

ESSAY

HUMAN WELFARE, NOT HUMAN RIGHTS

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Human rights treaties play an important role in international relations but they lack a foundation in moral philosophy and doubts have been raised about their effectiveness for constraining states. Drawing on ideas from the literature on economic development, this Essay argues that international concern should be focused on human welfare rather than on human rights. A focus on welfare has three advantages.

First, the proposition that governments should advance the welfare of their populations enjoys broader international and philosophical support than do the various rights incorporated in the human rights treaties. Second, the human rights treaties are both too rigid and too vague—they do not allow governments to adopt reasonable policies that advance welfare at the expense of rights, and they do not set forth rules governing how states may trade off rights. A welfare treaty could provide guidance by supplying a maximand along with verifiable measures of compliance. Third, the human rights regime and international development policy work at cross purposes. Development policy favors the poorest states, whereas the human rights regime condemns the states with the worst governments: Unfortunately, the poorest states usually have the worst governments. This Essay surveys various possible welfare treaties as alternatives to the human rights regime.

INTRODUCTION

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

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1. E.g., Bureau of Democracy, Human Rights, & Labor, U.S. Dep't of State, 2006 Country Reports on Human Rights Practices (2007).

2. E.g., Amnesty International Report 2007: The State of the World's Human Rights (2007); Freedom House, The Worst of the Worst: The World's Most Repressive Societies (2007); Human Rights Watch, World Report 2008 (2008) [hereinafter Human Rights Watch, World Report].

vantages on human rights abusing states,³ and the Council of Europe makes ratification of the European Convention on Human Rights a condition of membership.⁴ International organizations like the World Bank encourage recipients of aid to improve their human rights records.⁵ And by ratifying human rights treaties, even the most powerful states promise to respect the human rights of their populations.

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

Now consider an alternative world. Suppose that the State Department and the NGOs published annual lists of “low-welfare” states. These are states in which the public suffers from low levels of utility. The

3. In narrow circumstances foreign sovereign immunity is not granted to designated state sponsors of terrorism for acts that violate certain human rights. See National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083(a), 2008 U.S.S.C.A.N. (122 Stat.) 3338 (to be codified at 28 U.S.C. § 1605A) (waiving sovereign immunity for state sponsors of terrorism for actions arising out of “an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act”). In addition, the State Department issues annual reports that identify human rights abusers, and from time to time the United States imposes sanctions on human rights abusers such as Apartheid-era South Africa. See Gary Clyde Hufbauer, Jeffrey J. Schott & Kimberly Ann Elliott, *Economic Sanctions Reconsidered: History and Current Policy* 236 (2d ed. 1990).

4. Henry J. Steiner et al., *International Human Rights in Context: Law, Politics, Morals* 936–37 (3d ed. 2008). The European Union also considers human rights among its criteria for admission. See Peter Singer, *One World* 102–03 (2004) (discussing European Union’s use of “lure of entry” to encourage support for human rights).

5. See Joel E. Oestreich, *Power and Principle: Human Rights Programming in International Organizations* 2–3 (2007) (“[A] wide range of IGOs [intergovernmental organizations] have been incorporating human rights standards into their operations . . .”).

6. See Emilie M. Hafner-Burton, Kiyoteru Tsutsui & John W. Meyer, *International Human Rights Law and the Politics of Legitimation: Repressive States and Human Rights Treaties*, 23 *Int’l Soc.* 115, 118 tbl.1 (2008) (listing major human rights treaties with numbers of states that are parties).

7. See, e.g., *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, opened for signature May 2, 1991, 30 *I.L.M.* 1517; *Convention on the Rights of the Child*, adopted Nov. 20, 1989, 1577 *U.N.T.S.* 3; *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 *U.N.T.S.* 85 [hereinafter *Convention Against Torture*]; *Convention on the Elimination of All Forms of Discrimination Against Women*, adopted Dec. 18, 1979, 1249 *U.N.T.S.* 13; *International Covenant on Civil and Political Rights*, adopted Dec. 16, 1966, S. Exec. Doc. E, 95-2 (1978), 999 *U.N.T.S.* 171 [hereinafter *ICCPR*]; *International Covenant on Economic, Social and Cultural Rights*, adopted Dec. 16 1966, 993 *U.N.T.S.* 3 [hereinafter *ICESCR*]; *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature Dec. 21, 1965, S. Exec. Doc. C, 95-2 (1978), 660 *U.N.T.S.* 195.

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

We could also imagine a parallel legal world. The human rights treaties are replaced or supplemented with human welfare treaties. The human welfare treaties oblige states to maintain a certain level of welfare among their citizens, or even to promote or maximize their welfare. The treaties would not require states to take specific steps in order to enhance welfare; states would be free to experiment and to take advantage of whatever is unique about their resources and institutions. These treaties would overlap with existing human rights treaties to the extent that respect for certain human rights also tends to maximize welfare, but the treaties would give no priority to rights; they would instead recognize that rights would be trumped when they bar government actions that advance welfarist goals.

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

8. See, e.g., Jack Donnelly, *The Relative Universality of Human Rights*, 29 *Hum. Rts. Q.* 281, 292–93 (2007) [hereinafter Donnelly, *Relative Universality*] (arguing that transhistorical foundation for human rights is “implausible and politically unappealing”); Amartya Sen, *Elements of a Theory of Human Rights*, 32 *Phil. & Pub. Aff.* 315, 317 (2004) [hereinafter Sen, *Elements*] (noting widespread skepticism about foundations of human rights); Joseph Raz, *Human Rights Without Foundations 2–8* (Univ. of Oxford Faculty of Law Legal Studies Research Paper Series, Paper No. 14/2007, 2007), available at <http://ssrn.com/abstract=999874> (on file with the *Columbia Law Review*) (arguing that traditional philosophical approaches to human rights are “so remote from the practice of human rights as to be irrelevant to it”).

even in principle be resolved.⁹ Indeed, although some philosophers continue to argue that human rights have moral significance,¹⁰ none has offered a defense of the human rights treaty regime as it currently exists in the real world.

Second, if great controversy surrounds the question of rights, most people—even philosophers who strongly support human rights on deontological grounds—agree that the well-being of individuals is also a matter of moral concern.¹¹ Philosophers who write about the importance of respecting rights agree, with few exceptions, that governments should also concern themselves with improving the well-being of citizens.¹² The importance of well-being transcends national boundaries. In contrast to the anemic efforts to enforce human rights treaties and the controversies over the proper interpretation of the rights in those treaties, developed states have contributed massive amounts of aid to the poorest nations, though the effectiveness of that aid is questionable.¹³ And, although governments often give aid in order to advance diplomatic goals, there seems to be a rough consensus about where aid should go when strategic interests are not paramount. Aid to victims of natural disasters is commonplace and uncontroversial. Everyone agrees that aid should go to the poorest countries. Most of the debate in the development literature is about means, not ends.¹⁴ Yet the commitment to aiding people who live in the poorest states is in tension with a human rights regime that envi-

9. Compare Theodor C. van Boven, *Distinguishing Criteria of Human Rights*, in *The International Dimensions of Human Rights* 43, 43–48 (Karel Vasak & Philip Alston eds., 1982) (arguing that there is a hierarchy of human rights), with Theodor Meron, *On a Hierarchy of International Human Rights*, 80 *Am. J. Int'l L.* 1, 21–22 (1986) (disputing this claim).

10. See, e.g., Martha C. Nussbaum, *Frontiers of Justice* 290 (2006) [hereinafter Nussbaum, *Frontiers*] (noting “unsatisfactory features” of human rights discourse but arguing human rights provide unique “idea of an urgent claim based upon justice”); Thomas W. Pogge, *Realizing Rawls* 272 (1989) (arguing “global institutional ideal” must be “consistent with the basic rights of all human beings”); John Rawls, *The Law of Peoples* 80 (1999) (noting moral force of human rights is globally binding); Sen, *Elements*, supra note 8, at 320–28 (characterizing human rights as “ethical claims that demand acceptance”).

11. To be sure, well-being is also a highly contested concept. See Matthew D. Adler & Eric A. Posner, *New Foundations of Cost-Benefit Analysis* 52–61 (2006) [hereinafter Adler & Posner, *New Foundations*] (comparing utilitarian, egalitarian, rights-based, and “weak welfarism” approaches and contending that welfare has at least some moral weight in each view); *infra* Part II.B.2.

12. See, e.g., Adler & Posner, *New Foundations*, supra note 11, at 5 (noting general agreement with Pareto principle—that government projects are desirable if they make individuals better off while making no one worse off).

13. William Easterly, *The White Man’s Burden* 4 (2006) (noting Western countries have spent \$2.3 trillion on foreign aid over last five decades).

14. Compare Jeffrey Sachs, *The End of Poverty: Economic Possibilities for Our Time* 242–43 (2006) (advocating massive investment by developed nations in projects that will help poor nations), with Easterly, supra note 13, at 37–51, 367–83 (arguing that top-down schemes like Sachs’s do not work and advocating more experimental and incremental approaches). Both scholars agree that that the goal of foreign aid should be to promote growth and help the poor in developing countries.

sions isolating the worst governments, because the worst governments usually govern the poorest states.

Third, many of the debates about human rights are implicitly debates about the role of welfare. Developing nations often resist pressure to improve their human rights records by asserting collective rights—rights to economic development, for example.¹⁵ Vigorous disagreements about whether human rights are universal stand in sharp contrast with a general consensus that governments should enhance well-being by—among other things—reducing poverty and improving education: No one argues that in some countries governments should impoverish their citizens. Indeed, it is possible to believe that international human rights law has nothing to do with human rights in the philosophical sense: It refers instead to the limits on sovereignty imposed by international morality, whether or not international morality has anything to do with rights.¹⁶ If this is correct, then we should directly inquire as to what international morality requires rather than try to defend or rationalize the existing rights regime.

Finally, recent empirical studies suggest that states that ratify human rights treaties do not improve their human rights performance, or, at least, that improvements are small and sporadic and hard to measure, perhaps limited only to certain types of states—democracies, for example.¹⁷ These studies are controversial, but they raise the question whether a different type of treaty regime would produce better outcomes.

15. See Info. Office of the State Council of China, Progress in China's Human Rights Cause in 2003, at ch. I (2004), available at <http://www.china.org.cn/e-white/20040330/index.htm> (on file with the *Columbia Law Review*) (reporting on "The People's Rights to Subsistence and Development"); cf. Geoffrey York, Citing "Right To Development," China Rejects Emission Cap, *Globe & Mail* (Toronto), June 5, 2007, at A1 (reporting China's refusal to reduce emissions based on claim that "right to development" trumped other concerns). The UN General Assembly declared the existence of a right to development in 1986. Declaration on the Right to Development, G.A. Res. 41/128, art. I(1), U.N. GAOR, 41st Sess., 97th plen. mtg., U.N. Doc. A/41/53 (Dec. 4, 1986).

16. See Raz, *supra* note 8, at 14 (contending that human rights "set limits to the sovereignty of states").

17. See Todd Landman, Protecting Human Rights: A Comparative Study 159–70 (2005) (finding limited impact, mainly mediated by other factors); Emilie M. Hafner-Burton & Kiyoteru Tsutsui, Human Rights in a Globalizing World: The Paradox of Empty Promises, 110 *Am. J. Soc.* 1373, 1395–1402 (2005) (concluding ratification of human rights treaties does little to reduce violation of person's right to security); Oona A. Hathaway, Do Human Rights Treaties Make a Difference?, 111 *Yale L.J.* 1935, 1998 (2002) (finding no positive statistically significant relationship between Torture Convention ratification and human rights compliance); Linda Camp Keith, The United Nations International Covenant on Civil and Political Rights: Does It Make a Difference in Human Rights Behavior?, 36 *J. Peace Res.* 95, 112 (1999) (finding ratification of ICCPR did not "effect observable change in actual human rights behavior"); Eric Neumayer, Do International Human Rights Treaties Improve Respect for Human Rights?, 49 *J. Conflict Resol.* 925, 950–51 (2005) (finding that ratification of human rights treaties improves state's respect for human rights if it has well-developed democratic system of governance and strong civil society); Beth Simmons, Complying with the Law: The Case of International Human Rights Treaties 289–90 (2006) (unpublished manuscript, on file with the *Columbia Law*

In this Essay, I defend a welfarist alternative to international human rights law. Part I briefly surveys the human rights regime and its problems. It argues that the human rights treaties are both excessively rigid and excessively vague. Their rigidity consists in their refusal to allow states to trade off different values—for example, to allow states to violate political rights in order to enhance the overall well-being of the population. Their vagueness lies in their failure to provide mechanisms for evaluating a state's allocation of resources among projects that promote the public good. I argue that rather than trying to specify the obligations of government in terms of respecting specific rights, negative and positive, the treaties should require that states enhance the public welfare.

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

I. THE HUMAN RIGHTS REGIME: A DIAGNOSIS

A. *The Legal Regime*

1. *The Human Rights Treaties.* — There are seven major UN-sponsored human rights treaties. These treaties ban torture, racial discrimination, and discrimination against women, and guarantee “civil and political” rights, “economic, social, and cultural” rights, the rights of migrant workers, and the rights of the child.¹⁸ These treaties enjoy a large measure of support, with most obtaining participation rates ranging from 70% to nearly 100% of UN members.¹⁹ The UN has also recently adopted a treaty to guarantee the rights of the disabled.²⁰ In addition to these treaties, several regional human rights treaties exist. The most im-

Review) (finding some but limited impact of ratification of Convention Against Torture); see also Emilie M. Hafner-Burton & Kiyoteru Tsutsui, Justice Lost! The Failure of International Human Rights Law to Matter Where Needed Most, 44 J. Peace Res. 407, 420–23 (2007) (finding abusive governments that enter human rights treaties do not improve human rights practices); Emilie M. Hafner-Burton, Right or Robust?: The Sensitive Nature of Repression to Globalization, 42 J. Peace Res. 679, 680–85 (2005) (reviewing literature on relationship between globalization and human rights practices); Emilie M. Hafner-Burton & James Ron, Can the Human Rights Movement Achieve Its Goals? 12–17 (Dec. 6, 2007) (unpublished manuscript, on file with the *Columbia Law Review*), available at http://www.princeton.edu/~ehafner/pdfs/achieve_goals.pdf (reviewing state of empirical research regarding impact of human rights treaties on human rights violations).

18. See sources cited *supra* note 7.

19. See Hafner-Burton, Tsutsui & Meyer, *supra* note 6, at 118 tbl.1. The International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families is a notable exception, with only 20 states party. *Id.*

20. Convention on the Rights of Persons with Disabilities, opened for signature March 30, 2007, 46 I.L.M. 443.

portant is the European Convention on Human Rights (ECHR), which has, uniquely, a highly developed judicial system.²¹ There are also regional treaties in Africa and the Americas.²²

Table 1 provides a rough picture of the landscape.²³

TABLE 1: FOUR MAJOR HUMAN RIGHTS INSTRUMENTS

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

Note: numbers in cells are article numbers.

The two most important and comprehensive of the UN treaties are the International Covenant for Civil and Political Rights (column 2) and the International Covenant for Economic, Social, and Cultural Rights (column 3). The ICCPR is a charter of negative rights, whereas the ICESCR is a charter of positive rights. Negative rights are rights to be free of interference from other people and from the government; in particu-

21. See Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature Nov. 4, 1950, 213 U.N.T.S. 221, as amended by Protocol 11, opened for signature May 11, 1994, Europ. T.S. No. 155 [hereinafter ECHR]. The structure of the ECHR judicial system is set forth at *id.* arts. 19–51.

22. African Charter on Human and Peoples' Rights, adopted June 27, 1981, 1520 U.N.T.S. 217; American Convention on Human Rights, opened for signature Nov. 22, 1969, 1144 U.N.T.S. 123.

23. ICCPR, *supra* note 7; ICESCR, *supra* note 7; ECHR, *supra* note 21; Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

lar, the government is prohibited from restricting the activities of the rights holders in areas such as political debate and religious worship.²⁴ Positive rights are rights to receive benefits from the government; the government is required to provide benefits such as health care or education. Negative rights are associated with the classical liberal tradition of natural law, especially as embodied in the social contract theories of Locke and his successors, including the founders of the United States of America, who were particularly concerned about governmental abuse of power. Positive rights are associated with a range of liberalism's critics, including Marxists.²⁵ The Universal Declaration of Human Rights—a legally nonbinding document²⁶ that was adopted by the UN General Assembly in 1948 and predated the ICCPR and ICESCR by several decades—contains both rights, as Table 1 shows. The Cold War rivalry between the United States and the Soviet Union resulted in the bifurcated treaty system—with negative rights contained in the ICCPR, which the United States championed, and positive rights contained in the ICESCR, which the Soviet Union championed.²⁷

Today, most countries have ratified both treaties (the United States has not ratified the ICESCR, however).²⁸ Nonetheless, it is clear that states take negative rights more seriously than the positive rights of the ICESCR. The priority of negative rights takes many forms. As Table 1 shows, the ECHR, which is the only human rights treaty that provides for routine adjudication of its provisions and appears to enjoy widespread

24. See Nussbaum, *Frontiers*, supra note 10, at 286–88 (contrasting negative and affirmative conceptions of rights).

25. See Imre Szabo, *Historical Foundations of Human Rights and Subsequent Developments*, in 1 *The International Dimensions of Human Rights*, supra note 9, at 11, 13–20 (contrasting Lockean natural law tradition of inalienable rights with later socialist development of “economic, social and cultural rights”).

26. Some of the provisions of the Universal Declaration have entered customary international law, at least according to U.S. courts. See, e.g., *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 261 (2d Cir. 2003) (finding right to be free from torture to be customary international law).

27. Micheline R. Ishay, *The History of Human Rights* 221–29 (2004) (identifying Cold War rivalry as stimulus for adoption of two human rights treaties by General Assembly).

28. One hundred and sixty-two states have ratified the ICCPR. Office of the United Nations High Comm’r for Human Rights, *Status of Ratification: International Covenant on Civil and Political Rights*, at <http://www2.ohchr.org/english/bodies/ratification/4.htm> (last visited Oct. 18, 2008) (on file with the *Columbia Law Review*). One hundred and fifty-nine states have ratified the ICESCR. United Nations High Comm’r for Human Rights, *Status of Ratification: International Covenant on Economic, Social and Cultural Rights*, at <http://www2.ohchr.org/english/bodies/ratification/3.htm> (last visited Oct. 18, 2008) (on file with the *Columbia Law Review*). There are 192 member states in the UN. United Nations, *List of Member States*, at <http://www.un.org/members/list.shtml> (last visited Oct. 18, 2008) (on file with the *Columbia Law Review*).

compliance,²⁹ is mainly a charter of negative rights. Although many national constitutions contain positive rights as well as negative rights, for the most part only negative rights are justiciable, with the positive rights left to the vagaries of politics.³⁰ NGOs recognize that they can most effectively draw attention to violations of negative rights; for that reason, the main human rights watchdogs largely ignore violations of economic, social, and cultural rights.³¹ Thus, although most developed states do provide benefits to their citizens—health care, education, a social safety net, and so forth—they refuse to place these benefits outside the realm of democratic politics. By contrast, political rights in these states are generally outside the realm of democratic politics.³²

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

Moral theories typically hold that individuals have inherent human rights, derivable from the basic postulate of equal human dignity.³³ Some philosophers have taken a contractarian approach. Contractarians derive human rights from a Rawlsian original position argument where the veil of ignorance deprives people of knowledge of their nationality. Not knowing which nation they would belong to, people in the original position would choose international institutions that protect the rights of all human beings.³⁴ Other philosophers are welfarists: They believe that human rights promote the welfare of the global population.³⁵

It is an understatement to say that these theories are controversial; an enormous literature debates them. It is less well known that none of

29. See Mark W. Janis, *The Efficacy of Strasbourg Law*, 15 *Conn. J. Int'l L.* 39, 39–46 (2000) (summarizing studies of ECHR compliance and concluding “[f]or an international legal system, Strasbourg law is, from what we can tell, remarkably efficacious”).

30. The major exceptions are India and South Africa. See Steiner et al., *supra* note 4, at 321–47 (discussing India’s merging of fundamental rights with directive principles or positive rights and South Africa’s elevation of social or positive rights to constitutional status).

31. See Kenneth Roth, *Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization*, 26 *Hum. Rts. Q.* 63, 65 (2004) (discussing whether human rights organizations have legitimacy to address positive rights).

32. For further discussion, see *infra* Part I.B.

33. See Alan Gewirth, *Human Rights: Essays on Justification and Applications* 27 (1982) (suggesting human rights have “intrinsic and instrumental value in relation to dignity”). For a survey of moral theories of human rights, see generally Allen Buchanan & David Golove, *Philosophy of International Law*, in *Oxford Handbook of Jurisprudence and Philosophy of Law* 808 (Jules Coleman & Scott Shapiro eds., 2002).

34. E.g., Charles R. Beitz, *Political Theory and International Relations* 130 (1979); Pogge, *supra* note 10, at 53.

35. See, e.g., Singer, *supra* note 4, at 98–99 (comparing claims of human right to democracy with welfarist defense of democratic government).

the proponents of these theories pays much attention to the actual human rights treaty regime. The debate hovers at a theoretical altitude high above the facts on the ground. A few philosophers cite the Universal Declaration, which is a vague, hortatory document with no legal effect.³⁶ Other philosophers pick and choose among provisions of national constitutions, singling out those provisions that they approve.³⁷ The debate is best understood as an argument about whether states should respect some, mostly undefined, set of human rights, not about whether the existing human rights treaty regime is morally justified.

Consider, for example, the work of Martha Nussbaum and Amartya Sen. Nussbaum and Sen argue that states should be required to advance the “capabilities” of their citizens, that is, their ability to enjoy various objective goods such as health, literacy, and political participation. Their approach differs from that of traditional development economists, who believe that states should maximize economic welfare—that is, the satisfaction of subjective preferences as measured by willingness to pay. Yet Nussbaum and Sen are both “welfarists” in the broader sense that they emphasize that states should advance the well-being of people.³⁸ And both scholars argue that their approach is consistent with the traditional human rights agenda.³⁹

Neither scholar, however, addresses the existing human rights regime—that is, the legal regime embodied in treaties such as the ICCPR and the ICESCR. Sen has declined to explain how exactly the capabilities approach would be implemented, arguing that “it is important to emphasize the catholicity that the approach has. The foundational affirmation of the importance of capabilities can go with various strategies of actual evaluation involving practical compromises. The pragmatic nature of practical reason demands this.”⁴⁰

This raises the question of why Sen would think that the existing human rights regime would be consistent with the capabilities approach. That regime does not embrace catholicity but takes a specific approach to human rights in order to avoid the type of fatal indefiniteness that renders treaties unenforceable.⁴¹

36. See Sen, *Elements*, supra note 8, at 343 (discussing Universal Declaration as most important international recognition of human rights).

37. See, e.g., Nussbaum, *Frontiers*, supra note 10, at 286–88 (comparing provisions of United States Constitution with provisions of Indian Constitution).

38. In subsequent work, Sen distances himself from (what I call) welfarism, and seems to argue that his support for human rights is based on concern for “freedom” rather than “utility.” See Sen, *Elements*, supra note 8, at 328.

39. See Nussbaum, *Frontiers*, supra note 10, at 284–91 (explaining how capabilities approach is “closely allied” to human rights approach); Amartya Sen, *Development as Freedom* 147–48 (1999) [hereinafter Sen, *Development*] (arguing economic development and promotion of human rights are inextricably intertwined).

40. Sen, *Development*, supra note 39, at 85.

41. Sen reasonably argues that the existence of disputes about human rights “is no embarrassment to a theory of human rights.” Sen, *Elements*, supra note 8, at 323.

Nussbaum similarly insists that the “language of capabilities . . . gives important precision and supplementation to the language of rights.”⁴² She argues that the capabilities approach resembles the human rights approach and concludes that therefore it “should not be seen as a rival of the human rights approach.”⁴³ From a legal perspective, these claims are puzzling. Either international law will continue to embody the existing human rights approach or it will be modified so as to reflect Nussbaum’s alternative approach. It cannot do both. As I have noted, the existing human rights approach, for all the talk of positive rights, gives priority to negative rights.⁴⁴ But as Nussbaum acknowledges, the emphasis on negative rights is inconsistent with the capabilities approach.⁴⁵ In addition, the ICESCR, though it insists on generous positive rights, allows states to take their time before satisfying them. And it provides no mechanism for allocating resources among rights, positive and negative, thus making it a highly unsatisfactory instrument for implementing the capabilities approach.⁴⁶ If a treaty is ambiguous, then states can easily comply with it without appreciably changing their behavior.

Unhappiness with moral theories of human rights has led to the growth of political theories of human rights. Political theories argue that states or groups within states have an interest in agreeing to human rights.⁴⁷ The human rights treaty regime thus rests on an overlapping consensus about the obligations of states with mostly different but not wholly incompatible interests and moral and religious commitments.

Consider the Universal Declaration of Human Rights, which was created in the wake of World War II. It expressed revulsion at the ideology and methods of the Nazis, but it did not express a moral consensus beyond the rejection of fascism, as was acknowledged at the time.⁴⁸ This became unmistakable in the following years as governments attempted to reduce the ambiguous, hortatory provisions of the Universal Declaration to acceptably specific rules in legally binding treaties.⁴⁹ Western states

However, it is an embarrassment to a treaty regime that has remained vague because these disputes have not been resolved.

42. Nussbaum, *Frontiers*, supra note 10, at 284.

43. *Id.* at 291.

44. See supra notes 29–32 and accompanying text.

45. See Nussbaum, *Frontiers*, supra note 10, at 291.

46. See infra note 61 and accompanying text.

47. See Charles R. Beitz, *Human Rights as a Common Concern*, 95 *Am. Pol. Sci. Rev.* 269, 279–81 (2001) (discussing political role of human rights); Donnelly, *Relative Universality*, supra note 8, at 292–93 (arguing human rights represent overlapping consensus of different political visions of what is essential to protecting a “life of dignity”); Charles R. Beitz, *What Human Rights Mean*, *Daedalus*, Winter 2003, at 36, 44–46 (conceiving human rights as “basic requirements of global justice”).

48. See Ishay, supra note 27, at 218–24 (discussing historical origins of Universal Declaration).

49. See *id.* at 223 (discussing breakdown of consensus that had led to Universal Declaration and subsequent decision to develop two separate human rights treaties, ICCPR and ICESCR).

that initiated the treaty regime sought to publicize their commitment to liberal values, while drawing attention to the rejection of these values by the Soviet Union and its allies. They hoped that these values would appeal to people and governments around the world, who would reject the Soviet model. The Eastern Bloc championed social, economic, and cultural rights that, it claimed, were vindicated in communist, and not in Western, societies.⁵⁰

Developing states have ratified the treaties for more diverse reasons. Some developing states succumbed to pressure from Western states that tied aid and other benefits (such as EU membership) to treaty ratification. Other developing states may have ratified the treaties in order to show that they were “modern” or endorsed modernization or because newly empowered elites or other groups were committed to Western values.⁵¹ Governments of newly democratic states may have ratified the treaties in an effort to prevent future governments from reversing democratic reforms.⁵²

B. *Problems*

Many people have attributed the limited effects of human rights treaties to the absence of strong enforcement mechanisms.⁵³ However, many successful treaties do not have enforcement mechanisms or have highly limited adjudication and enforcement systems. In the end, all treaties rely on the initiative of member states for enforcement. Although enforcement mechanisms can help improve compliance, the absence of effective enforcement instruments most likely reflects states’ lack of enthusiasm for human rights treaties rather than inadvertence or insufficient foresight. The enforcement mechanisms theory just raises another question: Why don’t states show more enthusiasm for ensuring compliance with the human rights treaties that they have negotiated?

A common answer to this question is that states are jealous of their sovereignty. But this answer is also not persuasive. States agree to all kinds of incursions on their sovereignty in return for the benefits of inter-

50. See *id.* at 221 (“The Soviet representatives, unsurprisingly, gave priority to social and economic rights and equivalent civic duties, while American representatives favored political and civil rights.”).

51. Cf. Jack Donnelly, *Universal Human Rights in Theory and Practice* 135–38 (2003) (identifying “a largely Westernized elite” as driving force behind proliferation of anti-caste efforts in India).

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

53. See, e.g., Emilie M. Hafner-Burton, *Trading Human Rights: How Preferential Trade Agreements Influence Government Repression*, 59 *Int’l Org.* 593, 603 (2005) [hereinafter Hafner-Burton, *Trade*] (noting lack of formal enforcement mechanisms in most human rights treaties); Hathaway, *supra* note 17, at 2006–07 (noting minimal monitoring and enforcement of human rights treaties).

national cooperation. For example, states agree not to subject each other's diplomatic officials to certain legal obligations that apply to citizens.⁵⁴ They have done so in order to obtain a reciprocal benefit—non-discrimination against their citizens when they are on foreign territory. If states have an interest in the well-being of people in other states⁵⁵—and this proposition is the premise of the human rights regime—then they should be willing to accept limits on their freedom to violate the human rights of their own populations in return for other states accepting the same limits.

A more plausible explanation for the current state of affairs is that the developed nations perceive their interest in ensuring that other nations improve their human rights performance as real but limited. Developed nations refrain from pressuring human rights abusers when they have strategic, trade, or other interests in maintaining a harmonious relationship. Human rights abusing governments have no special interest in ending their human rights abuses, except in response to carrots and sticks offered by the developed nations. If the carrots are puny and the sticks are flimsy, then these governments will not improve their respect for human rights.⁵⁶

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

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

Consider the cases where states argue that their human rights obligations do not, or should not, bind them, because other values are equally important. Typically, states argue that national security or cultural tradition or even economic growth justifies violation of rights (or alternatively argue that the rights are defeasible or limited for these reasons). The currently defunct Asian values debate and the more recent challenge from Islam are versions of this argument.⁵⁷ Though these claims are invariably met with skepticism by the human rights community, it is worth

54. See Vienna Convention on Diplomatic Relations art. 22, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 (outlining special protections to be afforded foreign "missions").

55. The interest could be genuinely altruistic, or it could derive from a concern that human rights abusing states eventually pose a threat to their neighbors and other foreign states, which was the lesson of the Nazi experience.

56. See, e.g., Ishay, *supra* note 27 at 225–29 (describing Cold War superpowers' priorities as supporting their client states irrespective of their human rights practices).

57. See, e.g., Abdullahi Ahmed An-Na'im, Human Rights in the Muslim World, 3 *Harv. Hum. Rts. J.* 13, 17–25 (1990) (describing tension between Shari'a and human rights); Randall Peerenboom, Beyond Universalism and Relativism: The Evolving Debates About "Values in Asia," 14 *Ind. Int'l & Comp. L. Rev.* 1, 20–26 (2003) (discussing Asian values debate). The proponents of Asian values claimed that Asians valued social harmony

understanding why governments make them. They argue that if “Western” human rights treaties are respected in a given situation, the public will be worse off—thrown into civil war, vulnerable to insurgents, or, alternatively, unable to engage in practices that they value.⁵⁸ In short, human rights obligations interfere with welfare-promoting activities of the government, and these welfare-promoting activities should be given priority.

Many commentators have interpreted the Asian values challenge as a philosophical debate about the universality of human rights.⁵⁹ On this view, the critics are cultural relativists, and one can easily refute them by pointing out the well-known philosophical difficulties with moral relativism and precedents for Western-style human rights in Confucianism, Islam, and other non-Western traditions.⁶⁰ This critique misconceives the challenge, however. The better interpretation of the challenge is that virtually all governments concede that they have a “universal” obligation to advance the welfare of their populations, but, given local conditions and traditions, they cannot advance the welfare of their populations if they are constrained by the human rights treaties. The treaties do not allow governments to make the tradeoffs they need to make in order to advance the public interest.

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

more than Western freedoms; some Islamic scholars reject Western values that are inconsistent with Islam.

58. See An-Na'im, *supra* note 57, at 16 (noting tensions between human rights regime and traditional Islamic approaches to gender and religion); Peerenboom, *supra* note 57, at 26–27 (discussing tendency of Asian governments to defend human rights abuses based on need to deal with instability within their countries).

59. See Guy Haarscher, Can Human Rights Be “Contextualized”?, *in* *Human Rights with Modesty: The Problem of Universalism* 103, 106–08 (András Sajó ed., 2004) (classifying “Asian values” as a frontal attack that “run[s] counter to the official ideology of the international community, that is, human rights”).

60. See Sen, *Development*, *supra* note 39, at 231–40 (seeking support for human rights in classical Asian writings); cf. Donnelly, *Relative Universality*, *supra* note 8, at 284–86 (discussing and criticizing attempts to locate recognition of human rights in traditional non-Western cultures).

the barest minima, there are any universally proper ways to distribute resources. For a very poor country, a government might justifiably refuse to finance education because health and security needs are so pressing.

This point is not ignored by the human rights treaties, but they recognize it only in a highly imperfect way. These treaties do, with several exceptions, give governments discretion to make legitimate tradeoffs. With respect to positive rights, the ICESCR recognizes that each state should take steps “to the maximum of its available resources, with a view to achieving progressively the full realization of [those] rights . . . by all appropriate means.”⁶¹ This provision implicitly recognizes that states may not have the capacity to satisfy the positive rights immediately, as the UN Economic, Social, and Cultural Rights Committee has held.⁶² Commentators agree that it is difficult to complain about states’ budgetary priorities, given the difficulty for outsiders of evaluating the competing demands on the government.⁶³ With respect to negative rights, the ICCPR frequently acknowledges limitations, which permit the rights to be balanced against other considerations. For example, the right to freedom of expression may be restricted “[f]or the protection of national security or of public order . . . or of public health or morals.”⁶⁴ In addition, the ICCPR allows states to derogate from certain rights “[i]n time of public emergency which threatens the life of the nation.”⁶⁵ Other human rights treaties have similar provisions.

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

61. ICESCR, *supra* note 7, art. 2(1).

62. United Nations Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc., & Cultural Rights, Report on the Fifth Session, General Comment No. 3, at 83, U.N. Doc. E./1991/23 (Dec. 14, 1990) (acknowledging “constraints due to the limits of available resources”).

63. See, e.g., Varun Gauri, *Social Rights and Economics: Claims to Health Care and Education in Developing Countries*, in *Human Rights and Development: Towards Mutual Reinforcement* 65, 66–67 (Philip Alston & Mary Robinson eds., 2005) (discussing disagreement over success of Brazil’s rights-based approach to health care budgeting).

64. ICCPR, *supra* note 7, art. 19(3)(b).

65. *Id.* art. 4(1).

It is possible that a state might cite its positive rights obligation to supply health care under the ICESCR as a justification for its failure to fully respect the negative rights obligation not to torture under the ICCPR. However, the treaties themselves do not permit such an argument. The ban on torture is unqualified,⁶⁶ and although the amount of resources that states must devote to implement the ban is unspecified, any argument that a state does better by devoting resources to health care than to eliminating torture would be met with skepticism by the human rights community. If such an argument were accepted, the treaty regime would be excessively vague: It would permit states to violate human rights under the cover of pretext.

The human rights treaty regime thus commits two types of errors. First, in some places it does not permit governments that seek in good faith to advance the general welfare of the public to make reasonable tradeoffs—devoting resources to acute problems and denying resources to problems that, in local context, are less pressing. Second, in other places it allows tradeoffs without supplying a mechanism for evaluating those tradeoffs. The treaty regime manages to sail both into the Scylla of excessive strictness and the Charybdis of excessive vagueness.

C. *An International Welfare Fund*

One can better understand the problems with the current regime, and obtain an idea about how to reform it, by undertaking the following thought experiment about a hypothetical international welfare fund. This fund is an analytic construct only; nothing I will say depends on the establishment of an actual fund.

Suppose that the populations of nations care, at least a little, about the well-being of people living in other countries. We can think of the degree or intensity of care in monetary terms as the amount that individuals would be willing to pay in taxes for the benefit of foreigners. No doubt this amount is much higher in wealthy nations than in poor nations simply because wealthy people have more money to spare. But for the sake of simplicity we will imagine that most states would contribute some amount, M , to a common fund that would be used to help those in the most need of aid. M can be thought of as the monetized value of in-kind contributions such as military support for an unstable government or for rebels who seek to overthrow that government; diplomatic pressure; sanctions; traditional aid; trade benefits; immigration privileges; and so forth.

Four straightforward but important points can be made about the fund. First, the more that the fund is used effectively for ends that people

66. The ban on torture reads in its entirety: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.” *Id.* art. 7. The ICCPR’s derogation provision prohibits derogations from Article 7. *Id.* art. 4(2).

with diverse views and from different nations approve, the higher contributions are likely to be. The more overlapping the consensus is, the more that can be done.

Second, the fund itself is best used in a manner that is coordinated, or internally consistent, for otherwise resources will be wasted.⁶⁷ For example, suppose that some people think that a government of a poor state should build hydroelectric dams in order to ensure a supply of electricity, while other people think that the government should not build such dams because they damage the environment, harm the fishing industry, and reduce tourism revenues. It would be a great mistake if money in the fund both financed the dam and financed local NGOs that oppose the dam. It would be much better to use the money for some other purpose to which everyone agrees.

Third, the fund should be used to pressure states that are most likely to be vulnerable to pressure. In some cases, those states will be poor and weak. In other cases, states most susceptible to pressure will be those that are eager to break out of isolation and attract trade and investment. Resources should be targeted where they can achieve the greatest results, which would most likely involve focusing on those states that are vulnerable to pressure and that have the greatest shortfalls in the welfare of their populations.

Fourth, states can often most effectively maximize M , and thereby improve the well-being of people around the world, by taking actions that are rarely associated with typical treaty enforcement practices. For example, rich state X might be reluctant to use diplomatic pressure against poor state Y for all kinds of good reasons—such as the need to cooperate with respect to some other dimension of international relations—while being willing to (for example) allow poor people in state Y to immigrate to X , or to reduce trade barriers that harm the export industry in Y .

The defects of the human rights regime can be redescribed with the help of the fund heuristic. States that seek in good faith to spend the fund in a manner dictated by the human rights treaties would withhold resources from reasonable governments that, faced with difficult choices,

67. This is a truism in the aid literature. See, e.g., Simeon Djankov, Jose G. Montalvo & Marta Reynal-Querol, *Aid with Multiple Personalities*, 27 *J. Comp. Econ.* (forthcoming 2009), available at http://www.doingbusiness.org/documents/Aid_with_Multiple_Personalities_JCE.pdf (on file with the *Columbia Law Review*) (providing empirical evidence for reduction in aid efficiency caused by donor fragmentation); Arnab Acharya, Ana Fuzzo de Lima & Mick Moore, *Aid Proliferation: How Responsible Are the Donors?* (Inst. of Dev. Studies, Working Paper No. 214, 2004), available at www.ids.ac.uk/ids/bookshop/wp/wp214.pdf (on file with the *Columbia Law Review*) (pointing out costs to donee countries from dealing with multiple donors); Stephen Knack & Aminur Rahman, *Donor Fragmentation and Bureaucratic Quality in Aid Recipients* (World Bank Policy Research, Working Paper No. 3186, 2004), available at http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2004/02/04/000012009_20040204091915/Rendered/PDF/WPS3186.pdf (on file with the *Columbia Law Review*) (providing empirical evidence for erosion of administrative capacity caused by many small donors).

decide to reduce poverty rather than tackle negative rights violations committed by the police or military. At the same time, they would have no guidance as to how to treat states that allocate resources among health care, poverty relief, education, and other goods in wise or unwise ways. Hampered by the absence of a set of guiding principles, states would predictably respond inconsistently. Is there a better way?

II. THE WELFARIST TREATY

A. *The General Approach*

The challenge, then, is to construct a treaty regime that encourages the most efficient allocation of resources toward the goal of increasing overall human welfare.

A welfarist treaty would obligate states to promote the well-being of the global population.⁶⁸ Given the constraints of the state system, which drives governments to give priority to their own populations at the expense of foreign populations, a viable welfarist treaty would not obligate states to equalize the wealth of individuals across borders—indeed, even the most egalitarian states do not go this far for their own populations. Instead, a welfare treaty might establish welfare floors or some other system of priority that identified the lowest-welfare states. These states would have a legal obligation to raise the welfare of their populations, or to try to do so, and other states would have the obligation to pressure or help low-welfare states to live up to their welfarist obligations.

As a practical matter, the effect of this treaty would be to divide the world into high-welfare states that comply with the law and low-welfare states that do not. The high-welfare states would pressure the low-welfare states to adopt better policies or reward them for doing so. Technically, the current human rights regime does not make such a clear demarcation between human rights respecters and human rights abusers. Human rights respecters violate human rights treaties if they occasionally deviate from the law, whereas high-welfare states would violate the welfarist treaty only if they adopted disastrous policies. However, the pressure brought to bear on traditional human rights respecters who occasionally deviate is small, and so the differences between the two systems in this respect would be minimal. The advantage of the welfarist approach is that it would bring the legal regime into line with practice, as well as with the pragmatic assumption that scarce international resources should be used against the worst states, not states that are generally good or marginally bad.

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

68. On welfarism and international law, see generally Eric A. Posner, *International Law: A Welfarist Approach*, 73 *U. Chi. L. Rev.* 487 (2006).

First, consider China. The Chinese government violates human rights. It suppresses political dissent, censors the press, deprives people of fair trials, and harasses religious minorities.⁶⁹ Yet this authoritarian government is also responsible for the greatest enhancement of human welfare in recent history. From 1981 to 2001, four hundred million Chinese moved out of extreme poverty.⁷⁰ As long as the Chinese government continues to improve the well-being of so many people, states that care about welfare should refrain from pressuring China to improve its human rights record. With respect to all the welfare indicators to be discussed shortly, including objective values such as health and education, China scores well.

Second, consider the current international controversy over the death penalty. Many countries have abolished the death penalty and criticize the United States for retaining it.⁷¹ Human rights organizations also pressure the United States to abolish the death penalty.⁷² In terms of the analytic framework advanced by this Essay, a portion of the common fund devoted to improving human rights practices is being channeled toward American death penalty abolition. Is this a good use of these resources?

The answer is no. Capital punishment in the United States results in only a few dozen deaths per year—53 in 2006, down from a high of 98 in 1999 (over the last thirty years).⁷³ These executions might deter other killings, but even assuming that they do not,⁷⁴ the loss of life is trivial compared to the scale of other humanitarian catastrophes occurring around the world. For example, in Darfur there have been tens of thousands of deaths per year.⁷⁵ Resources would be better used, at the

69. Human Rights Watch, World Report, *supra* note 2, at 260.

70. See Martin Ravallion & Shaohua Chen, China's (Uneven) Progress Against Poverty 2 (World Bank Policy Research, Working Paper No. 3408, 2004), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=625285 (on file with the *Columbia Law Review*) ("In the 20 year period after 1981, the proportion of the population [in China] living below our new poverty lines fell from 53% to 8%.").

71. Nora V. Demleitner, The Death Penalty in the United States: Following the European Lead?, 81 *Or. L. Rev.* 131, 139 (2002).

72. See, e.g., Human Rights Watch, The Death Penalty in the United States of America, at <http://www.hrw.org/campaigns/deathpenalty/> (last visited Sept. 2, 2008) (on file with the *Columbia Law Review*) (arguing that death penalty is irreconcilable with principles of human rights).

73. Death Penalty Info. Ctr., Executions Per Year (2007), at <http://www.deathpenaltyinfo.org/article.php?scid=8&did=146> (last visited Sept. 2, 2008) (on file with the *Columbia Law Review*) [hereinafter Death Penalty].

74. The evidence of deterrence is weak. See John Donohue & Justin Wolfers, Uses and Abuses of Empirical Evidence in the Death Penalty Debate, 58 *Stan. L. Rev.* 791, 841 (2005) (showing death penalty's minimal deterrent effect on murder rate).

75. Estimates vary widely; the one authoritative study estimates 70,000 deaths over an eight month period in 2004. See Media Briefing, David Nabarro, World Health Org., Mortality Projections for Darfur (Oct. 15, 2004), available at <http://www.who.int/media/centre/news/briefings/2004/mb5/en/> (on file with the *Columbia Law Review*); see also John Hagan & Alberto Palloni, Death in Darfur, 313 *Science* 1578, 1579 (2006) (estimating

margin, to set up refugee camps and provide humanitarian relief in Darfur, than to pressure the United States to abolish the death penalty.

Further, the United States appears to be impervious to pressure from foreign countries to abolish the death penalty. Most executions are carried out by state governments, which play virtually no role in American foreign relations, and have a great deal of constitutional discretion over their criminal justice systems. One state—Texas—executed 24 people in 2006, nearly five times the number in the state with the second highest rate of execution.⁷⁶ Texas and other states can cater to xenophobic sentiments of their citizens without worrying about the foreign relations consequences. Resources used to pressure state governments to cut back on the death penalty, or to pressure the federal government to pressure the state governments, are thus unlikely to have any effect.⁷⁷ By contrast, resources used to pressure smaller, weaker countries where significant human rights abuses occur are more likely to have an effect.

Human rights treaties do not distinguish between the United States and Sudan.⁷⁸ Both states have an obligation to comply with human rights norms. Because the treaties do not provide a formula for limiting or balancing human rights, they give no guidance to interested states as to how to allocate resources in a manner that maximizes their effect. As a result, human rights enforcement is largely ad hoc. By contrast, a welfarist treaty directs states to focus on particular states, those with the lowest level of welfare: Sudan, not the United States.

One might argue that a sufficiently specific welfarist treaty would not command universal assent because different societies have different notions of the good life. Of course, the same argument has been made about human rights, and, as I have argued, the problem seems to be more significant for human rights than for welfare. At a minimum, it is no more of a problem for welfare than it is for human rights. The welfarist approach, however, has an advantage over the human rights approach. If welfare can be specified at a high enough level of generality, then states are free to choose whatever mechanisms they believe will best promote welfare. Such mechanisms can draw on local traditions and

between 170,000 and 255,000 deaths occurred in Darfur over thirty-one months of conflict up until August 2006).

76. See Death Penalty, *supra* note 73.

77. But see *Roper v. Simmons*, 543 U.S. 551, 575–77 (2005) (relying in part on human rights treaties to find juvenile death penalty unconstitutional). *Roper* indicates that international pressure may have some effect on the use of capital punishment in the United States, but that effect has been felt only at the margins. Indeed, Texas has ignored the International Court of Justice's latest effort to compel it to obey international law. See James C. McKinley, Jr., *Texas Turns Aside Pressure on Execution of 5 Mexicans*, N.Y. Times, July 18, 2008, at A13.

78. However, developing states have argued that compliance with human rights treaties should be judged in light of "capacities," an argument reflected in, for example, the General Assembly resolution that created the Human Rights Council. See G.A. Res. 60/251, ¶ 5(e), U.N. Doc. A/RES/60/251 (Apr. 3, 2006).

practices that are at variance with human rights norms—as long as the government can make the case that they improve rather than diminish welfare.

B. *Approaches*

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

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

How does one distinguish states that are responsive to pressure and those that are not? One possibility is that no such distinction can be made; the internal workings of states are just too difficult for the outside world to understand. If such is the case, then it may be necessary for governments to put pressure on all low-welfare states in the hope that welfare improvements in responsive states exceed welfare losses in nonresponsive states. Otherwise, it seems likely that states that seek trade and investment, cooperate with their neighbors, have relatively open political systems, have relatively effective governments that can control their population, and that are not too powerful, are most responsive. States that seek to cooperate with or obtain aid from other states will make concessions in order to obtain their goals. States with open political systems and effective governments can make promises, submit to threats, and otherwise react in a predictable way when outside states seek to influence their behavior. These criteria exclude isolationist states like North Korea, failed states like Somalia, geopolitical giants like China and the United States, and wealthy states with crucial resources like Saudi Arabia.

To capture this point, let us distinguish between responsive governments and nonresponsive governments. Aid should flow to nonresponsive governments as long as a large enough portion reaches the population. For responsive governments, low-welfare states should be pressured and marginally higher welfare states should be rewarded. The reason is that the governments of low-welfare states must be given incentives to adopt welfare-promoting policies when officials, for personal or political reasons, or out of incompetence, are otherwise inclined. If governments

know that they will receive aid (or avoid pressure) regardless of whether they adopt welfare-promoting policies, then they have no incentive to adopt such policies.

If this point seems paradoxical, one should understand that it is not special to the welfarist regime; it applies to the human rights regime as well. Governments pressure the worst human rights abusers by depriving them of aid, imposing economic sanctions, and occasionally invading them—in all of these ways usually making the population worse off rather than better off, because human rights abusing governments make sure that their populations feel the sting. As human rights improve, governments reward the country in question by extending aid, entering trade agreements, and so forth. Thus, the governments that engage in less human rights abuse, and whose populations are therefore better off from a human rights perspective, are rewarded.⁷⁹

b. *Precision.* — It is sometimes argued that treaties with precise obligations are easier to enforce than treaties with vague obligations.⁸⁰ If obligations are vague, then governments can easily rationalize violations. Moreover, if governments that are injured by violations have trouble agreeing among themselves as to whether the violations actually occurred, whether they were serious, and so forth, they will be unable to respond with a united front. The goal of a welfarist treaty is to promote welfare. Welfare is a contested concept. Thus, a treaty that simply required states to promote the welfare of their citizens would be vague and vulnerable to opportunistic breach. For this reason, it may be appropriate to choose more precise treaty obligations even though they do not fully capture whatever is meant by welfare.

c. *Availability of Data.* — A workable treaty regime requires behavior that is verifiable.⁸¹ States do not enter arms control agreements unless they can verify that the other side is not producing the restricted arms. Many human rights treaties require government behavior that is relatively easy to observe, at least in open societies. If torture occurs, witnesses and victims can come forward with testimony and evidence. A welfarist treaty suffers by comparison: Welfare is not directly observable. For a welfarist treaty to function, reliable proxies for welfare must be developed.

2. *Welfare.* — A very simple treaty could provide as follows: “Each state party has the obligation to promote the welfare of its people.” Two objections can be made. First, no one can agree on what “welfare” means, and therefore the obligation would be empty. Second, it is impos-

79. For empirical evidence, see Hafner-Burton, *Trade*, supra note 53, at 606 (showing members of preferential trade agreements that require compliance with human rights norms are expelled if they violate those norms).

80. See, e.g., Abram Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* 12 (1995) (“It is, of course, by no means unheard of that states, like other legal actors, take advantage of the indeterminacy of legal language to justify indulging their preferred course of action.”).

81. *Id.* at 174–96 (discussing history of verification processes in treaties).

sible to tell whether a state has satisfied its obligation because promoting welfare would be an affirmative duty, and could not be discharged simply (as in the case of negative duties) by refraining from engaging in a particular act.

As to the first objection, a large philosophical literature on welfarism suggests that welfare can be understood in three general ways.⁸² *Mental state* theorists, like Bentham, argue that welfare refers to hedonic affect—the felt experience of being happy, satisfied, well-off, etc.⁸³ For a long time, people argued that hedonic affect cannot be measured, but recent advances in psychology and economics suggest otherwise.⁸⁴ *Desire-based* theorists argue that welfare refers to the satisfaction of desires. Within this group, there is disagreement about whether satisfaction of desires improves welfare regardless of what those desires are (a view taken by most economists) or only if those desires meet further criteria—for example, being well-informed and undistorted by circumstances.⁸⁵ *Objective-list* theorists, like Martha Nussbaum, argue that welfare refers to the enjoyment of certain objective goods, such as health, education, personal relationships, and recreation.⁸⁶ Here, too, a great deal of disagreement exists about which activities count as objective goods.⁸⁷

Despite the disagreement between and within the camps, a consensus about, at least, the minimum requirements of welfare probably exists. Nearly everyone agrees that basic health care advances welfare—because healthier people are happier, or because people desire good health, or because health is an objective good. The same can be said about primary school education, nutrition, family life, association with friends, and so forth. The various approaches tend to come into conflict over more esoteric questions—for example, whether people who overeat and become

82. Derek Parfit was the first to suggest this tripartite understanding. Derek Parfit, *Reasons and Persons* 493–502 (1984).

83. Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* 11 (J.H. Burns & H.L.A. Hart eds., Athlone Press 1970) (1789) (“Nature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*. It is for them alone to point out what we ought to do, as well as to determine what we shall do.”).

84. See, e.g., Daniel Kahneman, *Objective Happiness*, in *Well-Being: The Foundations of Hedonic Psychology* 3, 22 (Daniel Kahneman, Ed Diener & Norbert Schwarz eds., 2003) (“Real-time measures of experience can be obtained, stored without error, and aggregated to yield a measure of objective well-being that is anchored in the reality of present experience . . .”).

85. For a discussion, see James Griffin, *Well-Being: Its Meaning, Measurement, and Moral Importance* 10–16 (1986) (contrasting “actual-desire” account of utility with “informed-desire” account).

86. See Martha C. Nussbaum, *Women and Human Development: The Capabilities Approach* 78–80 (2000) [hereinafter *Nussbaum, Capabilities*] (listing ten “central human functional capabilities”); see also Sen, *Development*, supra note 39, at 74–81 (arguing welfare should be evaluated by “the substantive freedoms—the capabilities—to choose a life one has reason to value”).

87. For a discussion of the various camps, see Adler & Posner, *New Foundations*, supra note 11, at 28–39.

obese should be counted as better off (they satisfy desires) or worse off (they do not satisfy informed desires, or they are not happy).

The second objection has been much discussed in the context of ordinary human rights treaties. Delicate judgments must be made as to how far a state must go in order to satisfy positive rights such as the right to work, which is contained in the ICESCR. Indeed, it is doubtful that the distinction between positive and negative rights has practical importance.⁸⁸ Consider the negative right not to be tortured. No state can reduce the incidence of torture to zero. Local police or soldiers will always contain rogue elements who torture even when torture is not official policy. To reduce the amount of torture, a government must not only pass laws against torture. It must instruct lower-level officials not to engage in torture, train them, monitor them, and make available resources to investigate, prosecute, and punish those who violate the law. Torture will always occur, so the relevant question is how much a government must invest in reducing torture before it can be deemed to comply with a rule against torture. The inquiry is no easier than the positive right inquiry regarding how much a government must invest in promoting literacy before it complies with a right to education. Seen in this way, the distinction between negative rights and positive rights collapses.

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

C. *Standards of Measurement*

1. *Gross Domestic Product.* — I start with per capita GDP, which is frequently used as a measure of well-being in academic research, and so provides a useful baseline for thinking about welfarist measures. Table 2 lists the bottom forty states by per capita GDP, plus that of the United States.

Treaty designers would need to make some complex choices about how a welfarist treaty would use the per capita GDP measure. It would make little sense to require that all states achieve a certain per capita GDP, such as the world median. Very poor states would have no chance to comply with the treaty. Either the median would shift over time, condemning half the states to treaty violation, or the target would need to be fixed with reference to a particular year. Both approaches seem arbitrary.

88. See Stephen Holmes & Cass R. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* 17–24 (1999) (pointing out that all rights, negative and positive, depend on government action for their vindication); Cass R. Sunstein, *Designing Democracy: What Constitutions Do* 222–24 (2001) (arguing that distinction between negative and positive rights cannot be sustained).

TABLE 2: PER CAPITA GDP⁸⁹

Country Name	Per Capita GDP
Liberia	366
Democratic Republic of the Congo	446
Eritrea	564
Cambodia	616
Afghanistan	626
Sierra Leone	630
Guinea-Bissau	639
Ethiopia	704
Somalia	731
Burundi	787
Madagascar	833
Togo	845
Niger	883
Central African Republic	952
Malawi	973
Tanzania	991
Gambia	1000
Bhutan	1001
Chad	1037
Zambia	1065
Uganda	1183
Yemen	1185
Mali	1238
Burkina Faso	1240
Sudan	1254
Rwanda	1278
Kenya	1295
Nigeria	1295
Iraq	1314
Benin	1374
Sao Tome and Principe	1471
Laos	1512
Kiribati	1525
North Korea	1527
Nepal	1537
Comoros	1629
Mongolia	1643
Republic of the Congo	1680
Mauritania	1686
United States	37,313

89. See Alan Heston, Robert Summers & Bettina Aten, Ctr. for Int'l Comparisons of Prod., Income & Prices at the Univ. of Pa., Penn World Table Version 6.2 (2006), at http://pwt.econ.upenn.edu/php_site/pwt_index.php (on file with the *Columbia Law Review*). Data are provided as of 2003, using purchasing power parity converted units.

A possible alternative would require states to hit certain targets that take into account their starting point—for example, a moving average growth rate for per capita GDP over a period of years. States would have an obligation to improve welfare rather than to reach a certain level of welfare. States that comply with the treaty would eventually become wealthy enough that they could be released from further growth obligations unless per capita GDP again dips to an unacceptably low level. Further, by setting the target as an average over a period of years, one avoids penalizing states that are hit by random shocks that cause economic downturns. States would be free to choose among methods that promote economic growth, which would allow them to take into account local conditions. Some states might find it easy to reduce trade barriers; others might prefer to invest in infrastructure or to strengthen property rights.

Per capita GDP has some normative appeal and practical advantages. For the desire-based theorist who relies on raw preferences (the conventional economist's view), per capita GDP provides a rough measure of welfare. Higher per capita GDP means that more goods and services are being consumed; because people want goods and services, an increase in consumption of goods and services would seem to indicate an increase in welfare. A desire-based theorist who gives moral weight only to informed or otherwise restricted preferences would be more uneasy about per capita GDP but might be satisfied with this measure as long as laws ensure that people are sufficiently informed. Consumer protection laws, for example, might serve this function. Similarly, hedonic and objective-goods theorists might think that per capita GDP is a rough proxy for welfare as long as people spend their money on improving their happiness (in the first case) or on objective goods (in the second). Again, laws can channel people's behavior in these directions. An important qualification of this argument is that if marginal utility declines with wealth, overall welfare will be higher in states with greater equality of income and wealth. For per capita GDP to be an accurate measure of welfare, it should probably be adjusted using a conventional measure of equality such as the Gini coefficient.⁹⁰

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

90. For a discussion of the Gini Coefficient and its use to measure inequality, see World Bank, *Measuring Inequality*, at <http://go.worldbank.org/3SLYUTVY00> (last visited Sept. 30, 2008) (on file with the *Columbia Law Review*).

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

2. *Happiness Measures.* — A second approach to drafting a welfarist treaty would exploit recent social science research on the measurement of subjective well-being. Economists and psychologists have discovered that people answer happiness surveys in a consistent manner that satisfies tests of external validity.⁹¹ A group of scholars argues that the results of these surveys provide a useful measure of subjective happiness.⁹² A typical survey question asks the respondent how happy she is on a scale from one to five or one to ten. A random sample of the population of a country can be given the survey, and the average response provides a rough measure of the welfare level of the country as a whole. Table 3 lists the bottom forty countries.⁹³

The mean score was 6.46; Denmark enjoyed the highest score (8.38). The United States had a score of 7.57.

As a generalization, happier countries tend to be wealthier, but exceptions abound. Nigeria (6.87), for example, is very poor but has an average happiness greater than that of Greece (6.78), Poland (6.37), and Portugal (5.97)—all relatively wealthy countries. Bangladesh (5.77) is happier than Ukraine (5.67) and Egypt (5.36), even though both countries have more than twice the per capita GDP of Bangladesh. Thus, Bangladesh and Nigeria would probably be in compliance with a welfarist treaty that used happiness measures but not a welfarist treaty that used per capita GDP; the opposite could be true for Ukraine and Egypt. Tanzania is unhappy and poor and would be in violation of either type of

91. See David G. Blanchflower & Andrew J. Oswald, *Well-Being over Time in Britain and the USA*, 88 *J. Pub. Econ.* 1359, 1361 (2004) (citing psychology literature on reliability and validity of self-reported happiness statistics).

92. See the essays in *Well-Being: The Foundations of Human Psychology*, *supra* note 84.

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

welfarist treaty. The United States, wealthy and happy, would violate neither type of treaty.

TABLE 3: LIFE SATISFACTION⁹⁴

Country	Satisfaction with Life	Year of Survey
Tanzania	3.87	2001
Zimbabwe	3.94	2001
Armenia	4.32	1997
Georgia	4.68	1996
Belarus	4.81	2000
Pakistan	4.86	2001
Macedonia	5.12	2001
Albania	5.17	2002
Bulgaria	5.22	2006
Iraq	5.23	2004
Egypt	5.36	2000
Azerbaijan	5.39	1996
Lithuania	5.41	2003
Moldova	5.45	2006
Latvia	5.54	2003
Uganda	5.62	2001
Montenegro	5.64	2001
Jordan	5.65	2001
Algeria	5.67	2002
Slovakia	5.67	2003
Ukraine	5.67	2006
Romania	5.75	2005
Bangladesh	5.77	2002
Bosnia and Herzegovina	5.77	2001
India	5.79	2006
Estonia	5.85	2003
Hungary	5.94	2003
Portugal	5.97	2003
Serbia	6.01	2006
Morocco	6.05	2001
Russia	6.09	2005
South Korea	6.35	2005
Poland	6.37	2005
Iran	6.38	2000
Peru	6.44	2001
Croatia	6.46	1999
Japan	6.48	2003
Kyrgyzstan	6.48	2003
Czech Republic	6.49	2003
Vietnam	6.52	2001

94. Ruut Veenhoven, World Database of Happiness, Distributional Findings in Nations, at http://www1.eur.nl/fsw/happiness/hap_nat/nat_fp.htm (last updated Jan. 1, 2008) (on file with the *Columbia Law Review*). The survey question was: All things

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

Happiness studies are controversial and raise numerous questions. Some critics argue that self-reported happiness is not the same as real happiness; people's survey responses might reflect cultural norms rather than subjective well-being. There is also a great deal of controversy about the moral status of happiness or life satisfaction.⁹⁵ Still, the happiness measure has advantages. For the mental state theorist, happiness measures surely approximate welfare better than per capita GDP does. Even the desire-based theorist might endorse the happiness measure, especially if she fears that per capita GDP reflects distorted rather than restricted or ideal preferences. Although people with informed desires might prefer other things besides happiness, the happiness measure might be a sufficient approximation of desire-based welfare. For the objective-list theorist, the value of the happiness measure depends on whether people who enjoy objective goods tend to be happier than other people. If they do, a happiness measure might suffice; if not, it will not. The evidence suggests that happiness is correlated with many items on standard objective lists, including health, education, and life expectancy.⁹⁶

3. *Objective Social Goods.* — Martha Nussbaum lists the following objective goods: life; bodily health; bodily integrity; senses, imagination, and thought; emotions; practical reason; affiliation (including the goods of both friendship and self-respect); play; other species; and control over one's environment (including both political rights and property rights).⁹⁷ Others have provided similar lists.⁹⁸ For our purposes, the most significant challenge posed by such lists is that of converting them into standards against which a state's activities can be measured.⁹⁹ Argua-

considered, how satisfied are you with your life as a whole now? 1-dissatisfied and 10-satisfied. Id.

95. For a discussion, see Matthew D. Adler & Eric A. Posner, *Happiness Research and Cost-Benefit Analysis*, 37 *J. Legal Stud.* (forthcoming 2008) (manuscript at 2–10, on file with the *Columbia Law Review*) (summarizing different views and advocating “weak welfarism” approach in which “overall well-being is one of a possible plurality of fundamental moral considerations”).

96. See Bruno S. Frey & Alois Stutzer, *Happiness and Economics* 24–44 (2002) (discussing methods for measuring well-being).

97. Nussbaum, *Capabilities*, *supra* note 86, at 78–80.

98. For example, the WHO has developed a quality of life assessment instrument to be used in surveys evaluating the level of objective social goods in a country. World Health Organization *Quality of Life (WHOQOL)–BREF* (2004), available at http://www.who.int/substance_abuse/research_tools/en/english_whoqol.pdf (on file with the *Columbia Law Review*); see Matthew D. Adler, *Welfare Polls: A Synthesis*, 81 *N.Y.U. L. Rev.* 1875, 1961–63 (2006) (discussing WHO approach).

99. What follows is an extremely rough sketch. For much more sophisticated work in this vein, see Sabina Alkire, *Valuing Freedoms: Sen's Capability Approach and Poverty*

bly, the ICESCR is a welfarist treaty: It requires states to promote health, education, literacy, and other aspects of human well-being. But if so, it is poorly designed. It fails the challenge to provide a basis for evaluating allocations of resources that governments make to achieve these goals. Should a government spend its last million dollars on a health clinic or a school? How should the government balance the lifesaving effects of the clinic and the school's impact on practical reason, self-esteem, and economic growth?

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

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

TABLE 4: OBJECTIVE INDICATORS¹⁰⁰

Country	GDP per capita	Human Development Index (HDI)	Life Expectancy at Birth	Infant Mortality Rate	Adult Literacy Rate (% ages >14)	Net Primary Enrollment Ratio	Health Expenditure Per Capita (PPP US \$)
Liberia	366					66	
Democratic Republic of the Congo	446	0.391	43.5	129	67.2		14
Eritrea	564	0.454	54.3	52		48	50
Cambodia	616	0.583	56.5	97	73.6	98	188
Afghanistan	626				28.1		
Sierra Leone	630	0.335	41	165	35.1		34
Guinea-Bissau	639	0.349	44.8	126		45	45
Ethiopia	704	0.371	47.8	110		46	20
Somalia	731						
Burundi	787	0.384	44	114	59.3	57	15

Reduction (2002). There is now a large literature on social indicators with its own journal entitled *Social Indicators Research*. For a recent critical survey, see Amal Kanti Ray, *Measurement of Social Development: An International Comparison*, 86 *Soc. Indicators Res.* 1 (2008).

100. United Nations Dev. Programme, *Human Development Report 2006* (2006). All data are from 2004 except health expenditure per capita and GDP, which are from 2003. GDP data are taken from Heston et al., *supra* note 89. Cells are blank where data were not collected by the cited sources.

Country	GDP per capita	Human Development Index (HDI)	Life Expectancy at Birth	Infant Mortality Rate	Adult Literacy Rate (% ages >14)	Net Primary Enrollment Ratio	Health Expenditure Per Capita (PPP US \$)
Madagascar	833	0.509	55.6	76	70.7	89	24
Togo	845	0.495	54.5	78	53.2	79	62
Niger	883	0.311	44.6	152	28.7	39	30
Central African Republic	952	0.353	39.1	115	48.6		47
Malawi	973	0.4	39.8	110	64.1	95	46
Tanzania	991	0.43	45.9	78	69.4	86	29
Gambia	1000	0.479	56.1	89		75	96
Bhutan	1001	0.538	63.4	67	47		59
Chad	1037	0.368	43.7	117	25.7	57	51
Zambia	1065	0.407	37.7	102	68	80	51
Uganda	1183	0.502	48.4	80	66.8		75
Yemen	1185	0.492	61.1	82		75	89
Mali	1238	0.338	48.1	121	19	46	39
Burkina Faso	1240	0.342	47.9	97	21.8	40	68
Sudan	1254	0.516	56.5	63	60.9	43	54
Rwanda	1278	0.45	44.2	118	64.9	73	32
Kenya	1295	0.491	47.5	79	73.6	76	65
Nigeria	1295	0.448	43.4	101		60	51
Iraq	1314				74.1	88	
Benin	1374	0.428	54.3	90	34.7	83	36
Sao Tome and Principe	1471	0.607	63.2	75	83.1	98	93
Laos	1512	0.553	55.1	65	68.7	84	25
Kiribati	1525					97	
North Korea	1527						
Nepal	1537	0.527	62.1	59	48.6	78	64
Comoros	1629	0.556	63.7	52		55	25
Mongolia	1643	0.691	64.5	41	97.8	84	140
Republic of the Congo	1680	0.52	52.3	81			23
Mauritania	1686	0.486	53.1	78	51.2	74	59
Mozambique	1700	0.39	41.6	104		71	45
Croatia	10,613	0.846	75.2	6	98.1	87	838
Argentina	11,438	0.863	74.6	16	97.2	99	1067
Slovakia	11,549	0.856	74.3	6	100		777
Latvia	11,739	0.845	71.8	10	99.7		678
Lithuania	12,085	0.857	72.5	8	99.6	89	754
Russia	12,218	0.797	65.2	17	99.4	91	551
Seychelles	12,641	0.842	72.7	12	91.8	96	599
Chile	13,263	0.859	78.1	8	95.7		707
Malaysia	13,318	0.805	73.4	10	88.7	93	374
Belarus	13,606	0.794	68.2	9	99.6	90	570
Netherlands	28,256	0.947	78.5	5		99	2987
Ireland	29,398	0.956	77.9	5		96	2496
Austria	29,722	0.944	79.2	5			2306
Canada	29,776	0.95	80.2	5		99	2989
Denmark	29,935	0.943	77.3	4		100	2762
Australia	30,591	0.957	80.5	5		96	2874
Switzerland	31,298	0.947	80.7	5		94	3776
United Arab Emirates	33,363	0.839	78.3	7		71	623
Norway	34,528	0.965	79.6	4		99	3809
United States	37,313	0.948	77.5	7		92	5711

Life expectancy, infant mortality, literacy, enrollment, and health expenditure per capita are all reasonable measures of life, health, practical reason, and other objective goods. But none can serve on its own as a

measure of objective well-being and thus an aggregative index would need to be developed. The Human Development Index (column 3) is a weighted average of per capita GDP, life expectancy, and enrollment in primary, secondary, and tertiary schools.¹⁰¹ Some poor states, such as Cambodia and Madagascar, have higher scores for objective indicators than wealthier states, such as Benin and Mauritania—and so Cambodia and Madagascar could be in compliance with an objective list welfarist treaty that Benin and Mauritania would violate.

Other combinations and weightings can be imagined, leading to the fear that any such index would be arbitrary.¹⁰² However, there is a great deal of consistency across categories of objective indicators, which creates hope that a reasonable index can be identified. It would then be necessary to establish a treaty obligation in terms of a state's location on the index or its progress toward a higher level. As I have discussed this point in connection with the per capita GDP and happiness measures, further discussion here is unnecessary.

4. *Democracy.* — One might choose not to focus on indicators of a population's well-being and instead focus on indicators of government quality. Some states might be poor because of bad governments while others are poor because of natural disadvantages, including a history of civil conflict or bad government, which the current government cannot overcome. Pressure should be put only on the governments of the first type of state. Thus, the human welfare treaty should oblige the world to pressure bad governments of low-welfare states (or perhaps bad governments of any state), while tolerating or aiding states that have relatively good governments, even if they have low welfare levels.

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

The theory of such a treaty has two premises. First, democracy reliably leads to welfare improvements for the population. The argument for such a view is that democratic governments need the support of most of the population, whereas authoritarian governments rely on only the support of an elite group or tribe or other small segment of the population. Therefore, democracies distribute welfare broadly, whereas authoritarian

101. By including per capita GDP, the HDI combines the subjective (desire-based) and objective approaches to well-being.

102. See T.N. Srinivasan, *Human Development: A New Paradigm or Reinvention of the Wheel?*, 84 *Am. Econ. Rev. (Papers & Proc.)* 238, 239–40 (1994) (criticizing conceptual foundations of HDI). For Sen's response, see Sen, *Elements*, supra note 8, at 79–81.

states distribute welfare narrowly.¹⁰³ However, the empirical evidence for this argument is slim.¹⁰⁴

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

Nonetheless, it is worth looking at the data. Political scientists have classified states according to their degree of democratization, with a score of 0 signifying an authoritarian state and a score of 10 signifying the highest level of democracy. The United States and other western countries receive a score of 10; North Korea receives a 0. Among the forty poorest countries, many—including North Korea—lack democracy: Eritrea, Gambia, Bhutan, and Sudan also receive 0; many others receive 1 or another low score. Yet there are some democracies, including Mongolia (10), Kenya (8), Madagascar (7), and Malawi (6).¹⁰⁵

An approach that stresses democracy, then, would require western states to provide aid to Mongolia and the other democracies, while denying aid to, and imposing pressure on, Eritrea and the other authoritarian states. Presumably wealthy democracies would receive no aid, but they would also receive no pressure even if they violate human rights. Other authoritarian states would receive pressure regardless of whether they are rich or poor, and regardless of whether they respect or violate human rights.¹⁰⁶

5. *Government Corruption.* — Democratic states often have bad governments and authoritarian states can have good governments. A treaty regime might thus focus not on the type of government but the quality of governance. Relevant indicators of quality might include the ratio of tax revenues to the value of government services, the speed and integrity of

103. See Casey B. Mulligan, Ricard Gil & Xavier Sala-i-Martin, Do Democracies Have Different Public Policies than Nondemocracies?, 18 J. Econ. Persp. 51, 52 (2004) (citing arguments that democracies make public policy decisions that are more favorable to the poor).

104. See *id.* at 58–59 (discussing empirical evidence that effect of democracy on public spending is statistically insignificant).

105. See Monty G. Marshall & Keith Jagers, Polity IV Project: Political Regime Characteristics and Transitions, 1800–2007, at <http://www.systemicpeace.org/polity/polity4.htm> (last updated Sept. 11, 2008) (on file with the *Columbia Law Review*).

106. There has long been discussion of the possibility that democracies should band together and promote the values of liberal democracy, leading by example rather than using carrots and sticks against nondemocracies. See, e.g., Anne-Marie Slaughter, The Liberal Agenda for Peace: International Relations Theory and the Future of the United Nations, 4 *Transnat'l L. & Contemp. Probs.* 377, 416–17 (1994).

the legal system, and the level of government corruption. I will focus on this last indicator here.

The Corruption Perception Index (CPI) measures “the degree of public sector corruption as perceived by business people and country analysts.”¹⁰⁷ The score ranges from 0 (highly corrupt) to 10 (clean). A welfarist treaty would require states to pressure highly corrupt states, regardless of whether they are democracies (such as Mongolia (10 on democracy, 3 on CPI)) or authoritarian regimes (such as Eritrea (0 and 2.6)); whether they are relatively wealthy (such as Belarus (3.3)) or poor; whether their people are happy (such as Nigeria (1.6)) or unhappy. Table 5 provides more data. If the world turned its attention from the twenty poorest countries to the twenty most corrupt countries, then Madagascar and Mali (among others) would be removed from the list, and Bangladesh, Azerbaijan, and Paraguay (among others) would be added to it. The theory is that corruption prevents welfare gains; so if countries were forced or encouraged to reduce corruption, welfare would increase.

TABLE 5: CORRUPTION PERCEPTION INDEX¹⁰⁸

Rank	State	CPI
1	New Zealand	9.4
	Denmark	9.4
	Finland	9.4
4	Singapore	9.3
	Sweden	9.3
6	Iceland	9.2
7	Netherlands	9.0
	Switzerland	9.0
9	Norway	8.7
	Canada	8.7
11	Australia	8.6
12	Luxembourg	8.4
	United Kingdom	8.4
14	Hong Kong	8.3
15	Austria	8.1
16	Germany	7.8
17	Japan	7.5
	Ireland	7.5
19	France	7.3
20	United States	7.2
150	Sierra Leone	2.1
	Kazakhstan	2.1

107. Transparency Int'l, 2007 Transparency International Corruption Perceptions Index (2007), available at <http://www.transparency.org/content/download/24104/3602> 17 (on file with the *Columbia Law Review*).

108. *Id.*

Rank	State	CPI
	Belarus	2.1
	Zimbabwe	2.1
	Côte d'Ivoire	2.1
	Tajikistan	2.1
	Liberia	2.1
	Republic of the Congo	2.1
	Ecuador	2.1
	Azerbaijan	2.1
	Kenya	2.1
	Kyrgyzstan	2.1
162	Bangladesh	2.0
	Papua New Guinea	2.0
	Turkmenistan	2.0
	Central African Republic	2.0
	Cambodia	2.0
	Venezuela	2.0
168	Laos	1.9
	Equatorial Guinea	1.9
	Guinea	1.9
	Democratic Republic of the Congo	1.9
172	Afghanistan	1.8
	Sudan	1.8
	Chad	1.8
175	Uzbekistan	1.7
	Tonga	1.7
177	Haiti	1.6
178	Iraq	1.5
179	Somalia	1.4
	Myanmar	1.4

Although many scholars believe that corruption interferes with development and hence well-being, this view is controversial.¹⁰⁹ Indeed, it seems perverse to pressure corrupt countries that do well on the various welfare indicators. At least for some countries, corruption might not interfere excessively with the delivery of public services to the population. A compromise approach would be to target only countries that are both corrupt and low in welfare.

6. *Aggregative Indices.* — If no single one of the measures described above seems satisfactory, they could be combined into an aggregate index. Doing so would be extremely difficult, however, as we would need to decide how much weight to give each measure (as well as other possible measures that I have not discussed). There is no a priori reason, for example, to give equal weighting to, say, corruption and happiness. And a

109. See International Handbook on the Economics of Corruption, at xvi (Susan Rose-Ackerman ed., 2007) (“It is a mistake . . . to assert that the main cure for corruption is economic growth. That claim reflects an overly simple view of the roots both of economic growth and of corruption.”).

person who believes that the happiness measure is the philosophically correct approach would reject weighting any of the objective measures, unless they happen to correlate with happiness. The Human Development Index, which gives weight to per capita GDP, life expectancy, and schooling, seems similarly arbitrary.¹¹⁰

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

Which are the lowest-welfare states in this sense? To compile a list, I examined the twenty poorest states, and among them chose those that appear in the bottom twenty (or more if there are ties) of the following indicators: democracy, corruption, life expectancy, and adult literacy. Six nations were in the bottom twenty on three or more lists: Bhutan, Central African Republic, Chad, Democratic Republic of the Congo, Niger, and Sierra Leone.¹¹¹

We would need to consider further issues such as whether these governments are susceptible to pressure, and how many people in these countries are likely to benefit from such pressure. Nonetheless, we might agree—in the sense of developing an overlapping consensus—that these states are plausible candidates for foreign pressure on welfarist grounds. They have low-welfare populations (on most measures) and they have bad governments (on most measures). A welfarist treaty, then, might require states to pressure these states, or a larger group of low-welfare states.

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

If the welfare measures instead strike one as absurd or perplexing, then the prospects of a welfare treaty may be dim. However, by the same token, the ICESCR and other treaties that advance positive rights would need to be discarded. Treaties that require behavior that cannot be measured against a standard of conduct are empty vessels. And if I am correct that the negative right is just a species of the positive right, because complying with negative rights requires states to allocate resources to specific programs rather than simply refraining from doing some act,¹¹²

110. For an alternative approach, see Ray, *supra* note 99, at 44–45 (proposing “social development index” that includes additional factors and uses alternative weightings).

111. However, Bhutan is a famously happy place. See, e.g., Andrew C. Revkin, A New Measure of Well-Being from a Happy Little Kingdom, *N.Y. Times*, Oct. 4, 2005, at F1 (discussing Bhutan’s decision to focus on “gross national happiness” rather than GDP).

112. See *supra* text accompanying note 88.

then the absence of such measures should discredit the negative rights treaties as well. For the ICCPR to function, for example, it must be possible for states to be able to complain that other states have not devoted enough resources to stamping out unlawful detentions. But to be able to make that complaint, states must be able to prove that those resources do not have a better use.

D. *A Pragmatic Defense of the Welfarist Approach*

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

The argument rests on a political science chestnut that people in wealthier societies have the means to demand that their government respect negative rights.¹¹³ Whether the government approves or not, wealth brings education, literacy, familiarity with practices in foreign lands, better ability to organize, the development of civil society, and so forth—and these factors contribute to a rights-respecting culture. The evidence is consistent with this claim. Table 6 lists ratings states have received for political rights and civil liberties (Freedom House) and political terror (Amnesty International and U.S. State Department). The political and civil rights scores range from one to seven, with lower numbers representing greater freedoms. The political terror scores range from one to five, with lower numbers referring to less political terror. These extremely crude ratings are the best approximation that we have of a state's compliance with human rights norms in the area of civil and political rights.

The lesson of this table is that, with isolated albeit important exceptions, wealthier states have stronger political and civil rights and lower

113. See Claire Apodaca, *Global Economic Patterns and Personal Integrity Rights After the Cold War*, 45 *Int'l Stud. Q.* 587, 600 (2001) (finding economic growth has positive impact on states' human rights records); Steven C. Poe & C. Neal Tate, *Repression of Human Rights to Personal Integrity in the 1980s: A Global Analysis*, 88 *Am. Pol. Sci. Rev.* 853, 866–67 (1994) (finding economic standing and democracy to be associated with statistically significant effect on respect for human rights); Steven C. Poe, C. Neal Tate & Linda Camp Keith, *Repression of the Human Right to Personal Integrity Revisited: A Global Cross-National Study Covering the Years 1976–1993*, 43 *Int'l Stud. Q.* 291, 305 (1999) [hereinafter Poe et al., *Personal Integrity*] (same). Others have made the point that policies that increase the wealth of other nations will likely improve human rights in those nations as well. See, e.g., Fernando R. Tesón, *Trade and Global Justice* 14–15 (Fla. State Univ. Coll. of Law Pub. Law & Legal Theory Working Paper No. 143, 2005), available at <http://ssrn.com/abstract=663651> (on file with the *Columbia Law Review*) (arguing free trade policies improve human rights).

levels of political terror. Indeed, all of the welfare measures are highly correlated, and so wealth, happiness, objective measures of well-being,

TABLE 6: POLITICAL FREEDOMS¹¹⁴

Country Name	GDP (PPP) (2003)	Freedom House Political Rights	Freedom House Civil Liberties	Political Terror Amnesty Int'l Score	Political Terror US State Dep't Score
Liberia	366	3	4	3	3
Democratic Republic of the Congo	446	5	6	5	4
Eritrea	564	7	6	3	3
Cambodia	616	6	5	3	3
Afghanistan	626	5	5	5	5
Sierra Leone	630	4	3	2	3
Guinea-Bissau	639	4	4	2	3
Ethiopia	704	5	5	4	4
Somalia	731	7	7	4	4
Burundi	787	4	5	4	5
Madagascar	833	4	3		2
Togo	845	6	5	5	4
Niger	883	3	3	2	2
Central African Republic	952	5	4	3	4
Malawi	973	3	4	3	3
Tanzania	991	4	3	3	3
Gambia	1000	5	4	3	3
Bhutan	1001	6	5		1
Chad	1037	6	6	2	4
Zambia	1065	3	4	3	3
Croatia	10,613	2	2	2	2
Argentina	11,438	2	2	2	2
Slovakia	11,549	1	1	1	1
Latvia	11,739	1	1	2	2
Lithuania	12,085	1	1	1	1
Russia	12,218	6	5	4	4
Seychelles	12,641	3	3		1
Chile	13,263	1	1	1	1
Malaysia	13,318	4	4	3	2
Belarus	13,606	7	6	3	2
Netherlands	28,256	1	1	1	1
Ireland	29,398	1	1	1	1
Austria	29,722	1	1	2	1
Canada	29,776	1	1	1	1
Denmark	29,935	1	1		1
Australia	30,591	1	1	1	2
Switzerland	31,298	1	1	2	1
United Arab Emirates	33,363	6	5	2	2
Norway	34,528	1	1		1
United States	37,313	1	1	3	

114. Freedom House, Freedom in the World 2007 Subscores (2007), at <http://www.freedomhouse.org/template.cfm?page=372&year=2007> (on file with the *Columbia Law Review*); Mark Gibney et al., Political Terror Scale, at http://www.politicalterrorsscale.org/ptsdata_online.php (last updated May 12, 2008) (on file with the *Columbia Law Review*). GDP data are taken from Heston, Summers & Aten, *supra* note 89.

and democracy are also correlated with respect for human rights.¹¹⁵ By contrast, ratification of human rights treaties does not appear to lead to improvement in human rights.

The limited empirical research that has been conducted establishes correlation, not causation.¹¹⁶ Suppose that some omitted variable—“culture” or favorable geography or some such thing—causes some states both to become wealthy and to respect rights. If so, an international policy of pressuring states to improve welfare will have no effect on wealth, welfare, and human rights. The tentative case for focusing on economic growth and other welfare measures as a means for improving human rights, then, rests on a theory that (1) aid and pressure can cause other states to become wealthier, and (2) increasing wealth causes populations to demand that their governments respect human rights. The case has not yet been made, but it may well be sound.¹¹⁷

III. THE RELATIONSHIP WITH FOREIGN AID

Most poor states, and many middle-income states, receive significant foreign aid—much of it intended to improve the well-being of the poor, and much of it designed to serve strategic or political interests of the donors. At one time, donor nations did not expect that recipient nations would necessarily comply with human rights treaties, but in recent years there has emerged a norm of “rights-based development” that insists that aid must be sensitive to the human rights practices of the recipient state.¹¹⁸ When an aid recipient abuses human rights, advocates frequently argue that aid should be withheld. This response has been institutionalized: Many international agencies, such as the IMF, condition as-

115. Cf. Poe et al., *Personal Integrity*, supra note 113, at 310 (finding correlation of democracy and economic development, among other factors, with respect for human rights).

116. See *id.* at 310–11 (calling for more research to flesh out understanding of causation).

117. This conclusion is, in fact, old-fashioned conventional wisdom that was influentially criticized by Sen, *Development*, supra note 39, at 33–34, and others. This wisdom deserves a second look.

118. The idea appears to have originated with Sen, *Development*, supra note 39, at 36–37, and it has since been endorsed by many scholars and international institutions, see, e.g., United Nations, *The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among UN Agencies*, in *Report of the Second Interagency Workshop on Implementing a Human Rights Based Approach in the Context of UN Reform* (2003), available at http://www.hreoc.gov.au/social_justice/conference/engaging_communities/un_common_understanding_rba.pdf (on file with the *Columbia Law Review*) (stating human rights standards should govern all development programs); United Nations Dev. Programme, *Human Development Report 2000: Human Rights and Human Development* 119 (2000), available at http://hdr.undp.org/en/media/HDR_2000_EN.pdf (on file with the *Columbia Law Review*) (advocating a “rights ethos for aid”); Peter Uvin, *Human Rights and Development* 122–65 (2004) (proposing “rights-based approach to development”).

sistance on adequate human rights performance.¹¹⁹ Many countries take this position as well. The Millennium Challenge Corporation, a U.S. government entity, sends aid to countries that score above the median on a group of indicators for political rights, educational investment, economic freedom, and corruption.¹²⁰

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

This policy can be given two justifications. First, one might hope that the withdrawal of foreign aid will hurt government officials rather than the public. Unfortunately, it is very difficult to ensure that aid flows reach their intended recipients; they must usually go through government intermediaries who can skim off a portion of the proceeds. Thus, except in unusual circumstances, reducing aid will hurt populations and not (or not just) officials.¹²¹

Second, one might argue that states will improve their human rights practices only if their governments believe they will be rewarded for doing so. If aid is given to poor states regardless of their human rights practices, then states will have no incentive to stop abuse. As an unfortunate but necessary consequence, poor people in at least some states will have to suffer both human rights abuse and a loss of foreign aid. For example, a sanctions regime imposed on Iraq between the first and second Gulf Wars was designed to pressure Saddam Hussein to step down or cooperate with other countries but mainly had the effect of immiserating the Iraqi people.¹²² Even when foreign pressure works, people must suffer in the short term so that improvements will occur in the long term.¹²³

119. See *supra* note 5 and accompanying text.

120. See U.S. Gov't. Accountability Office, Millennium Challenge Corporation: Progress Made on Key Challenges in First Year of Operations, GAO-05-625T, at 7 (2005) [hereinafter GAO, Millennium Challenge]; see also African Growth and Opportunity Act, 19 U.S.C. §§ 3701–3747 (2000) (outlining U.S. foreign aid policy for sub-Saharan Africa).

121. Cf. Albert H. Choi & Eric A. Posner, A Critique of the Odious Debt Doctrine, 70 *Law & Contemp. Probs.*, Autumn 2007, at 1, 33 (discussing implications of absolving governments of debt incurred by prior authoritarian regimes).

122. See Richard Garfield, Morbidity and Mortality Among Iraqi Children from 1990 Through 1998: Assessing the Impact of the Gulf War and Economic Sanctions 1–2 (1999), available at http://www.nd.edu/~krocinst/ocpapers/op_16_3.pdf (on file with the *Columbia Law Review*) (discussing trends in child mortality in Iraq after first Gulf War); Mohamed M. Ali & Iqbal H. Shah, Sanctions and Childhood Mortality in Iraq, 9218 *Lancet* 1851, 1851 (2000) (same).

123. Interestingly, the World Bank has been criticized for providing so much aid to middle income countries. Steven R. Weisman, Zoellick Defends Aid for Nations in 'Middle,' *N.Y. Times*, Oct. 11, 2007, at A16. The World Bank's response—that middle income countries use aid wisely and poor countries squander it—is reasonable but for obvious reasons not politically saleable. Similarly, the U.S. Millennium Challenge Corporation awards grants to countries that score above the median on a variety of

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

At least in some cases, the tradeoff will favor foreign aid. Yet such an approach is in tension with a human rights regime that makes no concessions to welfarist considerations except in extreme cases. The result is that the human rights community and the foreign aid community work at cross purposes. One arm of a government scolds a state for violating human rights law while another arm continues to dole out aid. One NGO places the state on its list of human-rights violators, while another sets up clinics and provides other benefits to the population that may reduce internal pressure on the government to reform. This tension between the human rights and foreign aid regimes threatens to derail progress toward the overlapping goal of both—to improve the well-being of people around the world.¹²⁴

By contrast, a welfarist treaty would involve no such tension. The treaty could be drafted to oblige developed states both to pressure states that fail to deliver adequate welfare to their populations and to provide aid to states that show progress. When potential aid recipients have responsive governments, donor states should condition aid on welfare improvement, and should threaten sanctions or other penalties if welfare does not improve, regardless of whether the government accepts aid. When potential aid recipients do not have responsive governments (and are unlikely to obtain responsive governments), then aid should be unconditional, as long as it reaches the intended beneficiaries among the population of the recipient state. Sanctions would be avoided.

As noted above, this approach works best if responsive and unresponsive governments can be distinguished. If they cannot be distinguished, then either the treaty would require all high-welfare states to put pressure on all low-welfare states, or else no treaty would be justified. The desirability of the treaty would depend on whether the welfare gains to the subset of states with responsive governments are greater than the welfare losses to the subset of states with unresponsive governments. If not, a welfarist treaty would simply reduce welfare, and would not be justified. It seems likely, however, that a rough distinction can be made. Failed states such as Somalia, isolationist states like North Korea, and giants like

objective indicators of political rights, educational investment, and economic freedom—with the unavoidable result that the very worst states are denied aid. See GAO, *Millennium Challenge*, supra note 120, at 7.

124. There is also a basic tension between the method of economic analysis and rights-based approaches. See Gauri, supra note 63, at 78–82 (describing differences between economic and rights-based approaches).

China are impervious to pressure. When no government exists, one cannot threaten to withhold aid from that government unless it changes its behavior. When the government has committed itself to isolation, it will be unlikely to respond to bribes and threats. And when the government controls a vast and powerful state, then efforts to pressure that government will backfire, as it can retaliate by reducing trade, threatening military action, and doing other things that harm pressuring states more than they are willing to tolerate for the sake of improving welfare elsewhere.

Currently, high-welfare states have no legal obligations to provide aid to low-welfare states. States nonetheless do provide such aid. Most wealthy states have foreign aid programs. Although much aid, perhaps the majority of aid, is used to promote strategic interests, at least some of it is used to help impoverished people in foreign countries, frequently the victims of natural disasters or civil war.¹²⁵ As noted above, aid from different states or organizations is not coordinated, and for this reason it is probably not distributed optimally. Recognizing this problem, states from time to time enter nonlegal agreements to coordinate the aid with a view of reaching a particular goal.¹²⁶

Under the current system, then, states have no obligation to give foreign aid (though they do), but they do have an obligation to pressure states that violate human rights. As I argued above, the aid regime and the human rights regime work at cross purposes: Much aid goes to human rights violators precisely because their populations are so miserable. And states put under diplomatic or public pressure to condemn the human rights violations of strategic allies can, in effect, compensate the allies for the diplomatic costs they incur by increasing foreign aid. In addition, some evidence suggests that aid can weaken government institutions and even exacerbate civil war¹²⁷—with predictably unfortunate effects on human rights. A better system would coordinate aid and pressure—the carrot and the stick.

Whether a welfare treaty that contains obligations to give aid is possible is not a question I can answer here. Certainly, the obstacles would be significant; it may be impossible to write a treaty that directs aid flows in a manner that all donor states found acceptable. In addition, foreign aid has so far been largely unsuccessful at promoting economic growth.¹²⁸ It

125. For a largely critical discussion of foreign aid programs, see generally Easterly, *supra* note 13.

126. See, e.g., United Nations Millennium Declaration, G.A. Res. 55/2, ¶ 30, U.N. Doc. A/RES/55/2 (Sept. 18, 2000) (resolving to strengthen cooperation and coordination between member states in area of foreign aid).

127. See Simeon Djankov, Jose G. Montalvo & Marta Reynal-Querol, *The Curse of Aid* 5, 18 (Mar. 2006) (unpublished manuscript, on file with the *Columbia Law Review*), available at <http://ssrn.com/abstract=893558> [hereinafter Djankov et al., *Curse*] (finding economic aid can weaken democratic institutions in developing countries).

128. For pessimistic empirical assessments of the relationship between aid and economic growth, see Robert J. Barro & Jong-Wha Lee, *IMF Programs: Who Is Chosen and What Are the Effects?*, 52 *J. Monetary Econ.* 1245, 1267 (2005) (finding high IMF loan

would be a mistake to freeze by treaty the amount or nature of foreign aid before academics understand how aid is optimally allocated (if at all). Still, the literature does not show that foreign aid has no short term positive welfare effects.¹²⁹ This means that minimal treaty provisions requiring high-welfare states to offer aid in coordinated fashion to states that improve their welfare levels might be appropriate.

CONCLUSION

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

A more important objection is that a welfarist treaty implicitly declares victory on behalf of welfarism in the long-running debate with critics who point out that welfarism, or certain versions of welfarism, has not been able to deal with certain persistent complaints: that welfarism does not take seriously the difference between persons; that welfarism assumes that values are commensurable when they are not; that welfarism fails to recognize that some values are more important than others; and many more. I have argued that some of these objections will influence how a welfarist treaty will be designed. But the more important point is that a treaty is just a means to an end, and a treaty that is sufficiently general about how states may advance welfare, while being sufficiently precise about how to measure overall welfare, need not take a strong position among these competing positions. Of course, it is possible that no

participation reduces economic growth); Simeon Djankov, Jose G. Montalvo & Marta Reynal-Querol, *Does Foreign Aid Help?*, 26 *Cato J.* 1, 24 (2006) (finding foreign aid negatively impacts growth of democratic governments); William Easterly, Ross Levine & David Roodman, *Comment, Aid, Policies, and Growth*, 94 *Am. Econ. Rev.* 774, 779–80 (2004) (arguing evidence does not suggest foreign aid is ultimately beneficial to developing countries). Recent book-length treatments include Paul Collier, *The Bottom Billion: Why the Poorest Countries Are Failing and What Can Be Done About It* 99–123 (2007) (noting some benefits of aid but arguing that “[a]id alone is really unlikely . . . to address the problems of the bottom billion and it has become so highly politicized that its design is often pretty dysfunctional”); Easterly, *supra* note 13, at 44–51 (analyzing impact of foreign aid on developing countries); Roger Riddell, *Does Foreign Aid Really Work?* 163–353 (2007) (providing comprehensive account of efficacy of foreign aid). These accounts vary in their assessment of aid, but all of them are skeptical of claims that aid significantly increases long-term economic growth rates.

129. There is some anecdotal evidence of virtually all aid being taken by corrupt officials, but this seems to be an exception. A more serious problem is that aid can exacerbate civil conflicts. Djankov et al., *Curse*, *supra* note 127, at 5.

welfarist treaty would satisfy all reasonable conceptions of the good, but if that is the case, it is hard to believe that any human rights treaty could. People who use the language of human rights find that they cannot agree on such diverse topics as the death penalty, the role of religion in public life, female genital cutting, the treatment of women and criminal defendants under Sharia, regulation of hate speech and subversive political parties, and human rights limitations on military action—leading to religious-wars style impasses that excite violent emotions and interfere with essential forms of international cooperation. If states can agree to respect the laws and practices of other states as long as those laws and practices are broadly consistent with maintaining and promoting the welfare of the local population, when measured against historic norms, then much would be accomplished. Not only would welfare improve; human rights probably would as well, as people obtain the means to demand that their rights be respected.

Another objection is that arguments based on rights have stronger motivating force than arguments based on well-being. It is easier for a person to complain that the government has violated her right to a trial than to argue that by failing to grant her a trial, the government failed to take seriously her well-being. However, the force of this objection depends on rights actually either having intrinsic deontological value or promoting well-being in a rule-utilitarian sense. Otherwise, rights talk just plays off misunderstandings. And it is not clear that the objection is correct on its own terms.¹³⁰ People in the West spontaneously offer aid in response to natural disasters such as the recent tsunami in South Asia; they seem less motivated by reports of ordinary human rights violations such as the imprisonment of political dissenters than by reports of famine, natural disaster, and civil war.

These objections aside, the welfarist treaty has two advantages over human rights treaties. It would advance an undeniable value—promoting the well-being of people in poor countries—rather than a controversial and philosophically suspect commitment to a bevy of rights. And after the hard work of adjudicating among the competing metrics has been done, it would use a common, simple, and transparent metric for evaluating states, rather than a set of incommensurable and ambiguous standards. As a result, it would create a system of priorities and ease coordination among states, and, at the same time, it would give each state a great deal of flexibility, allowing it to experiment with different approaches for advancing welfare, and to take advantage of whatever is unique about its resources and institutions. Diplomatic pressure would be directed against low-welfare states like Zimbabwe, Sudan, and Chad, and not against high-welfare states, such as the United States and China, which are in any event much more resistant to pressure. And foreign aid could be better coordinated so as to help those who need it most.

130. For doubts, see David Kennedy, *The Dark Sides of Virtue* 3–35 (2002) (analyzing negative impacts of humanitarian efforts).

