or

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<sup>44</sup> Cf. Louis Kaplow, A Note on Subsidizing Gifts, 58 J. Pub. Econ. 469 (1995) (showing that welfare-maximizing donations do not necessarily satisfy the Pareto criterion).

ethnic groups, the inhabitants of certain regions, and other groups that are a subset of the entire population. At one extreme, a dictator may take account of only his own welfare or that of his family. At the other extreme, a well functioning democracy will take account of the general population of voters, or the majority, or various groups or interest groups. The difference is one of degree, though often very great.

For simplicity, we will imagine two types of states: dictatorships and democracies. Dictatorships maximize the welfare of a few individuals or a small group, albeit subject to a constraint – if they provide too few resources to (or extract too much from) the general population, it will revolt.<sup>45</sup> The government of a democracy, we suppose, maximizes the welfare of the median voter. I will assume, roughly, that the world at all times consists of a mix of dictatorships and democracies.<sup>46</sup>

Note that maximization of the welfare of the median voter is not the same as domestic welfare maximization: it is consistent, for example, with transferring wealth from a poor minority to a wealthy majority, which would not generally enhance welfare because of the diminishing marginal utility of the dollar.

#### *D. The Collective Action Problem and Enforcement*

Because no world government exists that could enforce international law, international law can be sustained only if states enforce it in a decentralized fashion. But decentralized enforcement is highly problematic, and can be effective in only limited circumstances.<sup>47</sup>

To see why, imagine that state X violates international law by sending military forces across the border with state Y. Suppose that state Y is too weak to resist the military incursion; what is its recourse? It cannot file a complaint with an international prosecutor, or bring a lawsuit in an international court (or if it can do the latter, it has no way to enforce the court's judgment). It can complain to other states that state X violates international law, but it has no way to compel these other states to take action.

In an ideal world, other states – the international community – would sanction state X. Sanctions could include cutting off trade, suspending international cooperation, and even military intervention. Unfortunately, the

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<sup>45</sup> See Alesina and Spolaore, *supra* at 70-73.

<sup>46</sup> This is roughly accurate, and has been throughout the last one hundred years.

<sup>47</sup> See Todd Sandler, *Global Collective Action* (2004).

international community has weak incentives to impose sanctions on state X. The problem is that sanctioning is costly for the other states of the world. If a state Z cuts off trade with state X, then Z suffers from the lack of trade just as X does. If state Z participates in an invasion, then Z's soldiers are at risk. Further, Z might have close and valuable relations with X while having no relationship with state Y; in such a case, Z would gain very little from cooperating in imposing sanctions while losing a great deal. Finally, Z might rationally do nothing in the hope that other states will act: this free rider problem will undermine the incentives of all states even if they have an interest in maintaining international borders in general or Y's borders in particular. For all these reasons, effective international economic and international sanctioning has been extremely rare.<sup>48</sup>

International law is sustained chiefly through self-help, not collective action. Victims of illegal behavior retaliate against the violator; to avoid such retaliation, states comply with international law as much as they can. For example, when the United States violates WTO rules in a way that injures the European Union, only the EU retaliates; Japan does not.<sup>49</sup> When states invade each other, the victim fights back, occasionally with a few allies; except in rare cases, the rest of the world does not intervene. When states harass foreign diplomats, the diplomats' state threatens retaliation; the rest of the world does not.<sup>50</sup> Enforcement of international law is in this way mainly a bilateral phenomenon – a matter between violators and victims – and not a multilateral phenomenon.

These enforcement problems have two implications for international law. First, most of international law reflects the bilateral nature of enforcement. For example, even though the trade regime is a multilateral system, in the sense that the rules apply to all members, the regime provides that only the victim of trade violations have a right to retaliate, even though the system as a whole would be more effective if all states could agree to retaliate against violators, and follow

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<sup>48</sup> See George Lopez, *The Sanctions Decade: Assessing UN Strategies in the 1990s* 204 (2000) (finding 27-36 percent success rate for UN sanctions); Gary Clude Hufbauer, Jeffrey J. Schott, and Kimberly Ann Elliott, *Economic Sanctions Reconsidered* 92 (2d ed. 1990) (finding that sanctions are “of limited utility in achieving foreign policy goals that depend on compelling the target country to take actions it stoutly resists”); *Economic Sanctions and American Diplomacy 197-205* (Richard N. Haass ed. 1998) (finding that sanctions have limited value). All of these sources attribute failure, in part, to collective action problems.

<sup>49</sup> See Goldsmith and Posner, *supra* ch. 5.

<sup>50</sup> For example, Brazil protested the mistaken killing of its national by British police after terrorist attacks in London; Mexico protested the U.S. execution of its national who had not been advised of his rights under an international treaty; the U.S. protested the seizure of Americans as hostages in Iran in 1979. In all cases, the rest of the world was indifferent or mostly passive.

through on this agreement.<sup>51</sup> But states do not make such an agreement because they understand that the free rider problem would undermine it.

Second, international law that, explicitly or implicitly, depends on (large-number) multilateral enforcement is usually ineffective. Human rights treaties cannot be enforced through self-help because human rights abuses of state X against its own citizens do not injure any particular other state, but the international community at large, to the extent that the international community cares about human rights. With no particular victim to threaten retaliation, most states ignore the human rights regime.

The strength of international law enforcement is an empirical question, and a great deal of controversy surrounds this question. Most international law professors believe that enforcement of international law is strong because states do not want to be seen as scofflaws.<sup>52</sup> The empirical literature provides little support for this view. The UN charter's ban on the use of military force is frequently violated;<sup>53</sup> international humanitarian law is selectively invoked;<sup>54</sup> and human rights treaties are generally ignored.<sup>55</sup> These are all multilateral treaties; by contrast, bilateral treaties seem to have a better record.<sup>56</sup> However, I will avoid taking a strong position on this issue in this paper, and will vary my assumptions – sometimes assuming that enforcement is strong, and sometimes assuming that enforcement is limited.<sup>57</sup>

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<sup>51</sup> See Goldsmith and Posner, *supra* ch. 5 (and citations therein).

<sup>52</sup> See, e.g., Louis Henkin, *How Nations Behave* 47 (2d ed. 1979); Harold H. Koh, *Why Do Nations Obey International Law?*, 106 *Yale L.J.* 2599 (1997). For a critique of this view, see Eric A. Posner, *International Law and the Disaggregated State*, unpub. m.s. 2005.

<sup>53</sup> Glennon, *supra*.

<sup>54</sup> For some examples, see Lindsay Moir, *The Law of Internal Armed Conflict* 67, 119 (2002) (common Article 3, Protocol 2); James D. Morrow, *The Institutional Features of the Prisoners of War Treaties*, 55 *Int'l Org.* 971 (2001) (treatment of POWs during World War II); Eric A. Posner, *Terrorism and the Laws of War*, 5 *Chi. J. Int'l L.* 423, 428-29 (2005) (discussing poison gas and submarine warfare).

<sup>55</sup> See Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 *Yale L.J.* 1935 (2002) (ratification of human rights treaties not correlated with improvements in human rights); Eric Neumeyer, *Do International Human Rights Treaties Improve Respect for Human Rights?*, unpub. m.s. 2005 (ratification of human rights treaties not associated with human rights improvements in autocratic regimes).

<sup>56</sup> Of course, trying to establish that bilateral treaties are more effectively enforced than multilateral treaties would be difficult to do, and require a sophisticated empirical analysis that took account of selection effects and controlled for the strength of the obligation in the treaty. Thus, the claim in the text should be considered conjectural. For discussion, see Goldsmith and Posner, *supra*.

<sup>57</sup> One puzzle is why the collective action problem hinders interstate cooperation but not the cooperation within a state's population which is necessary to support regular government. On the

### *E. Summary*

The world population will not subject itself to a single government because preferences are heterogeneous. Instead, multiple states exist. Because of agency costs, all of these states have imperfect governments and many of them have extremely bad governments. Nonetheless, governments recognize that they can improve the well being of their citizens (or a subset of their citizens such as the elite) by cooperating with other governments. This joint recognition provides the mechanism that furthers welfare maximization, much as in standard analysis of domestic markets and international trade. States have an interest in supporting international law that allows them to increase the well being of their citizens. But the collective action problem ensures that the amount of cooperation falls short of the ideal, which is the amount that would exist if the world were governed by an ideal world state.

### III. IMPLICATIONS

This Part draws out the implications from the assumptions described in Part I. For expository convenience, I will analyze each of a series of international legal topics in the following way. First, I assume that governments are perfect and enforcement is perfect. Second, I assume that governments are imperfect and enforcement is perfect. Third, I assume that governments are imperfect and enforcement is imperfect. Finally, I briefly examine the law, history, and other relevant evidence. The moral of the story in each case is that even when institutions are strong (governments are perfect, enforcement is perfect), the structure of the state system places significant limits on the usefulness of international law. When more realistic assumptions are made about institutions, then the value of international law is even more limited.

#### *A. State Size; Secession; Merger*

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one hand, the population within a state is less diverse, but on the other hand it is far more numerous than the population of states. Whatever the answer to this puzzle – and no doubt the collective action problem is always a matter of degree – it does not matter for my analysis because interstate cooperation *assumes* intrastate cooperation. That is, if a state's policies are weak or inconsistent because the internal collective action problem is not overcome, the global effort to adopt policies that aggregate this state's interest with that of other states will be limited by the weakness of the state's interest. For example, a treaty that adequately reduces global warming is not possible, even if the interstate collective action problem is fully resolved, if one or more state parties to the treaty are unable to aggregate and represent their own citizens' interests in climate control.

The state system does not have particular implications about the number or size of states. Indeed, the number and size of states have changed greatly over the years. Roughly 80 states existed in 1870; 60 in 1900; 80 in 1950; 170 in 1980; and 190 today.<sup>58</sup> In this Part, I examine the implications of my assumptions for state size and number, and the law of secession and recognition.

### 1. Perfect Governments; Perfect Enforcement

An important implication of the assumption that governments are perfect agents – and not an additional assumption that is separate from it – is that states have the optimal size and shape. As this point is important, and has rarely attracted any comment in the philosophy or international law literatures, I will spend some time explaining what I mean.

Suppose there are two bordering, self-governing territories, X and Y.<sup>59</sup> Each territory is identical in size, resources, and population, including the number of people and the distribution of their preferences. Each government supplies a single public good – for concreteness, let us call it “criminal justice.”

Each individual’s utility is a function of income (from ordinary market activity) and the public good, minus a tax payment. People’s preferences for the public good are heterogeneous, meaning that some people value it a lot and some people value it very little. The tax is the same for everyone, and is used to fund the public good. Thus, people who attach a high value to the public good are net winners, and people who attach a low value to the public good are net losers.

Public goods are characterized by high fixed costs. To understand what this means, suppose that it costs one of the governments \$100 to set up the criminal justice system (build the police stations and courthouses, etc.), and then another \$1 per member of the population (the more people there are, the more police are needed). If the population is 50, then the total cost is \$150, and each person must pay a tax of \$3. If the population is 100, then the total cost is \$200, and each person must pay a tax of \$2. If the population is 1000, then the total cost is \$1100, and each person must pay \$1.10. Economists refer to this characteristic as “economies of scale”: supplying a public good is cheaper per person, the larger the population.

If criminal justice is a public good, and all else is equal, then the states X and Y can achieve economies of scale by merging, and thus merging their

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<sup>58</sup> Alesina and Spolaore, *supra* at 193 (graph of number of states over time).

<sup>59</sup> This section follows the analysis in Alesina and Spolaore, *supra*, at 17-30.



criminal justice systems. If each state has a population of 50, then – as the numerical example above shows – each citizen saves \$1 when the states are merged. Economies of scale, then, are a reason why states should merge and become larger. If economies of scale were all that mattered, then a single world state would be optimal.

However, as noted above, people have heterogeneous preferences. Suppose some people don't want or need criminal justice protection, or don't value it much, because they live in remote areas and don't fear criminal predation. Other people do value criminal justice because they live in congested cities where crime would be rampant if not deterred by the police. To simplify, suppose that the first type of person values the criminal justice system at \$1.50 and the second type of person values it at \$5.00. Further, suppose that initially the low-valuation type of person lives in state X, and the high-valuation type of person lives in state Y.

If the states do not merge, then clearly X will supply a lower level of criminal justice than state Y will. Indeed, in our stylized example, the state will supply zero criminal justice because the costs (\$3 per person) exceed the benefits (\$1.50 per person). (More realistically, X will invest in fewer courthouses and police stations, and generate less criminal justice, rather than zero.) Meanwhile, Y will supply the public good because the cost (\$3 per person) is less than the benefit (\$5 per person). Finally, note that if the states merged and supplied the public good based on a \$2.00 tax, then each person in X would lose \$0.50 compared to the status quo (where they lost 0), and each person in Y would gain \$1 relative to the status quo (where they gained \$2 rather than \$3).

This last point suggests that merger could occur as long as a transfer could be arranged – or, what is the same thing, a variable tax is used. Let people living in X pay a tax of \$1.25 and the people living in Y pay a tax of \$2.75. Now the people in X gain \$0.25 from the merger, and the people in Y gain \$0.25 from the merger.

But transfers are not costless. They involve administrative costs and cause economic distortions. Thus, the merger will not occur if the costs associated with the transfer (which are themselves an increasing function of the degree of heterogeneity) exceed the gains from exploiting economies of scale. This will sometimes be the case, but not always.

To sum up, the size of a state is a function of scale economies and heterogeneity costs. As scale economies increase relative to heterogeneity costs, the optimal size of the state increases as well.<sup>60</sup>

How does this conclusion follow from the assumption that governments are perfect agents? If governments are perfect agents, then they will agree to divide their own state, or merge it with other states or parts of other states, when doing so maximizes the welfare of their own citizens, even if the governments themselves go out of business. Thus, if scale economies are achieved through a merger, then the states involved will merge. If, in light of heterogeneity of preferences, states should divide, then they will and secession will be regarded as unproblematic. This is obviously unrealistic, but the question is why it is unrealistic, a question that I will address subsequently.

## 2. Imperfect Governments; Perfect Enforcement

### a. Democracies

Democracies maximize the welfare of the median voter, not of the entire domestic population; therefore, democratic governments are imperfect. As a result of this imperfection, states will tend to be too small, as shown by Alesina and Spolaore.<sup>61</sup>

The logic is as follows. Imagine a single state that generates a public good like criminal justice. The population is heterogeneous, so not everyone benefits from the public good to the same degree (transfers are impossible or costly). Because the government maximizes the welfare of the median voter, it chooses the type and level of public good that the median voter prefers. This means that the minority might not receive much of a benefit from the public good, and could even be harmed, because the taxation needed to fund the public good could exceed the benefits members of the minority receive.

Suppose now that the minority lives in a border region, and can secede if a majority of the minority votes in favor of secession. The minority might prefer to secede rather than contribute to the public good that it does not benefit from. The advantage of secession is that the minority can set up its own government that will supply the type and level of public good that the minority most prefers. The disadvantage of secession is that the cost of financing cannot be spread across as

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<sup>60</sup> I have ignored a lot of complications; readers who seek more depth should consult Alesina and Spolaore, *supra*.

<sup>61</sup> See Alesina and Spolaore, *supra* at 16-23.

many people. Still, in imaginable cases the minority will be better off with its own state, and the majority will – because of the cost of transfers – be unable to bribe the minority to remain part of the original state, even though aggregate welfare would be maximized in a single state

The driving force of the analysis is that neither the majority nor the minority have the right incentives to choose optimal policy. The majority externalizes costs imposed on the minority; the minority, if it has the power to secede, ignores the costs imposed on the majority. As a result, there are too many states, and states are too small. Secession is now morally problematic.

#### b. Dictatorships

The opposite is the case for dictatorships. Dictators are assumed to want to maximize revenue subject to an insurrection constraint – if citizens fall below a threshold level of welfare, they will revolt, which is more costly for the dictator than providing them with the threshold level of welfare. If the insurrection constraint is low enough, dictators maximize their own welfare by controlling as large a population as possible: the larger the population, the greater the source of revenue for the dictator's coffers.

One implication of this view is that dictators will exploit their citizens not by failing to finance public goods but by taxing them. Aside from the level of taxation, and the rules that dictatorships need to stay in power such as restrictions on political opposition, democracies and dictators should choose the same policies.<sup>62</sup> It follows that dictatorships and democracies will agree to similar kinds of international law – such as climate control pacts and trade agreements. Thus, there is reason to think that international law will not differentiate between democracies and dictatorships – at least for certain types of policies. We will return to this topic later.

#### c. Implications

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<sup>62</sup> See Casey B. Mulligan, Richard Gil, and Xavier Sala-i-Martin, Do Democracies Have Different Public Policies than Nondemocracies, 18 *J. Econ. Perspectives* 51 (2004). This is a controversial view; others have argued that dictators will undersupply public goods because they do not benefit directly from them. See, e.g., Mancur Olson, *Power and Prosperity: Outgrowing Communist and Capitalist Dictatorships* (2000) (modeling the decisions of dictators), and, for a discussion, Thráinn Eggertsson, *Imperfect Institutions: Possibilities and Limits of Reform* 60-62 (2005). My argument does not require that the (non-electoral, non-tax) policies of dictatorship and democracy converge completely, but that they do converge a sufficient amount.

For the global welfarist, imperfect government creates two sources of concern. First, imperfect governments choose domestic policies that do not necessarily maximize the welfare of their own citizens. Second, imperfect governments choose or acquiesce in state size that does not necessarily maximize the welfare of their own citizens. Can international law solve these problems?

The difficulty here is that for international law to solve these problems, governments which by hypothesis are imperfect must agree to international law that restricts their behavior. Is this possible? To keep the analysis concrete, I consider an important albeit sporadic issue of international law: the circumstances under which states should recognize a secessionist movement as having established a new state.

*All governments are democracies.* Suppose at time 1 that all states have the optimal size and shape. At time 2, minorities within states may choose to secede and establish their own states. At time 3, other states choose whether to recognize the existence of the new state. If they do, they trade and cooperate with the successor state to the same extent that they trade and cooperate with other states. If they do not, they refuse to trade or cooperate with the successor state, in which case the welfare of the citizens of the successor state falls drastically.

We can imagine a welfare-maximizing recognition law.<sup>63</sup> States would have the obligation to recognize successor states if and only if the joint welfare of citizens of the original and successor states exceeds the joint welfare of those citizens if no secession occurred. As a practical matter, the judgment would depend on the degree of heterogeneity of citizens and scale economies. If the members of the successor state are religiously, linguistically, ethnically, and culturally very different from the members of the rump state, then recognition would be more likely. If the division of the states would deprive citizens of important public goods – like a large internal market – then recognition would be less likely. In sum, by withholding recognition of precipitate secessions, states could in theory enhance global welfare.

*All governments are dictatorships.* A similar analysis would apply in the all-dictatorship case. States would have the obligation to recognize secessions only when they are welfare-maximizing for citizens of the successor state and the original state. Because the territory of dictatorships tends to be too large in the

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<sup>63</sup> I am referring to the law governing the recognition of states, not governments. See Restatement (Third) of the Foreign Relations Law sec. 201 (rules on recognition of states). The assumption in the text is that states would refuse to cooperate with states that they do not recognize; the reality is more complicated.

first place, the optimal recognition rule might well require foreign states to recognize separatist movements more quickly if they separate from dictatorships than if they separate from democracies. To see why, recall that dictators allow all citizens (except a small group of supporters) only enough welfare to prevent insurrections. A separatist group will secede as long as it receives more than that. As for the citizens of the rump, they will be made no worse off, as the dictator will continue providing them with the minimum amount. Thus, the dictator himself will suffer the loss from secession.

*A mix of democracies and dictatorships.* The comments above indicate that optimal recognition law would generally require states to recognize secessions from dictatorships, but to recognize secessions from democracies only when the population is sufficiently heterogeneous and scale economies are sufficiently low.

### 3. Imperfect Governments; Imperfect Enforcement

Imperfect enforcement occurs because governments may not gain anything from enforcing international law. The best case for enforcement occurs when two states are engaged in bilateral cooperation. If one state violates a treaty, the other state will likely retaliate. When the law benefits all or many states, and one state violates the law, the incentive of any other state to retaliate may be minimal. This is the familiar problem of collective action, as it applies to international cooperation.

The best case for enforcement of globally welfare maximizing recognition law would occur in the two-state case. Imagine two bordering states, each of which is a democracy and each of which has a separatist movement. One could imagine the following deal between the two states: each state promises not to recognize a separatist movement in the other state. If this promise is made public, then the incentive to secede may be substantially reduced: a new state that is not recognized as such by other states, which refuse to cooperate with it, is not likely to be viable. Separatists would do better by working for political reform within the structure of the existing state.

The deal is not necessarily welfare-maximizing, however. After all, the median voter in each state (in effect) agrees to the deal, and, by hypothesis, the median voter does not take account of the interests of the minority. For the rule to be jointly welfare maximizing, it would be necessary, at the time the deal is made, for the median voter not to know whether he or she is likely to want to secede or

to prevent secession.<sup>64</sup> This, of course, is highly unlikely; and unlikely to be sustainable in any event.

But the broader problem is that such two-state deals are unlikely to deter secession. The reason is that the separatist movement can seek recognition and cooperation from the rest of the world. If the two original states in question refuse to cooperate with the successor state, this just means that the opportunities for cooperation are that much greater for other states. For example, if the successor state has unexploited mineral resources, the rest of the world will be eager to cooperate with it, so that foreign companies will be able to exploit the resources. The collective action problem thus suggests that enforcement will be weak or nonexistent.

#### 4. Evidence: Law and History

In principle, recognition law could be used to maximize global welfare. States would have an obligation to recognize separatist movements quickly if they claim secession from dictatorships, and to recognize separatist movements slowly and reluctantly if they claim secession from democracies.<sup>65</sup> It is unlikely, however, that states have the right incentives to do so. Dictatorships have no particular interest in aiding democracies, and democracies could implement the optimal rule only if they could overcome severe collective action problems. For this reason, it is not surprising that international law does not generally oblige states to recognize or refuse to recognize new states (except to the extent limited by the principle of sovereignty).<sup>66</sup> Nonetheless, the principles and tradeoffs I have been discussing have important historical precedents.

Governments have long recognized that secession can be both desirable and problematic. The principle of self-determination advanced by President Wilson recognized that national borders during World War I were not necessarily just – in our terms, welfare maximizing. Wilson believed that ethnically homogenous populations should have the right to break off from existing imperial

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<sup>64</sup> Cf. Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 *Yale L.J.* 399 (2001) (discussing impartiality and constitutional design).

<sup>65</sup> This conclusion is an example of how welfarist analysis diverges from the views of someone who takes a rights-based view. See Barry, *supra*, at 56 (discussed above); Buchanan, *supra*. However, the rights theorist must also explain what amount of welfare losses are tolerable in order to “to make the maintenance of liberal institutions easier.” *Id.*

<sup>66</sup> *Restatement (Third) of Foreign Relations Law* sec. 202.

structures and establish their own states.<sup>67</sup> In tension with the principle of self-determination, states have long acknowledged that they should not encourage separatist movements in foreign states – this follows from the principle of sovereignty.<sup>68</sup> When secessions nonetheless occur, the law is simply that states may do whatever they want: they may recognize the new state, or not, however it might serve their interest. There have been occasional efforts to advance a new principle that new states will be recognized only if they respect human rights and are democratic, but this principle does not have many adherents.<sup>69</sup>

The principle of self-determination reflects the idea that homogenous populations are, all else equal, easier to govern than heterogeneous populations; thus, states should tend to be homogenous. The principle of sovereignty reflects the idea that every state is subject to centrifugal forces that may reduce rather than enhance welfare; it thus may be best for other states not to encourage separatism within a given state. The efforts to condition recognition on democracy and human rights reflect the idea that people living in dictatorships are worse off than people living in democracies. But the failure to embody these ideas in workable international law reflects the problem of collective action. Bilateral processes cannot, except in unusual circumstances, be used to implement these ideas. They can prevail only if all or nearly all states agree to enforce them – for a separatist movement needs only a few cooperative partners in order to be self-sustaining. But because of free riding, such a legal system has not come into existence.<sup>70</sup>

## *B. Sovereignty*

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<sup>67</sup> This principle was eventually accepted by states for the limited purpose of supporting indigenous separatist movements claiming independence from colonial powers. See Reference re Secession of Quebec, 2 S.C.R. 217 (1998) (distinguishing Quebec secession from decolonization).

<sup>68</sup> See Lawrence M. Frankel, International Law of Secession: New Rules for New Era, 14 Hous. J. Int'l L. 521, 535-37 (1992)

<sup>69</sup> See Lori F. Damrosch et al., International Law: Cases and Materials 258-61 (4<sup>th</sup> ed. 2001) (describing diplomatic efforts to make adherence to democratic principles and human rights a condition of statehood).

<sup>70</sup> An interesting, related question is whether the analysis above has implications for the international law of migration. On the one hand, heterogeneity of preference argues in favor of free migration: individuals will sort themselves into groups with similar preferences, reducing the cost of distributing the gains from government action. On the other hand, individuals fleeing oppressive or incompetent governments may put strains on the states in which they seek refuge – they might increase the heterogeneity of the recipient state's population if their main reason for migration is to escape oppression – and it might be better if they, being forced to stay put, were given an incentive to pressure their own government to improve. How these and other factors balance out is best left to future research.

The concept of sovereignty arose briefly in the discussion of secession, above, but it has more general importance. In this Part, I explore the ways in which sovereignty reflects an institutionally constrained globally welfare maximizing conception of international law.

As noted above, sovereignty is an ambiguous concept, but it is generally understood to mean the right of a state to be free from interference from other states, and the corresponding duty not to interfere with the governance of other states.<sup>71</sup> A clear example of a violation of sovereignty is a military invasion, in which one state's military forces enter the territory of another state without that other state's consent. Flying through the airspace of another state, or sending ships through its territorial waters, without its consent, is also a violation of sovereignty. There are many more ambiguous examples, such as using the radio to propagandize across borders or, as noted above, providing aid or encouragement to separatist movements.

### 1. Perfect Governments; Perfect Enforcement

If governments are perfect, then states will have the optimal size, and optimal policies will be chosen within their borders. In particular, governments will tax citizens and use the money to produce public goods that benefit all their citizens.

Governments will, however, have a strong incentive both to externalize costs on other states, and to free ride on the public good production of other states. As an example of the first, a perfect domestic welfare-maximizing government would locate industrial zones upwind from borders, so that the pollution will harm foreigners rather than citizens. As an example of the second, such a government might encourage its citizens to travel to other states in order to acquire technological knowledge generated by foreign states' investment in research.

One way to understand the concept of sovereignty is as a recognition of the central role of the state in producing public goods. Public goods cannot be efficiently produced unless states can control who pays for them and who benefits from them. A sovereign state has the formal legal right to object if another state either externalizes costs across its borders or, by encouraging its citizens or otherwise, free rides on the first state's production of collective goods. Sovereignty allows the victim state in the first case to demand that the pollution

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<sup>71</sup> See Louis Henkin, *International Law: Politics and Values* 8-11 (1995).



be reduced, and the victim state in the second case to close its borders to the citizens of the free riding government.

## 2. Imperfect Governments; Perfect Enforcement

As many commentators have noted, however, sovereignty also allows governments to abuse their own citizens. Suppose that state X persecutes members of a religious minority. People in state Y object. Under the principle of sovereignty, state Y would not be able to send an army to state X in order to protect the religious minority. Thus, many people have argued that sovereignty should yield in certain circumstances – for example, when a government commits atrocities against its own citizens.

The problem with this view is that it is in tension with the assumption for having a state system (as opposed to a world government) in the first place – that people living in a particular territory are better off if they have their own government than if they are a small part of a world state. Recall that the rationale here is that given the heterogeneity of the world population, public goods are created more efficiently at a national level than at a global level. The supposition that state Y's government will act in the interest of people living in state X by protecting them against X's government violates the assumption that states should be separate.

We can avoid this problem by assuming that people in state Y have an altruistic interest in the well being of people living in state X or, more generally, that altruistic concerns transcend national borders. If this assumption is correct, then there exists a global public good – all people having greater than a minimum level of well being. States would rationally agree to a treaty regime that creates this public good, and indeed the human rights regime could be interpreted in this fashion. Such a theory would not necessarily justify humanitarian intervention, but it would justify some kind of sanctioning system that would be targeted against states that commit atrocities against their own citizens.

It does not appear that imperfection of government stands in the way of such a system. There is no reason to think that imperfect governments would ignore the crossborder altruism of their citizens any more than any other values or interests. Indeed, dictatorships as well as democracies have at least made a show of expressing concern about the well being of citizens in foreign states. The Soviet Union, for example, represented itself as a defender of the working class everywhere in the world.

Many scholars argue that dictatorships should enjoy less sovereignty: they should be excluded from the benefits of membership in international organizations<sup>72</sup> or even subject to invasion by liberal democracies, which would then install a democratic regime.<sup>73</sup> This argument is vulnerable to many practical objections: it is unclear that foreign states can successfully install democratic institutions; invasions might result in civil war; adequate interventions may be too expensive and risky; and so forth. But for present purposes the most difficult problem with this view is that it is in tension with interstate cooperation. Suppose, for example, that a successful treaty that reduced global warming needed the participation of China. If China must be excluded from international organizations, or even invaded, because of its authoritarian system, then global climate control cannot be achieved. If China is included, then a dictatorship has benefited from international cooperation. This problem is ubiquitous in international relations because even small countries have very important resources, are needed for international goals (for example, tracking down terrorists who hide in them), and can easily dissolve into anarchy if invaded or isolated. As a result, the optimal sovereignty rule is ambiguous: it might favor treating dictatorships like democracies (so that global collective goods can be created through cooperation in the short term) or treating dictatorships as pariahs (in order to encourage regime change for the sake of the dictatorship's population).<sup>74</sup>

### 3. Imperfect Governments; Imperfect Enforcement

Enforcement problems, however, seriously complicate this analysis. We can point to two distinct problems.

First, what motives do foreign governments have for intervening? Even if they are perfect, they will intervene only if intervention improves the welfare of domestic citizens. If the foreign governments are imperfect, they may intervene even when doing so does not enhance the welfare (altruistic or otherwise) of their citizens. If the law relaxes sovereignty when a humanitarian crisis occurs, then foreign states, taking advantage of the law, may intervene but not in order to

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<sup>72</sup> See Pogge, *supra*; Buchanan, *supra*.

<sup>73</sup> See, e.g., Beitz, *supra*, at 92.

<sup>74</sup> This problem confronts humanitarian organizations as well, which must decide whether to cooperate with dictatorships (so that they are permitted to aid populations under the dictatorships' control) or to refuse to cooperate with them (so that the dictatorships do not indirectly benefit from the aid). They generally do the former. For a journalistic account, see David Rieff, *A Bed for the Night: Humanitarianism in Crisis* (2002).

alleviate the humanitarian crisis. They may intervene for other strategic reasons. This is the pretext problem.

Second, even if foreign governments are altruistic, there is a free rider problem. If a humanitarian crisis in state X can be solved through elimination of the government of X, then all states (assuming altruism) benefit from the elimination of that government. Thus, every state maximizes its welfare by refusing to intervene in the hope that some other state will intervene. Even if some intervention occurs, it is likely to be less than what would be optimal. Further, states are likely to free ride in punishing states that fail to intervene, or that intervene but do so for strategic reasons (that make things worse) rather than for altruistic reasons.

These problems are not decisive, but they illustrate the risks. A rule of exceptionless or absolute sovereignty would allow governments to abuse their own citizens but (assuming imperfect enforcement) discourage governments from invading other countries using humanitarianism as a pretext. A rule that permits or requires humanitarian interventions would discourage governments from abusing their citizens but encourage governments to launch invasions for strategic reasons.

#### 4. Evidence: Law and History

As noted, many elements of international law reflect altruistic concern for the well being of people living across borders. Human rights treaties oblige states to respect certain human rights.<sup>75</sup> International humanitarian law reduces the brutality of war.<sup>76</sup> International criminal law makes individuals liable for committing certain atrocities.<sup>77</sup> And, as discussed in Part I, some commentators support a right of humanitarian intervention.

However, these legal regimes are weak and rarely enforced. History suggests two reasons why. First, although crossborder altruism exists, it is minimal. Foreign aid, which is the most direct evidence of altruism, is very low, and usually tied to strategic goals.<sup>78</sup> Humanitarian interventions have been rare

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<sup>75</sup> See, e.g., International Covenant on Civil and Political Rights, Dec. 16, 1966.

<sup>76</sup> See, e.g., Geneva Convention, Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949.

<sup>77</sup> See, e.g., Rome Statute of The International Criminal Court, July 17, 1998.

<sup>78</sup> Alberto Alesina and David Dollar, Who Gives Foreign Aid to Whom and Why?, 5 J. Econ. Growth 33 (aid not correlated with poverty but with strategic interests); Wojciech Kopczuk, Joel Slemrod, and Shlomo Yitzhaki, The Limitations of Decentralized World Redistribution: An Optimal Taxation Approach, 49 Eur. Econ. Rev. 1051 (2005) (American aid policy implicitly

and limited. The clearest recent example of humanitarian intervention was America's ill-fated famine relief operation in Somalia; the U.S. withdrew after a small number of combat deaths.<sup>79</sup> Most other examples cited in the literature actually reflect mixed motives. The Vietnamese intervention in Cambodia and the Tanzanian intervention in Uganda may have helped the citizens in the invaded states but the purpose of the invasions was security.<sup>80</sup> The Kosovo example is more complicated but the contrast between intervention in Kosovo and the failure to intervene in Rwanda in 1994 and Darfur today suggests that regional security, not humanitarianism, is the distinguishing factor.<sup>81</sup>

Second, to the extent that all people are altruistic, all people benefit when atrocities in a foreign state are halted: this suggests a collective action problem. Even if preventing genocide in Rwanda benefits all states, all states would be even better off if other states took the considerable risk of sending in military troops. The international legal regime has not been able to overcome this problem of collective action.

As a practical and legal matter, then, sovereignty remains robust even though in a world with perfect governments (putting aside the government that commits atrocities) and perfect enforcement, sovereignty would be limited so that states could not commit atrocities against their own citizens. The problem is not so much that governments are imperfect but that altruism is limited and collective action problems are severe.

### *C. Cooperation*

Global welfarism implies that states should cooperate with each other in order to produce supranational (regional or global) public goods such as climate control and trade. There is no such obligation to cooperate because states have strong nonlegal incentives to cooperate, but there is an important regime governing the creation, interpretation, and enforcement of treaties.

#### 1. Perfect Governments; Perfect Enforcement

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values foreigners at 1/2000 the value of an American life); Jean-Sebastien Rioux and Douglas A. Van Belle, *The Influence of Le Monde Coverage on French Foreign Aid Allocations*, 49 *Inter. Stud. Q.* 481, 496 (2005) (French aid not related to wealth of recipient; related to newspaper coverage; democracy; and use of the French language).

<sup>79</sup> See Donatella Lorch, *Last of the U.S. Troops Leave Somalia: What Began as a Mission of Mercy Closes With Little Ceremony*, *N.Y. Times*, March 26, 1994, sec. 1, p. 1.

<sup>80</sup> See Glennon, *supra*.

<sup>81</sup> See James Traub, *Never Again, No Longer?*, *N.Y. Times*, July 18, 2004, at sec. 6, p. 17.

Why should states cooperate? Let's consider a simple example. A territory contains a factory and a resident who lives downwind. When the factory operates, it produces a benefit for its owner (B) and a cost to the downwind resident (C). Operation of the factory is desirable if and only if  $B > C$ .

If the factory and the resident occupy the territory of a single state, the government of the state can create a law that ensures that the factory operates only if it is socially desirable. For example, a law that provides that the factory may operate only if  $B > C$  is socially desirable; so is a law that requires the factory to pay C to the victim if it operates. In the latter case, the factory will internalize the social cost of its operations, and operate only if  $B > C$ . In addition, the state could determine whether the factory's operations are socially beneficial and pass a law banning operation of the factory if they are not.

Suppose now that the factory is in state X, and the pollution it generates crosses a border and harms a person who lives in state Y. From the perspective of global welfare, it remains the case that a law that forces factory owners to internalize the costs of production is desirable. However, state X no longer has an incentive to pass such a law. The problem is that state X's citizen – the factory owner – is harmed by a law that penalizes the factory for polluting, and no one in state X benefits from such a law. Therefore, state X will not pass such a law.

State Y's citizen is victimized by the pollution but, because state Y has no control over the factory owner, state Y gains nothing by passing an anti-pollution law. Perhaps, state Y will try to bribe state X to pass the law. If the victim is injured more than the factory owner gains, the bribe might be possible. But it might not. I will return to this issue shortly.

Suppose that each state has a factory and a citizen. State X's factory pollutes the drinking water of state Y's citizen; and state Y's factory pollutes the drinking water of state X's citizen. Would each state pass globally welfare-maximizing laws?

If they are unable to cooperate, the answer is no. State X's law benefits no one in state X, and harms X's factory owner; therefore state X will not pass the law. The same logic ensures that state Y also does not pass a law.

However, state X and state Y could agree to enter a treaty that provides that each state must pass a law that restricts pollution. The treaty could provide that each state must pass a law that prohibits pollution if the benefits (to the factory owner in the state) are less than the costs (to the citizens in both states). In

other words, the treaty would require each state to act as if crossborder costs were actually incurred by its own citizens.

If the two states can cooperate in this fashion, then the outcome is globally welfare-maximizing, and to the same extent as the outcome in the one-state case. But this is an exceptionally simple case. In the real world, there are two obstacles to cooperation: asymmetry and third-country effects.

*Asymmetry.* By asymmetry, I mean that the cost/benefit ratio is different for each state. Suppose, for example, that the factory in state X (which I will call factory X) produces an in-state benefit of 50 and an out-of-state cost of 100. Factory Y produces an in-state benefit of 50 and an out-of-state cost of 10. Table 1 provides the numbers.

Table 1

|              | Welfare Effect in X |        | Welfare Effect in Y |        | Global Effect |
|--------------|---------------------|--------|---------------------|--------|---------------|
|              | Owner               | Victim | Owner               | Victim |               |
| Factory in X | 50                  | 0      | 0                   | -100   | -50           |
| Factory in Y | 0                   | -10    | 50                  | 0      | 40            |
| Both         | 40                  |        | -50                 |        | -10           |

Consider a treaty that bans all pollution. Such a treaty would benefit Y (whose factory loses 50 but whose citizen gains 100) but would harm X (whose factory loses 50 but whose citizen gains only 10). Thus, X would refuse to enter such a treaty. Or consider a treaty that permits only cost-justified pollution. Such a treaty would benefit Y (whose factory loses zero but whose citizen gains 100) but would harm X (whose factory loses 50 and whose citizen gains zero). X would reject this treaty.

It is possible that Y could persuade X to sign one of these treaties (preferably the second) by making a side payment to X. Suppose that Y says that if X agrees to enter a treaty banning cost-unjustified pollution, then Y will pay X somewhere between 50 and 100. Both states would be better off after such a deal than in the status quo. However, states rarely make side payments of this sort to each other, and the reason is probably that they create perverse incentives. If state X knows that Y will pay it to reduce pollution, then it might encourage its entrepreneurs to set up factories close to the border with Y, and then threaten to operate them unless Y pays X more money. I will return to this problem later.

*Third-Country Effects.* Two states might cooperate with each other with the purpose of injuring third states. The Nazi-Soviet pact, which carved up Poland, is one such example. Other examples are less dramatic but no less

important. Trade economists have long recognized that a bilateral free trade pact can result in trade diversion that may destroy the welfare effects of the pact.<sup>82</sup> Briefly, when states X and Y agree to reduce tariffs while excluding Z, X and Y may produce and export to each other products that are more cheaply manufactured by Z because the tariff reduction offsets Z's competitive advantage. In theory, the aggregate welfare of the three countries could be lower than if all three have higher but equal tariffs. But even when this does not occur, third party effects can result in delay and other distortions, as states fight to avoid being excluded while trying to exclude others.

There is no bilateral solution to this problem; only a multilateral treaty regime could solve this problem. The GATT/WTO system is such an effort: the most-favored nation system ensures that X, Y, and Z, in our example, all have the same tariffs. But GATT/WTO's system is vulnerable to free riding, and indeed trade diversion has been accomplished through regional trade agreements, which have flourished despite their formal illegality under GATT/WTO.<sup>83</sup>

Whether the international trade regime should be considered a success or not, the larger point is that bilateral cooperation cannot by itself solve collective action problems, and indeed may exacerbate them by providing additional ways for states to harm third countries – as the Nazi-Soviet pact shows.<sup>84</sup>

*Summary.* Perfect governments will enter treaties in order to produce collective goods, but even with perfect enforcement, there are significant obstacles to international welfare-maximization. One obstacle is asymmetry of payoffs: states will not enter globally welfare maximizing treaties if one state loses, and although side payments could in principle solve this problem, side payments are often hard to administer or invite misbehavior. The other obstacle is the third-country effect: cooperation among two states can reduce global welfare because of the ubiquity of externalities in the international setting, and the absence of institutions to correct them.

## 2. Imperfect Governments; Perfect Enforcement

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<sup>82</sup> See Jadish N. Bhagwati, *Free Trade Today* (2002).

<sup>83</sup> See Goldsmith and Posner, *supra*.

<sup>84</sup> It is a mistake to assume that treaties are just like domestic contracts and therefore presumptively welfare-maximizing because parties would not make the agreement if they did not believe that it would make them better off. Domestic contracts take place in heavily regulated markets: courts and agencies guard against contracts that generate externalities (for example, under the antitrust laws). In addition, domestic markets are much thicker, with easier entry and exit.

Because governments are imperfect, the treaties they enter may not reflect the interests of all their citizens. The Holy Alliance of 1815, for example, was a treaty among authoritarian states – Russia, the Austro-Hungarian Empire, and Prussia – that obliged each to render assistance to the other in case a state’s own people threatened its monarchy. Such a treaty protected the ruling elites at the expense of the general public. A more prosaic example, albeit one of great importance today, is the World Trade Organization, which, according to its critics, benefits export industries at the expense of consumers, farmers, and workers.<sup>85</sup> Another modern example is sovereign debt incurred by ruling elites in order to finance their own lavish lifestyle rather than development for the sake of taxpayers who eventually have to pay back the principal plus interest.<sup>86</sup>

One interesting question is whether such welfare-reducing treaties should be enforceable. To see why this question matters, suppose that two dictatorships enter a treaty that reduces the welfare of both populations. Subsequently, one of the states goes through a regime change. The resulting government is democratic.<sup>87</sup> The government would like to repudiate the treaty; may it?

The usual answer is no. To take a typical example, a democratic state may not repudiate sovereign debt incurred by a prior dictatorship for the personal gain of its leaders. If it does so, it risks a sanction. But why shouldn’t states be permitted to escape such bad treaties?

One possible answer is that even dictatorships, and certainly less imperfect governments, will enter most treaties for domestically welfare-maximizing reasons. Recall that dictators do not have an incentive to forgo policies that generate public goods; they do best by choosing those policies and then exploiting their citizens through the tax system. Thus, when dictators enter treaties, the presumption should be that the treaties are designed to maximize welfare, not injure their citizens. To be sure, the citizens will rarely benefit, or benefit much from such treaties, but they will not be hurt by them. At the same time, some treaties like these will benefit citizens in some cases, and almost always the citizens of democratic counterparties. So a general rule in favor of enforcement seems to be welfare-maximizing.<sup>88</sup>

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<sup>85</sup> For a discussion and critique of the anti-WTO literature, see Martin Wolf, *Why Globalization Works* ch. 10 (2004).

<sup>86</sup> See Joseph E. Stiglitz, *Globalization and Its Discontents* (2003).

<sup>87</sup> A textbook example is the effort of Hungary to escape a communist era treaty with Czechoslovakia that obligated both states to develop a massive hydroelectric power plant on the Danube. See *Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, 1997 I.C.J. 7.

<sup>88</sup> Putting aside third-country effects.



### 3. Imperfect Governments; Imperfect Enforcement

Enforcement and administrative difficulties may undermine the value of a treaty. Imagine that state X and Y enter a treaty prohibiting cost-unjustified pollution, with a side payment. New factories are constructed on the territory of Y, and these factories emit pollution that crosses the border. X protests, but Y argues that the pollution is cost-justified, or that the factories are not of the type that are governed by the treaty. How is the dispute to be resolved?

In the one-state example, we know that the victims of pollution can bring a lawsuit against the factory owners. The court will resolve the dispute, and even if the court misinterprets the law, the law can be modified by the legislature. But the treaty in question did not establish a dispute resolution mechanism, and as long as Y can plausibly claim that the pollution is cost-justified (we assume that an implausible claim will be treated as a treaty violation, resulting in a reputational sanction of some sort), X will have no remedy. Nor is renegotiation of the treaty likely to solve the problem: Y will refuse to renegotiate unless X offers a new side payment.

X and Y could try to anticipate this problem by providing in the treaty that a tribunal will hear any disputes – either an existing international tribunal such as the International Court of Justice or a new tribunal established for the occasion. However, the ICJ has proven a disappointment and new tribunals are also not likely to be effective.<sup>89</sup> The reason is that human beings must make the decision, and the people who staff the tribunal must come from X or Y or both (or neither). If the people are loyal to their own government, then the tribunal will either deadlock or find for whichever state has more representation. Anticipating such an outcome, the states will be reluctant to agree to the tribunal, and indeed effective tribunals are rare.<sup>90</sup> Relying on people who are not nationals of either party is also unacceptably risky because such people cannot usually be trusted to take account of the parties' interests.<sup>91</sup>

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<sup>89</sup> See Eric A. Posner, *The Decline of the International Court of Justice*, unpub. m.s. 2005 (discussing the decline of the ICJ); Eric A. Posner and Miguel de Figueiredo, *Is the International Court of Justice Biased?*, 34 *J. Legal Stud.* 599, 624-25 (2005) (finding evidence of national bias in decisionmaking). See also Erik Voeten, *Judicial Behavior on International Courts: The European Court of Human Rights*, unpub. m.s. 19-21 (2005) (finding evidence of national bias among judges of the ECHR).

<sup>90</sup> See Eric A. Posner and John C. Yoo, *Judicial Independence in International Tribunals*, 93 *Calif. L. Rev.* 1 (2005) (discussing agency problems in international tribunals).

<sup>91</sup> *Id.*

All of these problems could be solved, in principle, if X and Y merged into a single state. Consider the example in Table 1 above. If X and Y merge into a single state, which I will call “XY,” then all the factories and all the residents are now subject to the same government. If the government seeks to maximize the welfare of its citizens, then it will pass legislation that ensures that the socially optimal level of pollution is created. Factory X will shut down, and Factory Y will stay open.

If merger would solve these problems, why don't state X and state Y merge? State X and Y will merge only if the governments of both states believe that merger will enhance the welfare of their citizens. In our example, merger will enhance the welfare of Victim Y by 100 and reduce the welfare of Factory Y by 50, so we might imagine that the government of Y would agree to the merger. However, merger would enhance the welfare of victim X by only 10 and reduce the welfare of Factory X by 100, so the government of X would reject the merger. To be sure, a merger with side payments might be possible, but it might also be difficult.

In addition, merger would solve the enforcement and administrative problems discussed above. The government of XY could pass laws that regulate pollution, set up an agency with the power to create and enforce rules, provide for adjudication, enforce the laws, and so forth. However, all of these functions could benefit the residents of former state X more than the residents of former state Y or vice versa. If the governments of these states anticipate such asymmetric effect before they merge, then they might not agree to merge in the first place.

In sum, the treaty rule that states X and Y would agree to is likely to be inferior to the domestic law that merged state XY would pass. If the ideal rule provides that factories may pollute only when benefits exceed costs, then state XY may well be able to incorporate this rule in domestic law, but the treaty between states X and Y would likely provide a weaker rule – for example, restricting only certain types of heavily polluting factories, or only particularly heavy pollution, or only factories close to the border or in certain regions. To be sure, the treaty rule will be better than no treaty at all.

There are two implications here. First, the practical significance of this result is that we should not be surprised by the weakness and imperfection of treaties, such as the Kyoto treaty, or the weaker version of Kyoto that the U.S. would agree to.<sup>92</sup> Treaties, unlike domestic law, must not only be welfare-

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<sup>92</sup> See Conference of the Parties to the Framework Convention on Climate Change: Kyoto Protocol, Dec. 10, 1997.

maximizing; they must also be Pareto-superior for all treaty parties. The more states that are involved, and the more heterogeneous their positions, the weaker that treaties will be.

Second, we should rarely observe treaties that redistribute wealth from one state to another. Every treaty creates a surplus, but the surplus will be distributed to parties according to their bargaining power, not their need. This being the case, there is no point in demanding that treaties like the Kyoto treaty require some states to make sacrifices while not requiring other states to: states will not agree to such a result. If a wealthy state wants to provide aid to a poor state, it can best do this by providing direct aid, as I will discuss below.

#### 4. Evidence: Law and History

Both of these observations are supported by history. Most treaties impose weak obligations and do not have asymmetric distributive impacts.<sup>93</sup> Despite some claims to the contrary, there is no evidence that international law recognizes a duty on the part of wealthy states to accept greater international obligations than poor states do.<sup>94</sup> In addition, as noted above, international law does not distinguish treaties that more or less imperfect governments ratify: all are enforceable under international law except (ambiguously) if they violate *jus cogens* norms such as the norm against genocide.<sup>95</sup>

As for the third-country effect, I have already discussed the way that the international trade regime has tried to cabin bilateral cooperation that harms third countries. Another example is the UN collective security system, which was supposed to replace the bilateral (or low-number) security pacts that contributed to the first and second world wars. But if these two multilateral regimes provide evidence that states recognize the danger of third-country effects, they do not show that this danger can be overcome. The problem is that the third-country problem can be solved only through collective action involving all or nearly all states, and collective action of this scope and magnitude may not be possible. The international trade regime shows ambiguous success – but probably because only three players, the EU, Japan, and the U.S., really matter. Whether the trade system can survive a larger number of equal players remains to be seen. The collective security system has largely failed to achieve the goals of its founders. There are regional successes – including NATO, the EU system, and NAFTA – but these

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<sup>93</sup> Goldsmith and Posner, *Limits*.

<sup>94</sup> See Christopher Stone, *Common but Differentiated Responsibilities in International Law*, 98 *Amer. J. Inter. L.* 276, 299 (2004).

<sup>95</sup> On *jus cogens*, see Damrosch et al., *supra* at 105-06.

successes are based either on the small number of parties or the dominance of a few large parties.

Finally, there is no general rule of international law that the treaties of dictatorships are less enforceable than the treaties of democracies. On the contrary, international law has always been clear that international obligations do not turn on the political regime of a state.

#### *D. Aid*

Wealthier states have no international legal obligation to provide aid to poorer states, although wealth disparities are vast, far greater than intrastate wealth disparities that uncontroversially result in domestic redistributive legislation. Wealthier states do provide aid to other states, and usually to poor (but not always the poorest) states, but on a voluntary basis. Global welfare maximization implies significant redistribution, far greater than what exists today, at least if the transfers actually reach the poor and are not confiscated by dictators or corrupt bureaucrats.

#### 1. Perfect Governments; Perfect Enforcement

Here, we see the starkest contrast between the implications of global welfare maximization and the limitations that result from the requirement of state consent. Assume first that the citizens of wealthy states are not altruistic toward poor people living in foreign states (or are able to exhaust their altruism through private contributions). Wealthy states would, then, refuse to agree to international law that required them to transfer resources to foreign states because such a law would make the populations of wealthy states worse off. Assume now that citizens have some altruism toward foreign citizens. In principle, wealthy states would not object to international law that requires them to donate aid, as long as the level of donation does not exceed the extent of their citizens' altruism.

However, although such an international law would not injure wealthy states, there is also no affirmative reason for it. Wealthy states could simply donate on their own free will. A treaty might help donor states coordinate their giving, but this could probably be done informally, as there are only about a dozen or so states that provide significant aid, and also assumes that the donor states have similar altruistic interests, which is not clear.

#### 2. Imperfect Governments; Perfect Enforcement

Imperfect donor governments may donate too much or too little aid, relative to what is welfare-maximizing for their populations, but the more serious problem is the imperfection of donee governments. It is widely agreed that much, perhaps most, foreign aid has been squandered because it has been confiscated by donee governments, lost to corruption, or misused in some way.<sup>96</sup>

Consider a donee government that is a dictatorship. Subject to the insurrection constraint, it keeps all surpluses from government policy for itself. A naïve donor government that gave money to the donee government would not maximize welfare, for the donee government would keep the money for itself and not give any money to its citizens. Because the leader and high officials of the donee government are already wealthy, the donation would not enhance welfare.

One possible solution to this problem is to make future donations conditional on the proper use of the current donation. Suppose, for example, that the donor government says that it will give \$1 million to the donee government; if this money is not used for food aid for poor citizens, then the donor government will not in future donate any more money.<sup>97</sup>

There are two problems with this solution. First, the increased food aid may substitute for some other good that goes toward satisfaction of the insurrection constraint. Suppose, for example, that the dictatorship already maintains medical clinics for the poor, in part to discourage insurrection. If the dictatorship now is required to give food to the poor, so that the insurrection constraint is exceeded, the dictatorship would rationally reduce medical care. Thus, the donation would not enhance the welfare of the poor.

Second, the dictatorship may give a very small amount to the poor, keep the rest for itself, and then inform the donor government that people will starve unless the donor makes a new donation. This is a version of the Samaritan's dilemma.<sup>98</sup> Donor nations may be able to credibly threaten not to donate more aid unless the donee gives at least some of it to the poor, but in equilibrium the donor will have to, in essence, "bribe" the donee government in order to ensure that some of the aid reaches the poor. The cost of bribery reduces the altruistic return to a donation, thus reducing the equilibrium level of donation itself.

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<sup>96</sup> See Sharon LaFraniere, *Africa Tackles Graft, With Billions in Aid in Play*, N.Y. Times, July 6, 2005, at A1.

<sup>97</sup> For example, the Bush administration's millennium project. See Elisabeth Bumiller, *Bush Plans to Raise Foreign Aid and Tie It to Reforms*, N.Y. Times, March 15, 2002, at A8.

<sup>98</sup> See James M. Buchanan, *The Samaritan's Dilemma*, in *Altruism, Morality, and Economic Theory* (Edmund S. Phelps ed., 1975).

### 3. Imperfect Governments; Imperfect Enforcement

As noted above, an international legal system governing aid could be useful if there is a collective action problem. If all donor nations benefit when the level of poverty in a donee nation is reduced, then such a collective action problem exists. A legal system that required states to donate a certain amount of aid could make them better off, against a baseline where they make unilateral donations based on the altruism of their citizens.

No such system exists, and the most likely reasons are: (1) the wealthy states can accomplish the same goals through informal negotiation; given the small number of donor states, it is not clear that legalization would be necessary. (2) The wealthy states (or their citizens) may have different views about where aid should go, and what type of aid should be supplied. Thus, there may not be sufficient agreement for a legal regime. (3) There is the free rider problem; wealthy states may be unwilling to sanction other wealthy states that fail to donate, other than by failing to donate themselves, in which case no aid is provided.

To solve this problem, Thomas Pogge proposes what he calls a Global Resources Dividend or GRD. A GRD is a tax on the production or use of natural resources, whose proceeds are to be disbursed to the poorest states. As an example, Pogge suggests a \$2 tax on crude oil extraction; such a tax would raise several hundred billion dollars annually, enough to bring more than 2 billion people above the World Bank's poverty line. Transparent rules would require that more money go to countries that make the most progress in eradicating poverty. As for enforcement, an agency would identify states that violate their obligations, and then all other states would be required to impose tariffs on imports from and perhaps exports to that country.<sup>99</sup> Pogge argues that his scheme is realistic because the GRD is more morally compelling than conventional forms of aid; it avoids a collective action problem by forcing states to commit themselves to making contributions; and it has prudential benefits, as countries beset by poverty and misery pose security threats to wealthy nations.<sup>100</sup>

Pogge's attention to institutional dimensions is welcome but his arguments are not persuasive. As he acknowledges, existing foreign aid reflects mostly

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<sup>99</sup> See Pogge, *supra* at 205-08.

<sup>100</sup> *Id.*, at 211-213.

strategic interests and the altruistic component is very small.<sup>101</sup> He suggests that states would be more altruistic if asked to join a program like his, which, he says, is consistent with a diverse array of ethical theories; but unilateral aid is also consistent with these ethical theories. In fact, Pogge's scheme is worse, from an ethical standpoint, than unilateral donation because it would almost certainly cause more harm than good. The tax would fall on the billions of people who make more than the World Bank's \$2/day threshold but are still extremely poor, who would have to pay more for the products and services they consume: bus fares, housing, food, clothing – the prices of all these products will rise because oil and other natural resources are factors in their production. As for the people below the \$2/day threshold, we know from experience that many of them will not receive any benefits, even while they will have to pay higher prices.<sup>102</sup> Pogge acknowledges that some governments will misuse aid; these governments will be deprived of the aid.<sup>103</sup> Yet their citizens will still have to pay higher prices for any imported goods, or domestic goods that use imported inputs, while receiving none of the benefits. Further, Pogge does not explain how states can solve their collective action problem simply by agreeing to the GRD program. States have strong incentives to violate their obligations, and other states would have strong incentives not to punish them by engaging in trade protectionism, which in any event would throw the entire global trading system into disarray. Indeed, this kind of problem – which is ubiquitous in the international arena and has defeated many schemes more modest than Pogge's – would also undermine his agency, which is vulnerable to manipulation for political reasons. Finally, the prudential benefits that Pogge attributes to his system – greater security for the rich nations if impoverished nations are made better off – are no different from those claimed for the current unilateral system.

The existing aid scheme is, by any measure, ungenerous, but it is an artifact of the division of the world into self-governing states. If a single world state existed, a more generous income transfer scheme would exist – a scheme similar to the kind that we see in nation states today – because the poor would influence government policy. But one would also have to recognize that massive agency costs and the heterogeneity of preferences would make the world government's provision of public goods extremely poor, so that the welfare gains

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<sup>101</sup> Id., at 207 (“the disbursement of conventional development assistance is governed by political considerations”).

<sup>102</sup> See, e.g., Rieff, *supra*.

<sup>103</sup> The fact is that almost all government misuse aid – much of it ends up in the pockets of corrupt officials. So Pogge's system would most likely simply enrich government officials at the expense of poor people who must pay higher prices or, if it were enforced rigorously, benefit a few poor people in a few states at the expense of poor people who live elsewhere.

from superior redistribution might be wiped out. More useful than imagining such a system or advocating schemes like Pogge's is the more mundane process of understanding how the minimal amount of aid that existing states are willing to disburse is best used to address short-term crises and to promote lasting development.<sup>104</sup>

#### 4. Evidence: Law and History

As noted above, the evidence suggests that crossborder altruism exists but is minimal. States have not agreed to international obligations to provide aid; the wealthy states do provide some aid but only on a voluntary basis. Some of it is direct; some of it is administered through institutions such as the World Bank. The latter and other institutions ensure that aid is coordinated and is not redundant, but otherwise states remain free to donate as much or as little aid as they wish.

##### *E. Summary*

If governments are perfect agents for their citizens, and enforcement is perfect, then globally welfare-maximizing international law would mainly prevent governments from preying on each other and encourage them to cooperate with each other. The principle of sovereignty accomplishes the first task, and we would observe multilateral treaties that require states to cooperate in the production of global collective goods such as climate control. However, these treaties would not produce optimal collective goods because of asymmetry and distributional problems; indeed, they likely would produce outcomes not much better than what we observe today. In addition, international law would not force states to transfer wealth to each other – neither directly, in the form of aid, nor indirectly, in the form of acquiescence in international treaties that distribute cooperate surpluses on the basis of need rather than bargaining power. Supranational institutions would likewise respect existing wealth and power distributions rather than change them.

If governments are imperfect agents for their citizens, and enforcement is perfect, then globally welfare-maximizing international law would be weaker. The problem is that dictatorships – and even democracies – will not necessarily agree to welfare-maximizing international law because such law may help people within their states who do not have political power. A new tradeoff also complicates matters: should democratic states cooperate with dictatorships in

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<sup>104</sup> See, e.g., *Leading Issues In Economic Development* (Gerald M. Meier and James E. Rauch eds. 2004).



order to generate mutually beneficial surpluses (such as trade, climate control, and so forth), or refuse to cooperate with dictatorships in order to undermine and discourage them? To the extent that the latter strategy is globally welfare-maximizing, then international law will have narrower scope.

If, in addition, enforcement is imperfect, then the scope of institutionally constrained welfare-maximizing international law shrinks even further. To the extent that states free ride on legal structures designed to generate public goods, these legal structures will not receive state consent in the first place (or will simply be ignored). The weakness of collective action may favor the traditional, more robust conception of sovereignty, but the extent to which it does so depends on empirical parameters about which there is little information.

All of my assumptions are empirical, and readers may disagree about them, but even if we vary them considerably, the overall conclusions would remain similar. Suppose, for example, that preferences are not as heterogeneous as they appear, or that – as globalization proceeds – the current heterogeneity of preferences declines. The predicted outcome would be a reduction in the number of states, but not in any general change in the state system. With fewer states, international cooperation would be easier than it is today, but the history of interstate cooperation in the late nineteenth and early twentieth centuries – when the number of states was less than a third of the number today – provides reason to think that the system overall would be similar.

Or, suppose that agency costs are not as high as they appear, or that – as technology like the Internet improves – agency costs decrease further. One might predict that governments become more democratic, or that authoritarian governments become more responsive to the interests of citizens. As a result, international treaties, like other aspects of government policy, would improve – at least, to the extent that states maintain cooperative, rather than rivalrous, approaches to foreign relations. But states would continue to be jealous of their sovereignty, indeed would become less likely to merge, and more likely to break apart, with the result that the collective action problem would worsen. International law thus might either improve or weaken – it is impossible to tell, but there is no reason for optimism.

Finally, suppose that the collective action problem is not as severe as it appears, or that – as monitoring technologies improve or better international structures are built – the collective action problem diminishes over time. States would cooperate more; multilateral treaties would have thicker obligations and enjoy more parties. But states would remain separate; indeed, the incentive for

states to merge would decline, and states might even break apart, as smaller units realize that they can take advantage of international cooperation. If this is so, the collective action problem would be aggravated.

#### IV. SOME OTHER QUESTIONS OF INTERNATIONAL LAW

##### *A. Why States, Rather than Individuals or Supranational Entities, Make International Law*

If individuals made international law – for example, by voting for delegates, who then passed laws by majority rule in an assembly – then there would be no international law; there would be a world government, and all law would be domestic. The reason that we do not have such a system is that preferences are heterogeneous. People group into states, and the state system is relatively stable, showing no movement toward a world government system.

From time to time, people suggest that supranational entities should make international law. For example, the European Union makes law, albeit in a highly limited fashion, for its members. If the suggestion means that a supranational entity such as the UN should make international law, and that entity operates through majority rule of delegates chosen on the basis of proportional representation of people, then the suggestion amounts to the argument that there should be a world government. A world government is a supranational entity. If the suggestion means that various regional supranational entities – the European Union, an American Union, and so forth – should make international law, then it is just an argument that the current state system should be replaced with a state system with fewer states. The reason we do not have such a system is that, outside Europe (and increasingly, it appears within Europe as well<sup>105</sup>) preferences are so heterogeneous that smaller states rather than larger states appear to be the trend.

The nation state appears to be the entity that most effectively trades off scale economies and preference heterogeneities. To obtain supranational collective goods, then, states must cooperate with each other. They do so chiefly by creating international law. Supranational bodies at the regional level apparently are possible – at least in Europe – but they cannot produce global collective goods, and in any event they remain rare.

##### *B. Why Individuals Do Not Have (Many) Obligations Under International Law*

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<sup>105</sup> See Richard Bernstein, 2 ‘No’ Votes in Europe: The Anger Spreads, N.Y. Times, June 2, 2005, at A1.

States are responsible for most international law violations; individuals are not. For example, if a state denies overflight rights to another state in violation of a treaty, the state is legally responsible; the persons who adopted the policy, gave the orders, or fulfilled the orders are not legally responsible. The state that violated the treaty may be legally required to pay reparations or take some other action.<sup>106</sup>

To understand this rule, imagine that two states agree to reduce crossborder pollution. Each state has an interest in seeing that the rule is enforced, but neither state has an interest in how the other state enforces the rule. One state might find that criminal penalties are the best way to prevent its own factory owners from polluting across the border, while the other state might instead use zoning laws and prohibit the construction of factories within a certain distance from the border. In other words, the creation of the public good is consistent with a diverse range of internal legal systems, and if international law were to make individuals liable, it would interfere with whatever internal system that might be best for a particular state.

One might fear that if states, not individuals, are liable, then international law cannot have teeth. What if states enter treaties but then make no effort to force their citizens to comply with them? To answer this question, one must know why the state does not comply with the treaty. If the answer is that circumstances have changed, and the state no longer has an interest in complying with the treaty, then it will not want individuals to be liable. The lack of individual liability ensures that the decision to comply with or violate the treaty remains at the level of government. This is surely the reason why individual liability is not common.

Another reason for refraining from individual liability is the problem of bias. If the individual responsible for an international law violation is prosecuted by the victim state, then the state has no incentive to respect the individual's rights – he or she is not a citizen. If the individual is prosecuted by his or her own state, then the state has no incentive to ensure that the individual is properly prosecuted and punished – the victim is not a citizen. In theory, the other state can object if the trial is biased, but in practice it is very difficult to tell whether a trial is biased or not. This is why diplomats who are accused of committing crimes are expelled rather than tried.

But individual liability does exist for a limited class of international law violations – chiefly, international crimes.<sup>107</sup> Soldiers who commit war crimes can

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<sup>106</sup> See Restatement (Third) of Foreign Relations sec. 207.

<sup>107</sup> See, e.g., Rome Statute, *supra*.

be held individually liable – either by their own government or by foreign governments. An early example of an international crime was that of piracy. A government that caught a pirate could try and execute him even if the pirate had not committed any crime on that government's territory or in its territorial seas and even if the pirate had not committed a crime against that government's nationals. The reason was probably that the pirate's own government had no control over him, so governments victimized by piracy could not lodge a protest with the pirate's government and expect any recourse. In the absence of effective recourse against the state, individual liability was a second best solution – although bringing with it certain risks, such as politically biased prosecutions.

It is questionable whether this logic applies to modern war crimes. Soldiers, unlike pirates, are controlled by governments. Perhaps this explains why, although international criminal liability exists as a category of international law, actual prosecutions remain extremely rare.<sup>108</sup>

### *C. Why States (Usually) Have the Same Legal Obligations Regardless of Political System, Size, Power, or Wealth*

Wouldn't welfare-maximizing international law impose fewer obligations on large states than on small states because large states are responsible for the well being of a large number of people? Alternatively, or in addition, wouldn't such law impose greater obligations on powerful and wealthy states so that they will use their power and wealth to help the poor living in other states? Instead, international law imposes the same obligations on all states.

The last statement needs to be qualified in a few ways. The general rules of international law impose the same obligations on all states; states are allowed to adjust their obligations by treaty however they want to. In particular, customary international law treats all states the same. Many major international legal institutions, such as the United Nations and the International Court of Justice, are based on the principle of sovereign equality, which means that all states are treated equally.<sup>109</sup> However, the United Nations cannot act in major ways without the consent of the most powerful states; and the ICJ is also biased in their favor and is in any event mostly ineffectual.<sup>110</sup>

The rough answer to the questions above is that if states efficiently produce public goods for their citizens, then there is no reason for them to be

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<sup>108</sup> See Eric A. Posner, *The Limits of International Criminal Law*, unpub. m.s. 2005.

<sup>109</sup> But there are important exceptions, like the International Monetary Fund.

<sup>110</sup> See Posner and de Figueiredo, *supra*.

required to help other states produce public goods for their citizens, or to be allowed to interfere with those states. Large states produce public goods for more people, but that doesn't mean they should have the power to interfere with the public good production of small states. If there are imbalances attributable to wealth differences, these imbalances can be handled through aid.

But what if governments are imperfect? As noted above, dictatorships and democracies have roughly the same incentives to choose policies that create public goods, and so they should agree to similar kinds of international obligations – the exception being for international obligations that prohibit dictatorship and its means. In theory, democracies could enhance global welfare by isolating and attacking dictatorships, and replacing the government with a democratic government; in practice, this has proven far too difficult and risky because dictatorships are hard to defeat, and a defeated dictatorship is often replaced by another dictatorship or civil war. Thus, democratic states gain by cooperating with dictatorships, and this benefits their own citizens; while there is little reason to think that the citizens of dictatorships would be better off if democracies refused to cooperate with dictatorships.

#### *D. Why International Law Is Predominantly Legislative, and Has Weak Judicial and Executive Institutions*

International law consists of quite an elaborate set of laws, but has weak judicial and executive institutions. Laws govern countless aspects of international behavior – the use of force, the practice of war, trade, communications, transport, the environment, and on and on.

Adjudicative institutions consist mainly of informal ad hoc arbitration. The International Court of Justice has generally been ignored, as have a variety of other lesser courts. It is too early to tell whether the International Criminal Court will succeed or fail, but without the support of the United States and many of the other major military powers, success seems likely to be limited. The only bright spot is the WTO dispute settlement mechanism, but it is still in its infancy.<sup>111</sup>

As for executive institutions, there is only one – the UN security council, which has the power to force states to comply with international law and the exigencies of collective security. But five diverse states hold a veto, and the veto power has ensured that the UN security council remains toothless; indeed, it has never used its strongest power, the power to order states to use military force.<sup>112</sup>

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<sup>111</sup> See Posner and Yoo, *supra*.

<sup>112</sup> Glennon, *supra*.

Thus, international legal institutions seem to be exceptionally thin and unbalanced – as though, to use a domestic analogy, the United States congress made laws only by unanimous rule, U.S. courts could hear cases but not enforce their judgments or even compel litigants to appear before them, and no executive existed and instead people relied on self-help to enforce their rights. Such a system would seem to be a recipe for anarchism in the domestic realm; how could it exist internationally?

The answer to this puzzle is straightforward. Prescriptive rules need the consent of states, states know what they are agreeing to, and they agree to rules only when they serve their interest. International law is usually thin – that is, it requires states to do little beyond what they would ordinarily do – because diverse states can agree to relatively little (except in bilateral settings). Still, international rules exist and govern a broad range of activities because states want to solve the problem of crossborder externalities. Adjudication and execution, however, are backward looking, zero sum phenomena. One state must lose an adjudication, and a state must also be the subject of execution. These states are not usually willing to consent to this infringement on their power and sovereignty. Thus, when executive and adjudicative institutions are proposed, states rarely consent to them unless they have a veto right or some other means of escaping adverse actions or judgments. But adjudication and execution usually can't be effective unless the parties involved delegate substantial discretion to an independent body that has a small number of members who can act quickly and efficiently. States are not willing to risk delegation for the same reason that they do not merge into larger states: they fear that the people who form the body will not be sufficiently responsive to heterogeneous preferences.<sup>113</sup>

## CONCLUSION

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<sup>113</sup> A related question is why international legal change occurs so frequently through simple law violation – states stop following a law and over time other states acquiesce – rather than agreement. The most probable answer is that customary international law is so hard to change: it requires consensus, and consensus is always hard to achieve. Robert Goodin makes the interesting proposal that customary international law may be changed only if the state in question breaks it openly, pays reparations if appropriate, and agrees that the proposed rules will apply to itself as well as to others. See Robert E. Goodin, *Toward an International Rule of Law: Distinguishing International Law-Breakers from Would-Be Law-Makers*, 9 *J. Ethics* 225 (2005). The question, from the perspective of this paper, is whether such a rule is sustainable. Although the first condition already is part of international law, it seems doubtful that other states will collectively sanction a state that advances a genuine improvement of the law but without doing so openly and without paying reparations.

The reason that a world government does not exist is that the global population is exceptionally diverse. If a world government were to spring into existence, it would quickly find itself unable to satisfy all its citizens, who would improve their position by seceding and establishing independent states. Thus, it is unrealistic to expect that states would delegate substantial power to international institutions that would implement the same policies that a hypothetical world government would. Yet we know that some international institutions are possible; so the question is what are the limits of international legal organization.

The strategy of this paper has been to make several simple assumptions – the heterogeneity of preferences, the imperfection of governments, and the difficulty of collective action – and then ask what kind of international legal reform consistent with these assumptions is likely to advance global welfare. The conclusion is that international law and organization are likely to remain thin and weak in the foreseeable future, but that within these constraints improvement is possible. Those who advocate legal reform should focus on modest revisions that are consistent both with global welfarism and institutional constraints.

A recurrent example of this argument has been humanitarian intervention: a new rule that permits humanitarian intervention might be justified; but if, as Singer implies, humanitarian intervention can be legitimate only under the auspices of a democratic United Nations,<sup>114</sup> then we must stay with the status quo, which means tolerating humanitarian crises, even genocide, on the ground that unilateral intervention would make long-term aggression more likely. Another example is Kyoto. An environmental treaty that places equal burdens on states is more likely to obtain universal consent than one that discriminates in favor of the poor. Even such a treaty, however, is vulnerable to the collective action problem. Global climate change – like war – might be a problem that cannot be fully solved. A third example is international criminal justice. The problem with the International Criminal Court is that it requires states to delegate substantial power to persons – the prosecutors, the judges – that they cannot control. Ad hoc tribunals set up in response to specific events – such as the Yugoslavia and Rwanda tribunals – have a greater chance of success because the states that establish the tribunals can immunize their own nationals.<sup>115</sup>

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<sup>114</sup> Singer, *supra*, at 144-48.

<sup>115</sup> Another example is global antitrust law. Paul Stephan argues that an ambitious international antitrust system is likely to fail because of institutional constraints. See Paul B. Stephan, *Global Governance, Antitrust, and the Limits of International Cooperation*, 38 *Cornell Int'l L.J.* 174 (2005).

The most visible example of the general problem is global distributional justice. One can imagine, as a point of comparison, a democratic world government that is responsive to the interests of billions of impoverished voters. Such a government would surely redistribute much more wealth to the poor than we observe today. But no world government exists or is foreseeable. In its absence, we must make do with the state system. Because all or virtually all states must consent to international law and institutions, wealthy states will never have a legal obligation to contribute significant resources to poor states. Authors try to evade this conclusion by proposing institutional reforms. But these reforms either approximate a world government (usually a federalist version) or assume the continuing existence of the state system. The first is by hypothesis unavailable; the second does not solve the problem because the wealthy countries will veto any significant distributive measures.<sup>116</sup>

People's views about these conclusions will depend to a large extent about intuitions about human psychology and other empirical realities, and diverse intuitions are reasonable. The minimal conclusion to be drawn is that institutions matter, and that philosophers and legal scholars who propose institutional reform so that global justice may be achieved have the burden of explaining their empirical assumptions. The problem can be encapsulated as the following question: if a world government is not possible in the foreseeable future, as most scholars assume, then why should radical reform of the UN or other elements of the current international system be possible? To answer this question, one needs a theory that explains what kind of institutional and legal reforms are compatible with the empirical conditions that underlie the modern state system. I have identified three such conditions: the heterogeneity of preferences, agency costs, and collective action problems. The next step is for reformers to explain whether they accept these conditions but disagree about their importance, or reject them and have another theory of international institutions that support their reform proposals.

The more ambitious conclusion is that international law is, and must be, weak, and, specifically, cannot fully exploit opportunities for creating global collective goods. The argument is that if the world population could create institutions that created global collective goods, then it would also be able to create a world government; if, as history seems to show, it cannot, then there is no

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<sup>116</sup> Cf. Young, *supra*, at 265-75. Her short-term solution works within the UN system, but she does not explain why the powerful countries with the veto will acquiesce in redistribution or yield power over international economic institutions. (She says they need to be "shamed" into it.) Her long-term solution is "global democracy," involving various democratic international organizations, but she does not explain how such a system would be possible.



reason to think that international law can do indirectly what a world government would do directly were it possible.

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