The University of Chicago Law Review

Volume 73 Spring 2006 Number 2

International Law: A Welfarist Approach

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This Article 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. These constraints also suggest that the rapid increase in the number of states over the past half century may be related to the advance of international law.

I. 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

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that is rooted in political morality while being precise enough to allow sufficiently defined conclusions. This Article 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 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 United Nations Charter, cross-border military force may be used in self-defense[1] or with the authorization of the UN Security Council;[2] neither of these conditions was met in Kosovo. At the same time, the intervention probably saved thousands of lives, and may even have prevented 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.[3] Others concluded that the war was "illegal but legitimate."[4] 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.[5] Other scholars fear that if such a right existed, some states would 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.[6] But that is the status quo, and anyway the Security Council is controlled by powerful states that will not act in the global interest. For this reason, some scholars think that the United Nations system should be revised so that it will be more democratic: a democratic United Nations would authorize justified

1 UN Charter Art 51.

2 UN Charter Art 42.

3 See, for example, Jonathan I. Charney, *Anticipatory Humanitarian Intervention in Kosovo*, 93 Am J Intl L 834, 840–41 (1999); Richard A. Falk, *Kosovo, World Order, and the Future of International Law*, 93 Am J Intl L 847, 848 (1999).

4 Independent International Commission on Kosovo, *The Kosovo Report* 4 (Oxford 2000).

5 See Fernando R. Tesón, *The Liberal Case for Humanitarian Intervention*, in J.L. Holzgrefe and Robert O. Keohane, eds, *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* 93, 93–94 (Cambridge 2003).

6 See, for example, Charney, 93 Am J Intl L at 840–41 (cited in note 3).

humanitarian interventions. But giving each state one vote would not be consistent with democracy, because 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.[7] But, as other scholars point out, the state system is arbitrary anyway, and sovereignty should be "decentralized," so that there is a system of overlapping jurisdiction based on the consent of the governed.[8] Or, a world government is the only really effective way to ensure that human rights atrocities can be addressed or prevented.[9] 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.[10]

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?[11] And if it is off limits, because it is unrealistic, then why should UN reform, the European compact, or the decentralization of sovereignty be considered within limits? The scholars all agree on the larger end of preventing atrocities. 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.[12]

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7 See Peter Singer, *One World* 144–48 (Yale 2002).

8 See Thomas W. Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* 190–94 (Polity 2002).

9 See Kai Nielsen, *World Government, Security, and Global Justice*, in Steven Luper-Foy, ed, *Problems of International Justice* 263, 276 (Westview 1988).

10 See Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* 450–54 (Oxford 2004).

11 But see generally Alexander Wendt, *Why a World State Is Inevitable*, 9 Eur J Intl Rel 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). See id at 529. Wendt is in a very small minority, and as he puts off the creation of world government for at least another century, see id at 492, the possibility has no relevant short-term implications even if he is correct.

12 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: A Moral Argument with Historical Illustrations* 101–02 (Basic 1977) (expressing skepticism over whether governments that send troops into a foreign state for humanitarian interventions act with pure motives), with David Luban, *Just War and Human Rights*, 9 Phil & Pub Aff 160, 178 (1980) (arguing that if "an intervention is on behalf of socially basic human rights it is justified"). However, on closer inspection the philosophical disagreement is swamped by what seem like empirical disagreements. Both Walzer and Luban are willing to allow states to engage in humanitarian interventions on some

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.[13] 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, especially when these institutions are democratic; and therefore institutional reform that could address global problems in a cosmopolitan spirit is not possible.[14] 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 Article, 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.[15] Increasing economies of scale, driven by technological change, give advantages to people who are mem-

level. See Michael Walzer, *The Moral Standing of States: A Response to Four Critics*, 9 Phil & Pub Aff 209, 216–18 (1980) (expressing approval of humanitarian intervention when states are massacring, enslaving, or expelling nationals); Luban, 9 Phil & Pub Aff at 178 (indicating support for allowing states to engage in humanitarian intervention to protect basic human rights). Walzer cares about the rights and well-being of foreigners, and 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.

13 Jack L. Goldsmith, *Liberal Democracy and Cosmopolitan Duty*, 55 Stan L Rev 1667, 1673 (2003). See also Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* 205 (Oxford 2005).

14 See Goldsmith, 55 Stan L Rev at 1667–70 (cited in note 13).

15 See Alberto Alesina and Enrico Spolaore, *The Size of Nations* 18–23 (MIT 2003).

bers 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 as states support it. Standard doctrine therefore acknowledges that all, or nearly all, states must consent to a rule before it can be deemed to be a part of 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 point suggests that narrow international agreements, involving few states, are likely to be more effective than large multilateral conventions.

The plan of this Article is as follows. Part II 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 the focus, in the rest of the Article, on institutions.

Part III 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 institutional constraints on welfare-maximization, and I discuss the extent to which they are accurate, and how they might be varied.

Part IV 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 its lack of adjudicative and executive resources).

II. 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 1975–78, Serbia in the 1990s, Somalia in 1992–93, 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. Michael Walzer thinks there must be mass murder, enslavement, or expulsion;[16] others think that intervention may be justified if human rights are violated on a large scale. These differences 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.[17] 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 hu-

16 See Walzer, 9 Phil & Pub Aff at 216–18 (cited in note 12).

17 See, for example, Michael Byers and Simon Chesterman, *Changing the Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law*, in Holzgrefe and Keohane, eds, *Humanitarian Intervention* 177, 178–79 (cited in note 5). Thomas Franck takes an intermediate position and finds the status quo in international law acceptable only because international law is flexible enough to be fair. See Thomas M. Franck, *Interpretation and Change in the Law of Humanitarian Intervention*, in Holzgrefe and Keohane, eds, *Humanitarian Intervention* 204, 226–27 (cited in note 5).

manitarian interventions forgone because of the strict rules currently in place.

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."[18] 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."[19] 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.[20] 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.[21] 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's 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 should be democratically elected, and thus should be representatives of people rather than of states; the United Nations should supervise the elections; and authoritarian states that refuse to allow such elections should be limited to one delegate.[22]

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18 Brian Barry, *Statism and Nationalism: A Cosmopolitan Critique*, in Ian Shapiro and Lea Brilmayer, eds, *NOMOS XLI: Global Justice* 12, 39 (NYU 1999).

19 Id at 40. See also Jonathan Glover, *State Terrorism*, in R.G. Frey and Christopher W. Morris, eds, *Violence, Terrorism, and Justice* 256, 272 (Cambridge 1991) (arguing that international courts should have jurisdiction over complaints brought against states by citizens who allege human rights violations).

20 See Singer, *One World* at 148–49 (cited in note 7).

21 See id at 137–39.

22 See id at 144–48.

Allen Buchanan agrees that states should engage in humanitarian intervention.[23] 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 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 over fifty years: make a serious investment in military capacity rather than depending upon the United States."[24] Nonetheless, Buchanan's main worry is not that the Europeans would refuse to form such a coalition but that the United States would block its formation.[25]

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. 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 state. And their political allegiance 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.[26]

Pogge promises to develop this proposal but never does, instead admitting that "[n]othing definite can be said about the ideal number of levels or the exact distribution of legislative, executive, and judicial

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23 For a general discussion, see Buchanan, *Justice, Legitimacy, and Self-Determination* (cited in note 10).

24 Id at 453.

25 See id. See also Allen Buchanan and Robert O. Keohane, *The Preventive Use of Force: A Cosmopolitan Institutional Perspective*, 18 Ethics & Intl Aff 1, 13–22 (2004) (endorsing a more complicated scheme designed to permit states to engage in preventive war on the condition that they agree to pay sanctions if the factual predicate of the war turns out to be false, as determined by an independent body).

26 Pogge, *World Poverty and Human Rights* at 178 (cited in note 8).

functions over them."[27] 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.[28] 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 Democratic Loan Guarantee Fund would ensure that outstanding debt is serviced until a democratic government is reestablished.[29]

Fernando Tesón takes the simplest view; he argues that international law should permit unilateral humanitarian intervention.[30] 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 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. Buchanan thinks, however, 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

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27 Id at 189.

28 See id at 153–55.

29 See id at 153–60.

30 See Tesón, *The Liberal Case for Humanitarian Intervention* at 93–94 (cited in note 5). See also Eric A. Posner and Alan O. Sykes, *Optimal War and* Jus Ad Bellum, 93 Georgetown L J 993, 1014–16 (2005) (leaving open the possibility of humanitarian intervention under international law); John Yoo, *Using Force*, 71 U Chi L Rev 729, 793–94 (2004) (outlining factors relevant to whether the international legal system will ultimately accept humanitarian intervention).

think that radical reform of the UN is. Pogge thinks that a world government would be inferior to his regime of overlapping jurisdictions.[31]

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 government to create and enforce it.[32] Singer's proposal requires amendment of the UN Charter,[33] but amendment requires a supermajority in the General Assembly and any amendment to the charter can be vetoed by the permanent members of the Security Council.[34] Singer assumes that states like China (which has veto power), 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 approximately 13,000) or Iceland (population approximately 297,000). 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 one hundred 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.[35] Buchanan imagines that the Europeans would

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31 For other proposals, see Iris Marion Young, *Inclusion and Democracy* 265–75 (Oxford 2000) (proposing "a global system of regulatory regimes to which locales and regions relate in a federated system"); Daniele Archibugi, David Held, and Martin Köhler, eds, *Re-imagining Political Community: Studies in Cosmopolitan Democracy* 113–228 (Stanford 1998) (introducing various proposals for international reform); David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* 267–86 (Stanford 1995) (advocating stronger international institutions in the short term and global democracy in the long term).

32 Consider Barry, *Statism and Nationalism* at 40 (cited in note 18) (describing the existence of certain perceived "institutional constraints" that limit the scope of reform options evaluated by cosmopolitans). Yet Barry does not bother to explain what they are, or how they influence his argument.

33 See Singer, *One World* at 144–48 (cited in note 7).

34 See UN Charter Art 109.

35 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, for example, Young, *Inclusion and Democracy* at 265–75 (cited in note 31) (arguing that "institutions of the United Nations are the best existing starting-points for building global democratic institutions"). The evidence suggests that states will not consent to a strengthened United Nations. Although everyone recognizes that the current organization—which places virtually all decisionmaking power in the hands of the five vetoholders in the Security Council—is both undemocratic and nearly ineffective, no seriously considered reform proposal would improve matters. For example, the Secretary-General's recent proposal would increase the number of Security Council members from fifteen to twenty-four by creating new permanent or temporary memberships that lack veto power. See United Nations General Assembly, *Report of the Secretary-General, In Larger Freedom: Towards Development, Security and Human Rights for All* 43 (Mar 21, 2005), UN Doc A/59/2005. Although the formal membership would be more representative of the regions of the world, decisionmaking would become more, rather than less, difficult,

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, to shoulder the cost of an effective military.[36] 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 on 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.[37] 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 lines of authority, while not always clearly described in constitutional documents, are well understood and enjoy consensus.

In addition to explaining the disagreements among these theorists, lack of attention to institutional problems also leads to internal inconsistencies in their proposals. 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 desir-

because the five vetoholders would continue to be able to block decisions and a larger number of states would be needed to approve them. This proposal has virtually no support, anyway.

The most discussed alternative, advanced by Brazil, Germany, India, and Japan, proposes adding ten members to the Security Council, of which these four nations and two others would have permanent seats and vetoes. See William M. Reilly, *Analysis: U.N. Security Council Reform*, UPI (Nov 12, 2005), online at http://www.upi.com/InternationalIntelligenceview.php?StoryID=20051111-050145-6910r (visited Mar 26, 2006). This proposal would also increase the representativeness of the Security Council by reducing its effectiveness: with six extra vetoholders and a larger body, agreement would be more difficult than it is today.

If these or similar reform proposals are accepted, then the likelihood that future humanitarian interventions will receive UN approval will be even lower than what it is today. This suggests that the only serious alternative to an effective prohibition on humanitarian intervention is the unilateral right advocated by Tesón, as I discuss below.

36 See Buchanan, *Justice, Legitimacy, and Self-Determination* at 453 (cited in note 10). Buchanan also ignores the extremely important political and logistical problems of managing an international military force, problems that would, in the foreseeable future, render a European military coalition far weaker than the sum of its parts.

37 See Pogge, *World Poverty and Human Rights* at 178 (cited in note 8).

> ability between different groups within it), there is no reason for a cosmopolitan to oppose it.[38]

Note the tension between this claim and his argument in favor of a world government or international legal system that takes precedence over national law. A world government is needed to solve global problems like climate warming. However, a world government might mistreat regions or sections; so these regions or sections must have the right to secede. Yet then they might secede so as to avoid the world government's climate 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 of international rules that would encourage separatist movements that would break up states[39] 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.[40]

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.[41] 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.[42] In addition, Tesón can point to precedents—that is, unilateral or coalition-led humanitarian 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 within the framework of international law.[43] 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

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38 Barry, *Statism and Nationalism* at 56 (cited in note 18).

39 See Pogge, *World Poverty* at 190–91 (cited in note 8).

40 See id at 208. Pogge makes his assumption despite the fact that we can observe separatist forces at work already in countries like Britain, Spain, and Italy.

41 See, for example, Press Association, *Straw: War Won't Change UN Charter*, Guardian Unlimited (Mar 30, 2004), online at http://politics.guardian.co.uk/iraq/story/0,12956,1182177,00.html (visited Mar 26, 2006).

42 See *Report of the Secretary-General, In Larger Freedom* at 33 (cited in note 35).

43 See Tesón, *The Liberal Case for Humanitarian Intervention* at 113 (cited in note 5). Consider Franck, *Interpretation and Change in the Law of Humanitarian Intervention* at 214–31 (cited in note 17) (cataloging various interventions and crises).

of customary international law—and it draws on empirical evidence about the attitudes and practices of states. But even Tesón's position 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.

III. 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 from those that are not. To do this, 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.[44]

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[44] These three assumptions will not surprise consumers of the trade literature, which is preoccupied both by agency costs (which are often assumed to explain government preferences for certain groups like import-competers) and collective action problems. See generally Alan O. Sykes, *The Economics of Public International Law* (John M. Olin Law & Economics Working Paper No 216, 2004), online at http://ssrn.com/abstract=564383 (visited Mar 26, 2006). Preference heterogeneity is also an important factor in the large literature on federalism and the optimal size of jurisdictions. See, for example, Robert D. Cooter, *The Strategic Constitution* 103–25 (Princeton 2000) (discussing intergovernmental relations and the optimal number of governments). The three assumptions also play an important role in the literature on international environmental law. See generally, for example, Scott Barrett, *Environment and Statecraft: The Art of Environmental Treaty-Making* (Oxford 2003); Jonathan Baert Wiener, *Global Environmental Regulation: Instrument Choice in Legal Context*, 108 Yale L J 677 (1999); Richard L. Revesz, *Federalism and Environmental Regulation: Lessons for the European Union and the International Community*, 83 Va L Rev 1331 (1997) (discussing the impact that multijurisdictional problems and collective action problems have on environmental regulation); Richard H. Steinberg, *Trade-Environment Negotiations in the EU, NAFTA, and WTO: Regional Trajectories of Rule Development*, 91 Am J Intl L 231 (1997) (explaining in interest terms the uneven pace of cross-national convergence of laws and regulations around the globe). However, the three assumptions central to this work rarely play an important role in the literature on public international law generally.

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 than the members of a particular group or society, are counted in the social welfare function. Thus, in a global welfarist regime, 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, nondistorted, 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.[45] 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.[46]

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45 See generally James Griffin, *Well-Being: Its Meaning, Measurement, and Moral Importance* (Oxford 1986).

46 Welfarism is also the standard assumption in the vast international trade literature. See, for example, Kyle Bagwell and Robert W. Staiger, *The Economics of the World Trading System* 3,

There are two plausible alternatives to the welfarist approach. The first alternative 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 traditional scholarship,[47] but it confuses normative and positive. States themselves are not moral agents; state interests are just constructs based on the interests and values of people living within states. Modern moral theorists 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.[48]

The second alternative 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.[49] Although I have doubts about this position, my purpose is not to criticize it. As I noted above, most contractarians such as Rawls

13 (MIT 2002) (assuming a national trade policy based on the objective of maximizing national welfare). For that reason, welfarism is also an attractive assumption for evaluating public international law more generally.

47 See Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* 307 (Columbia 2d ed 1995); Louis Henkin, *How Nations Behave: Law and Foreign Policy* 337–39 (Columbia 2d ed 1979).

48 See, for example, Charles R. Beitz, *Political Theory and International Relations* 71–83 (Princeton 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, for example, John Rawls, *The Law of Peoples* 27–30 (Harvard 1999) (noting that collectivities of "liberal peoples" have the right to protect themselves because their societies are based on promoting justice for all their citizens and all peoples); David Miller, *On Nationality* 51–52 (Oxford 1995) (arguing, in part, that the nation-state can be defended on an ethical basis because the presence of nation-states facilitates the transfer of necessary resources to ensure the dignity of individuals); Walzer, 9 Phil & Pub Aff at 209–16 (cited in note 12) (clarifying that his theories, which have been characterized as "statist," are developed not for the state but instead for the "political community that (usually) underlies it"). See also Barry, *Statism and Nationalism* at 15–34 (cited in note 18) (providing a survey and critique of nationalist theories, such as Miller's); Chris Brown, *International Relations Theory: New Normative Approaches* 23–81 (Columbia 1992) (providing a slightly dated discussion of the literature on "communitarian" versus "cosmopolitan" approaches to international relations).

49 Pogge and Buchanan adopt the rights-based perspective. See Pogge, *World Poverty and Human Rights* at ch 2 (cited in note 8); Buchanan, *Justice, Legitimacy, and Self-Determination* at ch 3 (cited in note 10). This view has its origin with Kant. See Immanuel Kant, *Perpetual Peace and Other Essays on Politics, History, and Morals* 33 (Hackett 1983) (Ted Humphrey, trans). Singer, by contrast, is a welfarist, although in *One World* he makes nonwelfarist "fairness" or casuistic arguments as well as welfarist arguments. See Singer, *One World* at 43–49, 185–95 (cited in note 7). Another welfarist is Robert Goodin. See Robert E. Goodin, *Utilitarianism as a Public Philosophy* ch 16 (Cambridge 1995) (discussing responsibilities toward fellow citizens versus foreigners).

agree that governments should concern themselves with the public's welfare. The argument in this Article 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, in large part, remain unaltered if I focused on human rights instead.[50]

B. Heterogeneous Preferences and the State System

A state is a political entity that joins a territory and a population. People in 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, 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).

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50 Yet another normative assumption is that the purpose of international law is to maintain peace. The problem with this view is that peace is not necessarily desirable if the status quo is unjust and those with power are unwilling to yield it peacefully.

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 near-absolute power to govern people within its territory, and also that each government acknowledges that it has no power to govern people within the territory of other states. This is generally what is meant by "sovereignty."[51] There are some limits on sovereignty. Most important, in principle all UN members except vetoholders 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 nonvetoholders can claim one of the vetoholders as a patron.[52] 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.[53]

A state exists only as long as its government can maintain control of people within its territory and prevent other states from encroach-

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51 There is an enormous literature on this topic. See, for example, John H. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97 Am J Intl L 782, 783 (2003) (describing the "monopoly of power" as the "core of sovereignty"); Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* 8 (Princeton 1999) (arguing that while almost all states have enjoyed international recognition, many fewer states have held "Westphalian sovereignty"). The word is used in many ways, often inconsistently; however, the core meaning I identify is uncontroversial.

52 See Michael J. Glennon, *Limits of Law, Prerogatives of Power: Interventionism after Kosovo* 151–52 (Palgrave 2001).

53 The reason for this is that there are great economies of scope in government. See Alesina and Spolaore, *The Size of Nations* at 27 (cited in note 15). If this assumption is abandoned, then conceivably various overlapping jurisdictions would be possible. See generally Bruno S. Frey and Reiner Eichenberger, *The New Democratic Federalism for Europe: Functional, Overlapping and Competing Jurisdictions* (Elgar 2004) (proposing a scheme of voluntary, overlapping jurisdictions).

ing. 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 that, 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 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.[54]

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 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 welfare-maximizing 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

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[54] See generally Louis Kaplow, *A Note on Subsidizing Gifts*, 58 J Pub Econ 469 (1995) (arguing that welfare-maximizing donations do not necessarily satisfy the Pareto criterion).

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 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.[55] 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.[56]

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.[57]

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55 See Alesina and Spolaore, *The Size of Nations* at 70 (cited in note 15).

56 This is roughly accurate, and has been throughout the past one hundred years.

57 See Todd Sandler, *Global Collective Action* 87–90 (Cambridge 2004).

To see why, imagine that state X violates international law by sending military forces across its border into 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 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, the effective use of sanctions has been rare.[58]

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.[59] 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 citizens, the victims'

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58 See David Cortright and George A. Lopez, *The Sanctions Decade: Assessing UN Strategies in the 1990s* 204 (Rienner 2000) (finding a 27-to-36 percent success rate for UN sanctions); Richard N. Haass, ed, *Economic Sanctions and American Diplomacy* 197 (Council on Foreign Relations 1998) (finding that sanctions have limited value where goals are overbroad and time is limited); Gary Clyde Hufbauer, Jeffrey J. Schott, and Kimberly Ann Elliott, *Economic Sanctions Reconsidered: History and Current Policy* 92 (Intl Instit for Econ 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"). All of these sources attribute failure, in part, to collective action problems.

59 See Goldsmith and Posner, *The Limits of International Law* at 153 (cited in note 13) (describing the international trade system as a large number of bilateral relationships where "each state pays attention to the behavior of a trading partner and complains and threatens retaliation if the partner violates its commitments").

state threatens retaliation—the rest of the world does not.[60] 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 has 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 through on this agreement.[61] 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.[62] The empirical literature provides little support for this view. The

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60 For example, Brazil protested the mistaken killing of its national by British police after terrorist attacks in London. See Elaine Sciolino, *Regrets, but No Apology, in London Subway Shooting*, NY Times A12 (July 25, 2005) (stating that Brazil demanded an "explanation" of the shooting). Mexico protested the U.S. death sentence of its national who had not been advised of his rights under an international treaty. See Linda Greenhouse, *Supreme Court to Hear Case of Mexican on Death Row*, NY Times A5 (Dec 11, 2004). The United States protested the seizure of Americans as hostages in Iran in 1979. See David Farber, *Taken Hostage: The Iran Crisis and America's First Encounter with Radical Islam* 144–47 (Princeton 2005) (describing the American response to the hostage crisis and the international reaction). In all cases, the rest of the world was indifferent or mostly passive.

61 See Goldsmith and Posner, *The Limits of International Law* at ch 5 (cited in note 13).

62 See, for example, Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 Yale L J 2599, 2603 (1997) (arguing that the "process of interaction, interpretation, and internalization of international norms into domestic legal systems is pivotal to understanding why nations 'obey' international law"); Louis Henkin, *How Nations Behave* at 47 (cited in note 47) (arguing that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time" out of fear of "roil[ing] relations") (emphasis omitted). But see Eric A. Posner, *International Law and the Disaggregated State*, 32 Fla St U L Rev 797, 800–02

UN Charter's ban on the use of military force is frequently violated;[63] international humanitarian law is selectively invoked;[64] and human rights treaties are generally ignored.[65] These are all multilateral treaties; by contrast, bilateral treaties seem to have a better record.[66] However, I will avoid taking a strong position on this issue in this Article, and will vary my assumptions—sometimes assuming that enforcement is strong and sometimes assuming that enforcement is limited.[67]

E. Summary

The world population will not subject itself to a single government because preferences are heterogeneous. Instead, multiple states will continue to 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

(2005) (critiquing Koh's failure to explain why domestic entities expend resources to force states to comply with international law).

63 See Glennon, *Limits of Law, Prerogatives of Power* at 2 (cited in note 52).

64 See, for example, Eric A. Posner, *Terrorism and the Laws of War*, 5 Chi J Intl L 423, 428–29 (2005) (noting that regulations concerning the use of poison gas were largely followed after World War I but regulations governing the use of submarines were not); Lindsay Moir, *The Law of Internal Armed Conflict* 67–88, 119–32 (Cambridge 2002) (discussing the practical effects of Common Article 3 and Protocol II of the Geneva Conventions); James D. Morrow, *The Institutional Features of the Prisoners of War Treaties*, 55 Intl Org 971, 976–77 (2001) (explaining that the treatment of POWs during World War II varied significantly by theater).

65 See Eric Neumayer, *Do International Human Rights Treaties Improve Respect for Human Rights?* 26 (unpublished manuscript 2005), online at http://ssrn.com/abstract=607681 (visited Mar 26, 2006) (discussing the ratification of human rights treaties as not associated with human rights improvements in autocratic regimes); Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 Yale L J 1935, 1980–81 (2002) (concluding that the ratification of human rights treaties is not correlated with improvements in human rights). See also Barrett, *Environment and Statecraft* at ch 10 (cited in note 44) (describing difficulties in obtaining compliance with environmental treaties).

66 Trying to establish that bilateral treaties are more effectively enforced than multilateral treaties would be difficult to do and would 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. See generally Goldsmith and Posner, *The Limits of International Law* at ch 5 (cited in note 13).

67 One puzzle is why the collective action problem hinders interstate cooperation but not the cooperation within a state's population that is necessary to support regular government. On the one hand, the population within a state is less diverse, but on the other hand it is far more numerous than the number 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.

elite) by cooperating with other governments. This joint recognition provides the mechanism that furthers welfare-maximization, much as in standard analyses 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.

IV. IMPLICATIONS

This Part draws out the implications from the assumptions described in Part III. 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, and Merger

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.[68] 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.

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[68] Alesina and Spolaore, *The Size of Nations* at 193 (cited in note 15) (graphing the number of states over time).

Suppose there are two bordering, self-governing territories, X and Y.[69] 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 fifty, then the total cost is $150, and each person must pay a tax of $3. If the population is one hundred, then the total cost is $200, and each person must pay a tax of $2. If the population is one thousand, then the total cost is $1,100, 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 combining their criminal justice systems. If each state has a population of fifty, 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. 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.

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69 See id at 17–30 (providing the basis for the following analysis).

If the states do not merge, then clearly state 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, state X will invest in fewer courthouses and police stations, and generate less criminal justice, rather than zero.) Meanwhile, state 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 tax, then each person in state X would lose $0.50 compared to the status quo (where they lost $0), and each person in state 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 state X pay a tax of $1.25 and the people living in state 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.[70]

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.

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70 I have ignored a lot of complications; readers who seek more depth should consult Alesina and Spolaore. Id (providing a mathematical analysis of issues related to jurisdiction size, heterogeneity, and economies of scale).

2. Imperfect governments; perfect enforcement.

a) Democracies. Democracies maximize the welfare of the median voter, not of the entire domestic population;[71] therefore, democratic governments are imperfect. As a result of this imperfection, states will tend to be too small, as shown by Alberto Alesina and Enrico Spolaore.[72]

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 from which it does not benefit. 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 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 the 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 provid-

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71 See Anthony Downs, *An Economic Theory of Democracy* 52–55 (Harper & Row 1957) (explaining that democratic governments can remain in power only by adopting policies that are preferred by the majority of voters).

72 See Alesina and Spolaore, *The Size of Nations* at 17–23 (cited in note 15) (discussing tradeoffs between government size and scope).

ing them with the threshold level of welfare.[73] 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.[74] 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. 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. Democracies are too small; dictatorships are too large. 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.

i) All governments are democracies. Suppose at time one that all states have the optimal size and shape. At time two, minorities within states may choose to secede and establish their own states. At time three, 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

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73 See id at 70.

74 See Casey B. Mulligan, Ricard Gil, and Xavier Sala-i-Martin, *Do Democracies Have Different Public Policies than Nondemocracies?*, 18 J Econ Persp 51, 71 (2004) (arguing that democratic institutions have insignificant effects on public policies). This is a controversial view; others have argued that dictators will undersupply public goods because they do not benefit directly from them. See, for example, Mancur Olson, *Power and Prosperity: Outgrowing Communist and Capitalist Dictatorships* 111–34 (Basic 2000) (using Stalinist economic policies to model the decisions of dictators). See also Thráinn Eggertsson, *Imperfect Institutions: Possibilities and Limits of Reform* 60–62 (Michigan 2005) (discussing Olson). My argument does not require that the (nonelectoral, nontax) policies of dictatorships and democracies converge completely, but that they converge a sufficient amount.

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.[75] 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.

ii) 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 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.[76] A separatist group will secede as long as it receives more than that. As for the citizens of the rump state, they will be made no worse-off, as the dictator will continue providing them with the minimum amount of welfare. Thus, the dictator himself will suffer the loss from secession.

iii) 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.

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75 I am referring to the law governing the recognition of states, not governments. See Restatement (Third) of the Foreign Relations Law of the United States § 202 (1987) (proposing rules on the 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.

76 See Alesina and Spolaore, *The Size of Nations* at 70 (cited in note 15).

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 for the median voter not to know whether he or she is likely to want to secede or to prevent secession at the time the deal is made.[77] 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.

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[77] Consider Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 Yale L J 399, 403 (2001) (arguing that behind a "veil of ignorance" of constitutional dimensions "the decisionmaker afflicted with uncertainty will, for lack of ex post information about whose interests to favor, choose the option or rule that impartially promotes the good of all those affected in an ex ante sense").

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.[78] 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).[79] 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 structures and establish their own states.[80] 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.[81] When secessions nonetheless occur, the

78 This conclusion is an example of how a welfarist analysis diverges from the views of someone who takes a rights-based view. See Buchanan, *Justice, Legitimacy, and Self-Determination* at 451–53 (cited in note 10) (rejecting the proposition that "state majoritarianism is necessary for legitimacy in international law"); Barry, *Statism and Nationalism* at 56 (cited in note 18) ("[C]osmopolitan nationalism has no principled position on boundaries. If the breakup of an existing state would make the maintenance of liberal institutions easier . . . there is no reason for a cosmopolitan to oppose it."). However, the rights theorist must also explain what amount of welfare losses are tolerable in order "to make the maintenance of liberal institutions easier." Barry, *Statism and Nationalism* at 56.

79 See Restatement (Third) of the Foreign Relations Law of the United States § 202.

80 See Woodrow Wilson, Address of the President, 65th Cong, 2d Sess, in 56 Cong Rec H 690–91 (Jan 8, 1918) (Woodrow Wilson's "Fourteen Points" speech). See also Frank Ninkovich, *The Wilsonian Century: U.S. Foreign Policy Since 1900* 288–89 (Chicago 1999) (discussing the relevance of Wilsonian self-determination in the post–Cold War international system). 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*, [1998] 2 SCR 217, 222–23 (Canada) (distinguishing the Quebecois secession from decolonization because "Quebec does not meet the threshold of a colonial people").

81 See, for example, Lawrence M. Frankel, *International Law of Secession: New Rules for a New Era*, 14 Houston J Intl L 521, 535–38 (1992) ("The community of states often acts as a closely knit club determined to aid its members against threats from outsiders, i.e. stateless people represented by independence movements.").

law is simply that states may do whatever they want: they may recognize the new state, or not, however it might serve their interests.[82] 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.[83]

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. The effort to condition international recognition on the adoption of democracy can succeed only if all or nearly all states agree to enforce the rule—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.[84]

B. Sovereignty

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, global welfare-maximizing conception of international law.

As noted above,[85] sovereignty is an ambiguous concept, but it is generally understood to mean the right of a state to be free from in-

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82 See Restatement (Third) of the Foreign Relations Law of the United States § 202.

83 See Lori F. Damrosch, et al, *International Law: Cases and Materials* 258–61 (West 4th ed 2001) (describing diplomatic efforts to make adherence to democratic principles and human rights a condition of statehood).

84 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. 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.

85 See Part III.B.

terference from other states and the corresponding duty not to interfere with the governance of other states.[86] 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.[87]

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 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.

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86 See Louis Henkin, *International Law: Politics and Values* 8–12 (Nijhoff 1995).

87 See Part IV.A.4.

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.[88]

The problem with this view is that it is in tension with the assumption of 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.[89]

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.

Many scholars argue that dictatorships should enjoy less sovereignty: they should be excluded from the benefits of membership in international organizations[90] or even subject to invasion by liberal democracies, which would then install a democratic regime.[91] 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

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88 See text accompanying note 16.

89 See text accompanying note 15.

90 See, for example, Buchanan, *Justice, Legitimacy, and Self-Determination* at 452–53 (cited in note 10).

91 See, for example, Beitz, *Political Theory and International Relations* at 90–92 (cited in note 48) (positing that "unjust" states could be subject to intervention under certain conditions).

from international organizations, or even invaded, because of its authoritarian system, then global climate regulation 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).[92]

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 alleviate the humanitarian crisis. They may intervene for other strategic reasons. This is the pretext problem.[93]

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.

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92 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. See generally David Rieff, *A Bed for the Night: Humanitarianism in Crisis* (Simon & Schuster 2002) (introducing a journalistic account of the "humanitarian paradox" posed by humanitarian organizations' dealings with dictatorships).

93 See Part II.

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.[94] International humanitarian law reduces the brutality of war.[95] International criminal law makes individuals liable for committing certain atrocities.[96] And, as discussed in Part II, some commentators support a right of humanitarian intervention.

However, these legal regimes are weak and rarely enforced. History suggests two reasons why. First, although cross-border altruism exists, it is minimal. Foreign aid, which is the most direct evidence of altruism, is very low, and usually tied to strategic goals.[97] Humanitarian interventions have been rare and limited. The clearest recent example of humanitarian intervention was America's ill-fated famine relief operation in Somalia; the United States withdrew after a small number of combat deaths.[98] Most other examples cited in the literature actually reflect mixed motives. The Vietnamese intervention in Cambodia and

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94 See, for example, *International Covenant on Civil and Political Rights*, UNGA Res 2200A (XXI), 21 GAOR Supp No 16 at 52–58, 999 UNTS 171 (Dec 19, 1966, entered into force Mar 23, 1976).

95 See, for example, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1955 6 UST 3516, TIAS No 3365 (1949).

96 See, for example, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Rome Statute of the International Criminal Court* (July 17, 1998), UN Doc A/CONF 183/9, reprinted in 37 ILM 999 (1998).

97 See Wojciech Kopczuk, Joel Slemrod, and Shlomo Yitzhaki, *The Limitations of Decentralized World Redistribution: An Optimal Taxation Approach*, 49 Eur Econ Rev 1051, 1054 (2005) (arguing that American aid policy implicitly values foreigners at 1/2000th the value of an American life). See also Jean-Sébastien Rioux and Douglas A. Van Belle, *The Influence of* Le Monde *Coverage on French Foreign Aid Allocations*, 49 Intl Stud Q 481, 495–96 (2005) (concluding that French aid is not related to the wealth of the recipient; rather it is related to newspaper coverage, democracy, and use of the French language). But see Alberto Alesina and David Dollar, *Who Gives Foreign Aid to Whom and Why?*, 5 J Econ Growth 33, 55–56 (2000) ("After controlling for its special interest in Egypt and Israel, U.S. aid is targeted to poverty, democracy, and openness.").

98 See Donatella Lorch, *Last of the U.S. Troops Leave Somalia; What Began as a Mission of Mercy Closes with Little Ceremony*, NY Times sec 1 at 1 (Mar 26, 1994).

the Tanzanian intervention in Uganda may have helped the citizens in the invaded states, but the purpose of the invasions was security.[99] 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.[100]

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 governments that commit 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.

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

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99 See Glennon, *Limits of Law, Prerogatives of Power* at 80–82 (cited in note 52).

100 See James Traub, *Never Again, No Longer?*, NY Times sec 6 at 17 (July 18, 2004).

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 state Y gains nothing by passing an antipollution law because state Y has no control over the factory owner. 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 state 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 providing that each state must pass a law restricting pollution. The treaty could provide that each state must pass a law prohibiting 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 cross-border costs were actually incurred by its own citizens.

If the two states can cooperate in this fashion, then the outcome is globally welfare-maximizing to the same extent as the welfare-maximizing 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.

a) 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 fifty and an out-of-state cost of one hundred. Factory Y produces an

in-state benefit of fifty and an out-of-state cost of ten. 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 fifty but whose citizen gains one hundred) but would harm X (whose factory loses fifty but whose citizen gains only ten). 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 one hundred) but would harm X (whose factory loses fifty and whose citizen gains zero). X also 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 fifty and one hundred. 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.[101]

b) 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.[102] 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

101 See Part IV.C.3.

102 See Jagdish Bhagwati, *Free Trade Today* 106–18 (Princeton 2002) (discussing the systemic impact of trade diversion resulting from the proliferation of trade pacts).

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; only a multilateral treaty regime could solve this problem. The General Agreement on Tariffs and Trade (GATT)/World Trade Organization (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 the GATT/WTO system is vulnerable to free riding, and, indeed, trade diversion has been accomplished through regional trade agreements.[103]

Regardless of whether the international trade regime should be considered a success, 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.[104]

c) 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 the asymmetry of payoffs: states will not enter globally welfare-maximizing treaties if one state loses. 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.

Because governments are imperfect, the treaties they enter may not reflect the interests of all their citizens. The Holy Alliance of 1815,[105] 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

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103 See Goldsmith and Posner, *The Limits of International Law* at 149 (cited in note 13) ("Although states do not explicitly violate the rule, they circumvent it easily by creating preferential trading areas . . . of which there are hundreds. NAFTA is just one example.").

104 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.

105 See Paul W. Schroeder, *The Transformation of European Politics 1763–1848* 558–59 (Oxford 1994).

monarchy. Such a treaty protected the ruling elites at the expense of the general public. A more timely example is the WTO, which—according to its critics—benefits export industries at the expense of consumers, farmers, and workers.[106] 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.[107]

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.[108] 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.[109] 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.[110] 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 benefit the citizens of democratic counterparties. So a general rule in favor of enforcement seems to be welfare-maximizing.[111]

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106 But see Martin Wolf, *Why Globalization Works* ch 10 (Yale 2004) (discussing and critiquing the anti-WTO literature).

107 See Joseph E. Stiglitz, *Globalization and Its Discontents* 243–44 (Norton 2002) (observing that Cold War loans to the Democratic Republic of Congo were used to enrich its leader rather than to fund development).

108 See generally, for example, *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, 1997 ICJ 7 (involving Hungary's effort to escape a communist-era treaty with Czechoslovakia that obligated both states to develop a massive hydroelectric power plant on the Danube).

109 See Craig S. Smith, *Major Creditors Agree to Cancel 80% of Iraq Debt*, NY Times A1 (Nov 22, 2004) (observing that Iraq would still be obliged to pay Hussein-era debts without debt relief by creditors).

110 See Alesina and Spolaore, *The Size of Nations* at 70 (cited in note 15).

111 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 state 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 either that the pollution is cost-justified, or that the factories are not of the type 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.[112] 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 (ICJ) or a new tribunal established for the occasion. However, the ICJ has proven a disappointment and new tribunals are unlikely to be effective.[113] The reason is that human beings must make the decision, and the tribunal staff must come from X or Y or both (or neither). If the tribunal members are loyal to their own government, then the tribunal will either deadlock or find for whichever state has more representation.[114] Anticipating such an outcome, the states will be reluctant to agree to the tribunal, and indeed effective tribunals are rare.[115] Relying on people who are not nationals of either party is also unacceptably

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112 See Part IV.C.1.

113 See Eric A. Posner, *The Decline of the International Court of Justice* 6–12 (John M. Olin Law & Economics Working Paper No 233, Dec 2004), online at http:// ssrn.com/abstract=629341 (visited Mar 26, 2006).

114 See Eric A. Posner and Miguel F.P. 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* 19–21 (unpublished manuscript 2005), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=705363 (visited Mar 26, 2006) (finding evidence of modest national bias among judges of the ECHR).

115 See Eric A. Posner and John C. Yoo, *Judicial Independence in International Tribunals*, 93 Cal L Rev 1, 29–51 (2005) (discussing low success rates in international tribunals based on usage and compliance rates).

risky because such people cannot usually be trusted to take account of the parties' interests.[116]

All of these problems could be solved, in principle, if state X and state 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 state 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 one hundred and reduce the welfare of Factory Y by fifty, 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 ten and reduce the welfare of Factory X by one hundred, 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 effects before they merge, then they might not agree to merge in the first place.

In sum, the treaty rule to which states X and Y would agree 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, particularly heavy pollution, factories close to the border, or factories 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 Protocol—or the weaker

116 Consider id at 72–74.

version of Kyoto to which the United States would agree.[117] Treaties, unlike domestic law, must not only be welfare-maximizing; they must also be Pareto superior. The more states that are involved, and the more heterogeneous their positions, the weaker the 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 Protocol 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.[118] 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.[119] In addition, as noted above,[120] 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.[121]

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 am-

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117 See generally *Report of the Conference of the Parties on Its Third Session, Held at Kyoto From 1 to 11 December 1997, Addendum, Part Two: Action Taken by the Conference of the Parties at Its Third Session*, Conference of the Parties (Dec 11, 1997), UN Doc FCCC/CP/1997/7/Add.1.

118 See Goldsmith and Posner, *The Limits of International Law* at 150–51 (cited in note 13) (arguing that treaties are weak and do not redistribute wealth or power).

119 See Christopher D. Stone, *Common but Differentiated Responsibilities in International Law*, 98 Am J Intl L 276, 299–301 (2004) (concluding that although there has been a recent push for differentiating obligations, it has not been accepted as a new normative principle).

120 See Part IV.B.

121 On *jus cogens*, see Damrosch, et al, *International Law* at 105–06 (cited in note 83).

biguous success—but probably because only three players, the EU, Japan, and the United States, 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 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.[122]

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.

Although such an international law would not injure wealthy states, there is also no affirmative reason for it. Wealthy states could simply donate of their own free will. A treaty might help donor states

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[122] See Stone, 98 Am J Intl L at 299 (cited in note 119) ("In general, the terms of customary international law and multilateral conventions apply universally.").

coordinate their giving, but this could probably be done informally, as there are only about a dozen or so states that provide significant aid. A treaty would also require the donor states to 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.[123]

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 the future donate any more money.[124]

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.[125] Donor nations may be able to

123 See Sharon LaFraniere, *Africa Tackles Graft, with Billions in Aid in Play*, NY Times A1 (July 6, 2005).

124 An example is the Bush administration's millennium project. See Elisabeth Bumiller, *Bush Plans to Raise Foreign Aid and Tie It to Reforms*, NY Times A8 (Mar 15, 2002).

125 See James M. Buchanan, *The Samaritan's Dilemma*, in Edmund S. Phelps, ed, *Altruism, Morality, and Economic Theory* 71, 75–78 (Russell Sage 1975) (describing the Samaritan's di-

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.

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 (GRD).[126] 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 per barrel tax on crude oil extraction; such a tax would raise several hundred billion dollars annually, enough to bring more than two 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.[127] Pogge argues that his scheme is realistic because the GRD is more morally compelling than conventional forms of aid, it avoids a collec-

lemma—that is, how the expectation of charity can lead parties to act in such a way as to maintain poverty).

126 Pogge, *World Poverty and Human Rights* at 197–215 (cited in note 8).

127 See id at 205–08.

tive 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.[128]

Pogge's attention to institutional dimensions is welcome but his arguments are not persuasive. As he acknowledges, existing foreign aid reflects mostly strategic interests and its altruistic component is very small.[129] 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 per 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 per day threshold, we know from experience that many of them will not receive any benefits, even while they will have to pay higher prices.[130] Pogge acknowledges that some governments will misuse aid; these governments will be deprived of the aid.[131] 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.

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128 See id at 211–13.

129 See id at 207.

130 See, for example, Rieff, *A Bed for the Night* at 189–93 (cited in note 92) (discussing the failures of humanitarian efforts in Rwanda); LaFraniere, *Africa Tackles Graft* (cited in note 123).

131 See Pogge, *World Poverty and Human Rights* at 206–07 (cited in note 8). The fact is that almost all governments misuse aid—much of it ends up in the pockets of corrupt officials. So Pogge's system would most likely 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.

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 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.[132]

4. Evidence: law and history.

As noted above,[133] the evidence suggests that cross-border 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 surpluses on the basis of need rather than bargaining power. Supranational institutions

132 See generally, for example, Gerald M. Meier and James E. Rauch, eds, *Leading Issues in Economic Development* (Oxford 8th ed 2004).

133 See Part IV.B.4.

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 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 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[134]—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 competitive, ap-

134 Alesina and Spolaore, *The Size of Nations* at 193 (cited in note 15).

proaches 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.

V. 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. 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[135]) 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

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. The state that violated the treaty may be legally required to pay reparations or take some other action.[136]

To understand this rule, imagine that two states agree to reduce cross-border 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 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

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135 See Richard Bernstein, *2 'No' Votes in Europe: The Anger Spreads*, NY Times A1 (June 2, 2005) (indicating that a lack of approval by voters in France and the Netherlands has put plans for a European Union constitution on hold).

136 See Restatement (Third) of the Foreign Relations Law of the United States § 207 (governing the attribution of conduct to states).

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.[137] Soldiers who commit war crimes can 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—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.[138]

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

137 See, for example, *Rome Statute of the International Criminal Court* (cited in note 96).

138 See Eric A. Posner, *The Limits of International Criminal Law* 6–7 (unpublished manuscript 2005) (on file with author).

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.[139] However, the United Nations cannot act in major ways without the consent of the most powerful states; the ICJ is also biased in their favor[140] and is in any event mostly ineffectual.

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 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; 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.

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139 But there are important exceptions, like the International Monetary Fund.

140 See Posner and Figueiredo, 34 J Legal Stud at 624–25 (cited in note 114).

Adjudicative institutions consist mainly of informal ad hoc arbitration. The ICJ has generally been ignored, as have a variety of other lesser courts.[141] It is too early to tell whether the ICJ 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.[142]

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.[143]

Thus, international legal institutions seem to be exceptionally thin and unbalanced—as though, to use a domestic analogy, the U.S. 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 anarchy 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 cross-border 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

141 See Part IV.C.3.

142 See Posner and Yoo, 93 Cal L Rev at 44–50 (cited in note 115).

143 See Glennon, *Limits of Law, Prerogatives of Power* at 90–91 (cited in note 52).

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.[144]

VI. CONCLUSION

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 Article 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,[145] then we must stay with the status quo, which means tolerating humanitarian crises, even genocide, on the ground that unilateral in-

144 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, 233–38 (2005). The question, from the perspective of this Article, 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.

145 See Singer, *One World* at 144–48 (cited in note 7).

tervention 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.[146]

The most visible manifestation 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.[147]

People's views about these conclusions will depend to a large extent on 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

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146 Another example is global antitrust law. See Paul B. Stephan, *Global Governance, Antitrust, and the Limits of International Cooperation*, 38 Cornell Intl L J 173, 217 (2005) (concluding that an ambitious international antitrust system is likely to fail because of institutional constraints).

147 But see Young, *Inclusion and Democracy* at 265–75 (cited in note 31) (advocating greater authority for the United Nations in the short-term, and global democracy in the long-term). Young's 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.

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 United Nations 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 supports 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 reason to think that international law can do indirectly what a world government would do directly were it possible. A troubling implication of this argument is that as international law advances, becomes stronger, and supplies more public goods, populations within states have a greater incentive to secede, leading to greater fragmentation of the world population, and thus greater difficulty in international cooperation. The rapid increase in the number of states during the past half century, a time of great expansion in international law, especially international trade law, is prima facie evidence for this claim. Although the cost of political fragmentation may be less than the gains from international law, this phenomenon may put a limit on what international law can accomplish.