# The Welfarist Approach to International Law: An Appraisal

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## 1. Introduction

Legal theory and empirical legal studies are largely complementary, in both national and international law. Traditionally, legal academics have extensively relied upon doctrinal work dominated by legal scholarly writings, and still do. However, recently the use of empirical research has dramatically expanded in law reviews, at conferences and among leading law faculties,[1] especially in the field of domestic law while empirical research in international law is still at a lower stage.[2] While pragmatic approaches to law, whether national or international, provide unique insights on the impact of law in society, one of the problems associated with the task of interpretation of law in general, and international law in particular, by means of methodologies that are borrowed from cognate areas of law – such as sociology, economy, statistics and psychology – is that quantitative analysis is often given prominent relevance at the expense of legal theory.[3]

It is conventionally accepted that the peace of Westphalia of 1648 represents the beginning of international law as a means for maintaining international peace among sovereign states. At that time, states were regarded as the original and exclusive international actors, and international law was informed by the principle of state sovereignty. However, over the centuries international law has evolved into a system comprising several actors – states as well as non-state actors – and it serves a variety of purposes, from facilitating international cooperation to creating common standards for the protection of the environment to regulating international trade. Likewise, the list of the sources of international law has expanded and it is not limited to formal agreements between states. Such changes are reflected in the theoretical underpinnings of international law, which cannot be restricted to a unitary conception or single definition of international law.

This chapter examines one of the most recent conceptions of international law, namely, the welfarist approach to international law. Although at a seminal stage, this conception is grounded on the economic analysis of law and assumes that states are the primary actors of international law and bear the responsibility to enter global-maximizing agreements with other states on behalf of their population. Consequently, this conception assumes that the ultimate purpose of international law consists in maximizing global welfare rather than, for example, human rights or peace and security. This chapter

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[1] T. E. George, 'An Empirical Study of Empirical Legal Scholarship: The Top Law Schools' Vanderbilt University Law School – Law and Economics Working Paper No. 05-20, 2.

[2] T. Ginsburg & G. Shaffer, *How Does International Law Work? What Empirical Research Shows*, *in* OXFORD HANDBOOK OF EMPIRICAL LEGAL STUDIES 753 (P. Cane and H. Kritzer eds., 2010).

[3] K. Sloan, *Empiricism Divides the Academy*, THE NATIONAL LAW JOURNAL (28 February 2011).

questions the normative foundations of the welfarist conception of international law. It aims to establish whether the welfare-maximizing approach to international law represents an effective and realistic proposal for reforms of international law. Section 2 analyses the normative background of the welfarist conception of international law. It examines the concept of global welfare as well as the idea of human welfare treaties as the preferred means for implementing the welfarist conception of international law. Section 3 analyses the ontology of international law that the welfarist approach presupposes, and it evaluates it against contemporary conceptions of international law. Finally, section 4 examines the teleology of international law emerging from the welfarist ontology and questions the theoretical basis of maintaining that the relevance of international law is strictly functional to achieve state interests.

## 2. Theoretical foundation of global welfarism

This section examines the theoretical underpinnings of the welfarist approach to international law. Sub-section 1 explores the idea of global welfarism and its process of operationalization through human welfare treaties. It shows that the latter are conceived as an alternative to human rights treaties and represent a form of foreign aid. Sub-section 2 conceptualises the normative implications of conceiving the welfarist approach as a proposal for institutional reform of international law.

### 2.1 Conceptualising global welfarism

The welfarist approach to international law is a proposal for institutional reform of international law that is rooted in political morality.[4] It aims to provide a useful tool for interpreting international law in an objective and realistic manner.[5] To that end, it rests on a series of empirical assumptions on the nature and functioning of international law.

Posner maintains that, to be institutionally plausible, proposals for international legal reform must assume the existence of heterogeneous preferences among the world population, agency costs, and the collective action problem.[6] He also contends that the purpose of international reform is to enhance global welfare.[7] Within this perspective, he recognizes global welfare as 'the theory that all individuals… are counted in the social welfare function'[8] and represents a matter of concern of all governments.[9] This leads to the conclusion that as long as 'international law is based on the consent of states, it can reflect only their areas of agreement […]. Thus, welfarist premises represent an attractive starting point for understanding international law.'[10]

[4] E. A. Posner, *International Law: A Welfarist Approach*, 73 UNIV. CHICAGO L. REV. 487, 488 (2006).
[5] *Id*.
[6] *Id*.
[7] *Id*.
[8] *Id*., at 500.
[9] *Id*.
[10] *Id*.

The observations above show that the welfarist approach focuses on institutional constraint on international law reforms.[11] Drawing from this assumption, Posner writes that international law promotes welfare by fostering cooperation among states and, at the same time, putting pressure on low-welfare states.[12]

One way to implement the welfarist approach to international law is to enter welfare treaties as an alternative to human rights-based treaty proposals[13] and shall prevail over human rights obligations when the latter prevent governments from achieving welfarist goals.[14]

The welfarist alternative to human rights calls to high-welfare states to commit to provide aid to low-welfare performing states.[15] Technically, such low-performing 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.'[16] Thus, sufficiently detailed treaty obligations enable high-welfare states to put pressure on low-welfare states for their enforcement.[17]

It follows from the observations above that the idea of the human welfare treaty relates closely to the practice of foreign aid.[18] Posner argues that although high-welfare states have no legal obligations to provide aid to low-welfare states, they nonetheless provide such aid.[19] Resort to human welfare treaties would thus oblige low-welfare states to prove that their policies have improved the overall welfare of their population.[20] Posner argues that this would advance the human rights of the population of the donee, since increased welfare conditions provide the means to demand that fundamental human rights be respected.[21]

## 2.2 Implications

### 2.2.1 *Human welfare treaties as aid treaties*

Although high-welfare states are not obligated to provide aid to low-welfare states, they do provide such aid.[22] Thus, a human welfare treaty may contain obligations to give aid, if the contracting states so wish. As noted above, human welfare treaties are not tied to

[11] *Id*., at 502.
[12] E. A. Posner & A. O. Sykes, *Efficient Breach of International Law: Optimal Remedies, "Legalized Noncompliance," and Related Issues*, 110 MICH. L. REV. 243, 246-247 (2011).
[13] Posner, *supra* note 4, at 502.
[14] E. A. Posner, *Human Welfare, Not Human Rights*, 108 COLUM. L. REV. 1758, 1799 (2008) (hereinafter referred to as human welfare treaties).
[15] *Id*., at 1775.
[16] *Id*.
[17] *Id*., at 1779. Posner also points out that 'Treaties that require behavior that cannot be measured against a standard of conduct are empty vessels.' *Id*., at 1793.
[18] *Id*., at 1796.
[19] *Id*.
[20] *Id*., at 1800.
[21] *Id*., at 1801.
[22] *Id*., at 1799.

human rights-constraints.[23] Nor do they aim to direct flows of aid in a manner that all donor states would find acceptable.[24] Accordingly, Posner writes that a treaty is just a means to an end.[25] This suggests that under treaty provisions, low-welfare governments would have an obligation to prove that their policies enhance public welfare, whatever the means adopted to achieve that goal.[26]

Human welfare treaties presuppose a system of stick and carrot.[27] They are grounded on the assumption that enforcement of treaty obligations can be evaluated by adopting a measurable and transparent index, such as variations of gross domestic product (GDP),[28] against which assess the effectiveness of the policies adopted by the donee. It follows from the above that if low-welfare states do not comply with treaty provisions, aid is withdrawn.[29]

The rationale behind the idea of human welfare treaties as aid treaties implies that high-welfare states always act in a correct manner and according to law.[30] However, this assumption is plausible only as part of a thought experiment.[31] Since the very nature of international law is contestable,[32] the process of interpretation of international norms cannot guarantee legal certainty, unless a positional perspective of analysis is specified. However, given the uncertainties surrounding the ontology and teleology of the international legal system,[33] the choice of any positional perspective of analysis ultimately turns out to be an arbitrary choice. It follows that the assumption that high-welfare states act according to law is a generalisation that can hardly be supported by underlying normative provisions. Conversely, it holds true only to the extent that the tenets of the human welfare treaties are recognised as the selected perspective of analysis.

### 2.2.2 *Human welfare treaties and the right to development*

Human welfare treaties aim to improve the overall living conditions of the population of low-welfare states.[34] Grounded on an economic and rational perspective,[35] the welfare-maximizing approach to international law recognises 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

[23] See *supra* note 13. For a critique of potentially harmful effects of human welfare treaties on minority populations, see S. Korman, *The Welfarist Approach to Human Rights Treaties: A Critique*, 58 UCLA L. REV DISCOURSE 95 (2010).
[24] Posner, *supra* note 14, at 1760..
[25] *Id*., at 1800.
[26] *Id*.
[27] *Id*., at 1799.
[28] *Id*., at 1757.
[29] *Id*., at 1796-9.
[30] *Id*., at 1775.
[31] Posner discusses various welfare measures as a thought experiment. However, it does not question the assumption that high-welfare states act correctly and in accordance with law. *Id*., at 1793.
[32] T. Cheng, *Making International Law without Knowing What It Is*, 10 WASHINGTON UNIV. GLOBAL STUD. L. REV. 1 (2011).
[33] See *infra* sections 3 and 4.
[34] See *supra* section 2.1.
[35] Posner and Sykes, *supra* note12, at 246.

> 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.[36]

One of the consequences of this approach is that human welfare treaties do not take into consideration the heterogeneity of national societies. Furthermore, they submit that the flow of money should be provided to foster economic development, not human development. From this perspective, human development flows from improved economic conditions of the overall population.[37] Hence, proponents of the welfarist conception of international law maintain that human rights-based projects should not be funded.[38]

However, some argue that human welfare treaties can harm heterogeneous societies by improving the overall welfare conditions of the majority of the society, for example by neglecting persecution and discrimination against minority and other disenfranchised populations.[39] To minimize the risk of such negative effects, Korman suggests that targeted human welfare treaties should focus on improving the welfare of the poorest and most marginalised groups of society.[40] This compromise would require the granting of rights to such disadvantaged groups as well.[41]

Korman also argues that human welfare treaties, including the proposal above, fail to recognise that human rights and economic development are not necessarily conflicting goals. The right to development, for example, provides a normative background against which foster economic, social and cultural development of all segments of society while promoting and protecting fundamental human rights.[42]

Solemnly proclaimed as a human right in itself by the UN Declaration on the Right to Development of 1986, the right to development comprises all other human rights.[43] It follows that in order to fulfil the right to development, all other human rights must be fulfilled or, at least, not denied. For this reason, the right to development is regarded as a procedural right or a meta-right.[44]

The UN Independent Expert on the Right to Development suggests that one way to implement the right to a process of development is to enter development compacts, which require specific negotiations on a case-by-case basis.[45] Negotiations must ensure the

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[36] Posner, *supra* note 14, at 1771.
[37] *Id*., at 1775-6.
[38] *Id*.
[39] Korman, *supra* note 23.
[40] *Id*., at 108-9.
[41] *Id*.
[42] See *infra.*
[43] UN General Assembly, *Declaration on the Right to Development*, UN Doc. A/RES/41/128, 4 December 1986, Art. 1.1. On the history of the right to development, see I. D. BUNN, THE RIGHT TO DEVELOPMENT AND INTERNATIONAL ECONOMIC LAW: LEGAL AND MORAL DIMENSIONS (2012); R. N. Kiwanuka, *Developing Rights: The UN Declaration on the Right to Development*, 35 NETHERLAND INT'L L. REV. 257 (1988).
[44] A. Sengupta, *The Human Right to Development*, 32 OXFORD DEV'T STUD. 179, 183, 191 (2004).
[45] UN Independent Expert on the Right to Development, first report, UN Doc. E/CN.4/1999/WG.18/2, 27 July 1999, para. 34. See also A. Sengupta, *On the Theory and Practice of the Right to Development* 24 HUM. RTS. Q. 837, 880-3 (2002).

prioritization of certain basic commitments,[46] popular participation[47] and accountability of the actors involved.[48]

Development compacts share a few characteristics with human welfare treaties. First, they aim to foster the well-being of the target population.[49] Second, they contain specific obligations and do not rest upon generic principles.[50] Third, they provide aid to developing countries.[51] However, the two proposals differ significantly in terms of structural arrangements. Firstly, development compacts are entered by all those international actors, state and non-state actors, that are in a position to provide support.[52] They also demand direct involvement and active participation of the target population.[53] In contrast, human welfare treaties are conceived as instruments of cooperation between states.[54] Secondly, development compacts foster a model of economic and social development that is based on a human rights-constraint. They also establish both rights and duties of all international actors involved, including the individual.[55] Conversely, human welfare treaties are not committed to any human rights-based approach to development and recognise only the duty of low-welfare governments to improve the living standards of their population to the extent established by treaty provisions.[56]

### 2.2.3 *Human welfare treaties and poverty*

The welfarist approach to international law presupposes the idea that 'compliance with international law is justified only if compliance promotes national or global welfare.'[57] Although the idea of global welfare is a contested concept,[58] Posner writes that human welfare treaties aim to improve the well-being of all people.[59] This section conceptualises the relationship between global welfare and poverty in light of the concept of well-being. It

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[46] Priority should be accorded to the protection of the worst-off, the poorest and the most vulnerable. See UN Independent Expert on the Right to Development, UN Doc. E/CN.4/1999/WG.18/2 (1999), *supra* note 45, paras. 32 and 69-76.

[47] A passage from the Global Consultation report (1990) reads: 'participation is the right through which all other rights in the Declaration on the Right to Development are exercised and protected.' UN Secretary-General, *Global Consultation on the Right to Development as a Human Right*, UN Doc. E/CN.4/1990/9/Rev.1, 26 September 1990, para. 177. For a comment on the Global Consultation see R. L. Barsh, *The Right to Development as a Human Right: Results of the Global Consultation*, 13 HUM. RTS. Q. 322, 329 (1991).

[48] For example, the UN Independent Expert writes that '[the responsibility of states] is complementary to the individuals' responsibility… and is just *for the creation of the conditions for realizing*, not for actually realizing the right to development. Only the individuals themselves can do this.' UN Independent Expert on the Right to Development, UN Doc. E/CN.4/1999/WG.18/2 (1999), *supra* note 45, para. 41 (emphasis added).

[49] As discussed in section 2.1.

[50] See *supra* note 45.

[51] See *supra* section 2.2.1.

[52] See *supra* note 45.

[53] See *supra* note 46.

[54] See *infra* section 3.2.

[55] See *infra* notes 78 and 79.

[56] See *supra* note 26.

[57] Posner and Sykes, *supra* note 12, at 246.

[58] Posner, *supra* note 14, at 1779.

[59] Posner, *supra* note 4, at 500.

examines the concept of poverty in order to establish whether its root causes lie in economic underdevelopment and, consequently, can be redressed through the adoption of human welfare treaties.

The welfarist approach to international law is grounded on the assumption that global welfare is 'the well-being of everyone living in the world.'[60] This implies that 'the welfare of all individuals counts equally.'[61] Furthermore, the welfarist approach to international law does not take into consideration human rights concerns,[62] so long as it has been conceived from a functionalist and economic perspective.[63] As noted above, human rights treaties are regarded as obstacles to economic and social development of low-welfare countries.[64] This suggests that poverty, or lack of well-being, should be seen as equal to economic underdevelopment. Viewed from this angle, human welfare treaties turn out to be anti-poverty measures.

However, the idea of poverty is a contested concept. In contrast to the empirical assumption implied by human welfare treaties, the UN Independent Expert on Extreme Poverty and Human Rights, for example, writes that 'poverty removal [is] a human right objective itself.'[65] Likewise, the UN General Assembly recognises that poverty is a violation of human dignity[66] that prevents the enjoyment of basic human rights.[67] It also recognises that concrete proposals for the eradication of poverty[68] should be based on political commitment as well as on unconditional respect for all human rights.[69]

Four reports of the UN Independent Expert on Human Rights and Extreme Poverty[70] also examined the definition of extreme poverty and its legal implications. They established that extreme poverty should be viewed as a phenomenon comprising 'a combination of income poverty, human development poverty and social exclusion, in a

[60] *Id*., at 490.
[61] *Id*., at 500.
[62] As discussed in section 2.1.
[63] Posner and Sykes, *supra* note 12, at 246.
[64] See *supra* note 36.
[65] Report of the UN Independent Expert on Human Rights and Extreme Poverty, UN Doc. E/CN.4/2006/43, 2 March 2006, para. 26. Marks also writes that the phenomenon of global poverty is a human rights issue. Susan Marks, *Human Rights and the Bottom Billion*, 1 EUR. HUM. RTS L. REV. 37 (2009).
[66] UN General Assembly, *Human Rights and Extreme Poverty*, UN Doc. A/RES/65/214, 25 March 2011, Preamble, para. 2, and para. 1.
[67] *Id*., Preamble, para. 14, and para. 4; UN General Assembly, *Human Rights and Extreme Poverty*, UN Doc. A/RES/49/179, 23 December 1994, Preamble, para. 7.
[68] UN General Assembly, *Human Rights and Extreme Poverty*, UN Doc. A/RES/55/106, 4 December 2000, para. 3.
[69] UN General Assembly, *Human Rights and Extreme Poverty*, UN Doc. A/RES/63/175, 18 December 2008, Preamble, para. 14 (arguing that respect for universal, indivisible, interdependent and interrelated human rights is of crucial importance for all policies and programmes designed to fight extreme poverty).
[70] Report of the UN Independent Expert on Human Rights and Extreme Poverty, UN Doc. E/CN.4/2005/49, 11 February 2005; Report of the UN Independent Expert on Human Rights and Extreme Poverty, UN Doc. E/CN.4/2006/43 (2006), *supra* note 65; Report of the UN Independent Expert on Extreme Poverty and Human Rights, UN Doc. A/HRC/5/3, 31 May 2007; Report of the UN Independent Expert on Extreme Poverty and Human Rights, UN Doc. A/HRC/7/15, 28 February 2008.

serious and prolonged form.'[71] From this perspective, poverty represents a multi-dimensional phenomenon.

The second element of the definition of poverty above, namely, human development, is also referred to as capability deprivation. The term 'capability', in turn, is used in the sense of having the 'freedoms that all individuals identify with their well-being.'[72] In addition, the UN Independent Expert on Human Rights and Extreme Poverty argues that lack of human rights represents the root cause of extreme poverty.[73] From this standpoint, extreme poverty turns out to be a violation or a denial of human rights.[74] Consequently, the UN Independent Expert on Human Rights and Extreme Poverty points out that if 'a violation of human rights is sufficient to cause extreme poverty, extreme poverty also entails a violation of human rights.'[75]

The observations above suggest that different conceptions of the normative idea of poverty and well-being presuppose different understandings of the nature of the international legal system. In particular, one of the consequences of adopting the welfarist approach to international law is that the issue of economic and social development is regarded as a duty of sovereign states and implies that international law plays a minor role in addressing that issue.[76] From this perspective, international law turns out to be limited to inter-state cooperation, especially in the form of human welfare treaties. Hence, it acknowledges the right of the donee to receive aid from the donor, provided that the former demonstrates that human welfare treaty obligations have been met.[77]

Conversely, the human right to a process of development relies entirely upon international law and international institutions, and establishes both rights and duties of all actors involved. In particular, with regard to the role of the state, the UN Independent Expert on Extreme Poverty and Human Rights writes that 'The State plays its role as a part to human rights-based social arrangements, on equal term with civil society and grass-root level organizations.'[78] With regard to the role of civil society, the Independent Expert on Extreme Poverty and Human Rights underscores that 'If the objectives […] are recognized by society through a due process of norm creation, then all members of society would be obliged to carry out their specific duties.'[79]

The considerations above show that the welfarist approach recognises the superiority of the idea of sovereignty, especially in the form of national interest, over positive international law. Hence, it acknowledges that the ultimate purpose of international law is to serve the needs of individual member states, irrespective of other concerns. In contrast, the human rights-based approach to well-being and development fosters supra-nationalism,

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[71] UN Independent Expert on Human Rights and Extreme Poverty, UN Doc. E/CN.4/2005/49 (2005), *supra* note 70, ¶. 22.
[72] *Id*., ¶ 11.
[73] *Id*., ¶ 28 (arguing that 'if human rights were the constituent elements of well-being when there is no poverty, the corresponding obligations would cover all policies that are necessary to eradicate poverty').
[74] *Id*., ¶ 29.
[75] *Id*.
[76] On the limits of the usefulness of international law, see Posner, *supra* note 4, at 509.
[77] Posner, *supra* note 14, at 1800.
[78] UN Independent Expert on Human Rights and Extreme Poverty, UN Doc. E/CN.4/2006/43 (2006), *supra* note 65, ¶ 34.
[79] *Id*., ¶ 28.

which includes international institutions and practices. This suggests that, in principle, both the economic and the human rights approach to welfare may be jointly implemented by states. However, as a proposal for institutional reform that is grounded on an inter-state system of relations based on state consent, the welfarist approach to international law possesses a peculiar, underlying conception of international law that raises ontological and teleological claims on the nature and functioning of international law as a system.

## 3. Ontological Claims

This section evaluates the ontology of international law underlying the idea of human welfare treaties against conceptions of modern international law. By pursuing a theoretical inquiry into the structural nature of international law, it aims to assess the ontology of international law presupposed by the welfarist conception of international law against the backdrop of existent conceptions of international law.

### 3.1 Conceptions of modern international law

It is widely recognised that international law is a contested concept.[80] There is no universally accepted definition of it. However, one way to analyse conceptions of international law is to adopt the perspective of international legal personality.

Portmann writes that there are three mainstream conceptions of modern international law,[81] namely, the formal conception, the individualistic conception and the actor conception. The formal conception draws on the teachings of Kelsen. It has two basic propositions. The first proposition maintains that the personal scope of international law is an open concept. Since international actors are regarded as the addressees of the norms of international law, international legal personality proves to be the consequence of the making of international norms. The second proposition establishes that there are no further consequences attached to being an international person. The formal conception pursues a general, rule-oriented approach to international law.[82]

The individualistic conception draws on the teachings of Lauterpacht. It has two main propositions. The first proposition establishes that states are regarded as entities consisting of individuals. In principle, this entails that there is no difference between the interest of the state and the interest of the individual:

> No doubt it is true to say that international law is made for States, and not States for international law, but it is true only in the sense that the State is made for human beings, and not human beings for the State.[83]

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[80] Koskenniemi, for example, writes that 'International law is what international lawyers make of it.' MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF THE INTERNATIONAL LEGAL ARGUMENT 615 (2005).

[81] Portmann's analysis is the most comprehensive contribution to the issue of international personality from a normative point of view. R. PORTMANN, LEGAL PERSONALITY IN INTERNATIONAL LAW 42-125 (2010).

[82] *Id*., at 173-207.

[83] H. LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 430-31 (1933).

From this standpoint, international law creates basic rights and duties of the individual. The second proposition maintains that the sources of international law include general principles of law, which are detached from state will. This entails a qualified presumption that individuals are subjects of international law as well as the ultimate addressees of all law, including international law. The individualistic conception pursues a teleological and normative approach to international law.[84]

Finally, the actor conception draws on the thought of McDougal, Lasswell and Reisman. It has two basic propositions. The first proposition establishes that international law is not a set of rules, but a process of authoritative decision making. The second proposition maintains that participation in the decision making process is open to all those actors – state and non-state actors, including the individual – that possess authoritative decision making power. The actor conception of international law pursues a policy-oriented approach to international law.[85]

Although none of the existent conceptions of international law is in principle superior to another, Portmann writes that the formal conception is currently regarded as the dominant conception,[86] the actor conception represents the minoritarian conception while the individualistic conception is functional to the field of human rights law.[87]

Considered as 'a merely descriptive device belonging to the realm of legal doctrine and as such being without concrete legal implications',[88] the formal conception of international law establishes that international legal personality does not confer the competence to create international law on international actors. It recognises that the capacity of international law-creation stems from customary international law, since the latter contains rules declaring that states are competent to create law by concluding international treaties.[89] This creates a hierarchy of norms authorising particular entities to create and apply international law.

One of the consequences of the formal conception is that international law is regarded as a hierarchical, state-centred system.[90] As long as international norms are not organised around a formal hierarchy of norms,[91] international practice shows that international law does not consist in as a homogeneous entity. On one hand, states create norms of customary international law and enter general treaties. On the other hand, they enter into additional agreements aimed at narrowing the focus of state intervention to specific tasks. As a result, the norms of international law have progressively gained precision, leading to the phenomenon of fragmentation of international law.[92]

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[84] PORTMANN, *supra* note 81, at 126-72.
[85] *Id.*, at 208-242.
[86] *Id.*, at 248.
[87] *Id.*
[88] *Id.*, at 174.
[89] *Id.*, at 176-7.
[90] A. CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 288 (1988).
[91] INT'L L. COMM'N, REPORT OF THE STUDY GROUP ON FRAGMENTATION (FINALIZED BY M. KOSKENNIEMI), FRAGMENTATION OF INTERNATIONAL LAW: DIFFICULTIES ARISING FROM THE DIVERSIFICATION AND EXPANSION OF INTERNATIONAL LAW, UN Doc, A/CN.4/L.682, 13 April 2006, ¶ 493.
[92] There is no universally accepted definition of fragmentation of international law. However, it is generally regarded as the phenomenon of functional specialization of general international law into various fields governed by own rules and principles, such as international human rights law, international economic law,

The other conceptions of international law produce different consequences. The individualistic conception recalls the Kantian conception of international law, which establishes that 'the primary normative unit is the individual, not the State.'[93] The same assumption also applies to international organisations, since they are entities created by states with a functional scope.[94] From this perspective, the boundaries of international law are not conceived as horizontal relationships between sovereign states. Peters, for example, argues that international law is entirely based on an individualised view of sovereignty[95] where the principles of equality and human dignity constitute the pillars of the international legal system.[96]

One of the consequences of the actor conception is that the concept of law, including international law, is not limited to rules and it is not separated from policy factors. Interpretations of law must take into account both the context and the rules.[97]

### 3.2 The welfarist ontology

This sub-section evaluates the ontology of international law stemming from the welfarist conception of international law in light of conceptions of modern international law. Its purpose is to evaluate some of the consequences of adopting the welfarist conception of international law as the positional perspective of analysis of the dynamics of modern international law.

Since the welfarist approach to international law aims at reforming the international legal system,[98] it presupposes an underlying conception of such a system. However, in the absence of a well-defined and broadly accepted normative framework,[99] Posner argues that the 'underlying *normative* assumption [of the welfarist conception of international law] is that it is socially desirable to increase the efficiency of cooperation among states.'[100] In addition, Posner argues that 'international law can exist only as long as states support it. Standard doctrine therefore acknowledges that all, or nearly all, states must consent to a rule before it can be deemed to be a part of international law.'[101]

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the law of the sea, and investments. For a historical account of the phenomenon of fragmentation, see A. C. Martineau, *The Rhetoric of Fragmentation: Fear and Faith in International Law*, 22 LEIDEN J. INT'L L. 1, 27 (2009).

[93] F. R. Tesón, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53, 54 (1992).

[94] *Contra* see M. Prost and P. K. Clark, *Unity, Diversity and the Fragmentation of International Law: How Much Does the Multiplication of International Organizations Really Matter?* 5 CHINESE J. INT'L L. 341, 368 (2006) (arguing that international organizations are weak subjects of international law).

[95] A. Peters, *Humanity as the A and Ω of Sovereignty*, 20 EJIL 513, 515 ff (2009). *Contra* E. Kidd White, C. E. Sweetser, E. Dunlop and A. Kapur, *Humanity as the A and Ω of Sovereignty: Four Replies to Anne Peters*, 20 EJIL 545 (2009). See also A. Peters, *Humanity as the A and Ω of Sovereignty: A Rejoinder to Emily Kidd White, Catherine E. Sweetser, Emma Dunlop and Amrita Kapur* 20 EJIL 569 (2009).

[96] Peters, *supra* note 95, at 515.

[97] *See* I R. HIGGINS, THEMES AND THEORIES. SELECTED ESSAYS, SPEECHES AND WRITINGS IN INTERNATIONAL LAW 18 (2009); M. S. McDougal, *The Impact of International Law Upon National Law: A Policy-Oriented Perspective*, 4 SOUTH DAKOTA L. REV. 25, 36 (1959).

[98] Posner *supra* note 4.

[99] *Id*., at 487.

[100] Posner and Sykes, *supra* note 12, at 246 (emphasis added).

[101] Posner, *supra* note 4, at 491.

The observations above suggest that the welfarist conception of international law possesses two features. First, it posits an extra-legal foundation of the international legal system, so long as its normative assumption consists of a socially desirable outcome.[102] This, in turn, is based on both the idea of global welfare[103] and a realistic understanding of institutional constraints.[104] With regard to global welfare, Posner writes that the assumption that international law should maximize global welfare is an analytical convenience.[105] With regard to the realistic understanding of institutional constraints, it refers to the consistency of proposals for international legal reform 'with what we know about human psychology and the problems of institutional design.'[106]

Second, the welfarist conception of international law entails a state-centred conception of the international legal system. Posner, for instance, maintains that 'because international law is the product of interaction among governments, it must be understood to maximize, in a rough sense, the welfare of the political officials who create it.'[107] This ontology of international law, however, does not comport with the dominant conception of international law and it turns out to be grounded on traditional and currently discarded doctrine, such as the states-only conception and the recognition conception of international law.

Portmann writes that the states-only conception of international law draws on the teachings of early 20th century scholars, such as Triepel and Oppenheim, and it possesses two basic propositions.[108] The first basic proposition establishes that the international community consists of sovereign states. The second one establishes that international law is created only by states and applies alone to those states that have consented to it. As long as the welfarist conception of international law refers only to states as the subjects of international law and recognises that the ultimate sources of international law are only those based on state consent, it complies with the two basic propositions of the states-only conception.

The recognition conception of international law draws on teachings of 20th century scholars, including Strupp and Schwarzenberger.[109] It possesses three basic propositions. The first one recognises that the state is the highest authority in international relations. The second one acknowledges that international law can only emanate from state will and is binding only on those states that have consented to it. The third one establishes the

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[102] See *supra* note 100.
[103] See *supra* note 8.
[104] Posner, *supra* note 4, at 488.
[105] *Id*., at 491.
[106] *Id*., at 499.
[107] Posner and Sykes, *supra* note 12, at 251.
[108] PORTMANN, *supra* note 81, at 43. Its main manifestations in legal practice are the *Mavrommatis*-formula, the *Courts of Danzig* Advisory Opinion and the *Van Gend en Loos* case. See *The Mavrommatis Palestine Concessions* (Greece v. UK), judgment of 30 August 1924 (jurisdiction), 1924 PCIJ Series A No. 2; *Jurisdiction of the Courts of Danzig*, Advisory Opinion of 3 March 1928, 1928 PCIJ Series B No. 15; Case 26/62 *Van Gend en Loos*, [1963] ECR 1.
[109] PORTMANN, *id.*, at 80. Its main manifestations in legal practice are the *Reparations for Injuries* Advisory Opinion, the international status of the International Committee of the Red Cross, the international status of the Holy See and the Order of Malta, and the *Texaco/Calasiatic v. Libya* award. See *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, [1949] ICJ Reports 174; *Texaco Overseas Petroleum Company and California Asiatic Oil Company* v. *The Government of the Libyan Arab Republic*, Award on the Merits of 19 January 1977, Sole Arbitrator Dupuy, 53 ILR 422 (1979).

presumption that states are the original or necessary persons of international law. Other non-state persons may exist if social practice shows that states have recognised them. However, they possess limited personality. The welfarist approach to international law refers to the practice of recognition of new states.[110] It thus envisions a possible 'welfare-maximizing recognition law' allowing states to refuse cooperation with states that they do not recognise[111] and acknowledges that international law does not oblige states to recognise new states.[112] Posner also argues that both the welfarist approach and the recognition of states reflect the idea of state sovereignty.[113] This suggests that as it is formulated, the welfarist conception of international law complies with the three basic propositions of the recognition conception.

The analysis above demonstrates that the welfarist approach to international law is based on ontological claims that are at odds with current conceptions of modern international law. It also shows that as long as it complies with the basic propositions of currently discarded conceptions of international law, the welfarist approach suffers from theoretical inconsistency between the means – namely, the state-centred conception of international law and human welfare treaties – and the purpose of its project of institutional reform. In order to feature a practical approach to reform, welfarist conceptions of international law should take into consideration the historical evolution of the role of states in international law that has led to the current, plural composition of the international legal system.

## 4. Teleological Claims

This section examines the teleology of international law stemming from the ontology of international law backed by the welfarist approach to international law. Sub-section 1 analyses the function and purpose of international law as envisioned by the welfarist conception. It shows that international law possesses a limited scope that is functional to state interests. Sub-section 2 analyses the teleology of the welfarist conception of international law and assesses whether it is coherent with its ontology of international law.

### 4.1 Minimal international law

The welfarist conception of international law recognises the state as the primary international actor[114] whose primacy is derived from the moral function of the state system.[115] According to Posner, 'states themselves are not moral agents: state interests are just constructs based on the interests and values of people living within states.'[116]

[110] E. A. Posner, *supra* note 4, at 513-14, 516.
[111] *Id*., at 514.
[112] *Id*.., at 516.
[113] *Id*.., at 516-517.
[114] *Id*., at 536 (arguing that states are the only international decision makers).
[115] 'The nation-state appears to be the entity that most effectively trades off scale economies and preference heterogeneity.' *id*.., at 537.
[116] *Id*., at 501.

According to this understanding, states are entities made for the people while international law is conceived as a system created only for states.

To argue that international law is for states implies that international law is conceived as a normative but not as an autonomous system. Posner and Sykes, for instance, write that 'international law per se has no moral force. It is simply the product of negotiation among bureaucrats and politicians (treaties), or it is a description of empirical regularities in the behaviour of nations (customary international law).'[117] In the absence of any conceptual autonomy, the welfarist justification of international law establishes how states should act, thus determining the reason for compliance with international law.[118] This, in turn, fosters a minimalist conception of international law based on three assumptions.[119]

The first assumption is that the teleology of international law consists of state interests. Posner argues that 'because there is no world government, international law can exist as an effective constraint only when states can overcome the collective action problem.'[120] Consequently, international law possesses a teleology that is limited to the usefulness of international law to state interests.[121] By implication, 'the strength of international law [turns out to be] an empirical question.'[122]

The second assumption is that international law is a discretional tool in the hands of single states. Conceived as a form of inter-state action,[123] it consists of *ad hoc* bilateral or multilateral agreements through which states set out the conditions for establishing global welfare.[124] Previous sections showed that the most effective way to implement the welfarist approach to international law is to enter human welfare treaties. However, Posner argues that:

> [A]lthough states are subject to treaty obligations, the populations of those states retain the formal and real power to direct their governments to violate the treaties, and so in this respect treaty obligations are consistent with the existence of sovereignty. Sovereignty is based on the beliefs and attitudes of populations, and cannot be lost or given away unless the relevant population acquiesces.[125]

This suggests that not only international law is a system based on state consent, but is binding to the extent that it supports the interest of each state.[126] Accordingly, the welfarist approach to international law recognises the efficient breach of international law as a legitimate practice.[127] For instance, Posner argues that 'world policies, reflected in international law, [exist] only when they make all states better-off.'[128]

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[117] Posner and Sykes, *supra* note 12, at 246.
[118] *Id*., at 247.
[119] For further analysis on Posner's realist conception of international law, see also J. L. GOLDSMITH AND E. A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005).
[120] Posner, *supra* note 4, at 491.
[121] *Id*., at 509.
[122] *Id*., at 507.
[123] *Id*., at 522.
[124] 'Global welfarism implies that states should cooperate with each other in order to produce supranational (regional or global) public goods such as climate control and trade.' *Id*., at 522.
[125] *Id*., 503.
[126] *Id*., 509.
[127] See Posner and Sykes, *supra* note 12.
[128] Posner, *supra* note 4, at 505.

The third assumption is that the welfare-maximizing teleology of international law possesses several, potentially conflicting, manifestations. This assumption stems from the underlying ontology of international law, as discussed in section 3. The latter shows that as a state-centred system, international law is governed by state will and its ultimate sources are represented by treaties among sovereign states. Consequently, international law has a minimal relevance that is functional to state interest. State interests, in turn, might conflict with each other. As Posner and Sykes point out, 'One cannot rule out the possibility… that some governments may pursue objectives that are at odds with any principled conception of welfare.'[129] This suggests that, viewed from this angle, international law does not possess any conceptual autonomy as a legal system.

### 4.2 Implications

To argue that the function of international law is to maximize the well-being of the world population has two implications. The first one refers to the role of states as the primary international actors and how it affects the functioning of the international legal system. Posner argues that 'one needs a theory that explains what kind of institutional and legal reforms are compatible with the empirical conditions that underlie the modern state system.'[130] This entails a further consideration. As noted above, the conception of modern state presupposed by the welfarist approach suggests that states are entities made by individuals for individuals. This, however, represents the first basic proposition of the individualistic conception of international law, which is regarded as a conception that is mainly functional to the field of international human rights law.[131] Human welfare treaties, on the contrary, reject the idea of human rights.

The second implication refers to the normative consequences of conceiving the state as the primary international actor. The previous sub-section showed that from the welfarist perspective, international law is not an autonomous system as long as it is created by states to protect national interests. Although states are recognised as entities created by the people for the people, only states are regarded as international decision makers. Posner writes that 'If individuals made international law… then there would be no international law; there would be a world government, and all law would be domestic.'[132] Viewed from this angle, only states are regarded as the addressees of international law. Accordingly, they bear the responsibility to comply with international law[133] while the individual possesses limited liability for international crimes such as the one of piracy.[134]

The analysis above suggests that the welfarist conception of international law acknowledges the international legal responsibility of the individual, although this is

[129] Posner and Sykes, *supra* note 12, at 251. Likewise, Posner writes that '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 that the victims lose.' Posner, *supra* note 14, at 1800.
[130] Posner, *supra* note 4, at 543.
[131] See *supra* section 3.1.
[132] Posner, *supra* note 4, at 536.
[133] According to Posner, 'The lack of individual liability ensures that the decision to comply with or violate the treaty remains at the level of government.' *Id*., at 537-8.
[134] *Id*., at 538 (arguing that 'In the absence of effective recourse against the state, individual liability [is] a second-best solution').

subordinated to state will. This further suggests that, as a non-autonomous, functional system, international law does not possess any teleology of its own. Therefore, to argue that the ultimate purpose of international law is to maximize global welfare turns out to be an unstated assumption that ultimately contradicts its own ontology.

## 5. Conclusion

This chapter examined the theoretical foundation of the welfarist conception of international law. It showed that its normative assumption consists in maximizing global welfare through inter-state cooperation. It demonstrated that such a normative assumption is based on a state-centred understanding of the international legal system that is at odds with the dominant conception of modern international law. It concluded that the welfarist conception does not recognise international law as an autonomous system. Hence, it does not possess any ultimate purpose of its own.

The considerations above show that the welfarist approach to international law stems from empirical evidence rather than normative provisions. Although proponents of the welfarist conception of international law acknowledge that it is based on unstated assumptions, the economic perspective underlying welfarist proposals for institutional reform of the international legal system fails to recognise evidence of the normative force of international law as an autonomous legal system. For instance, it is undeniable that customary international law is binding on all states, irrespective of state will. Likewise, general principles of international law are not derived from the will of states. Consequently, lack of normative justification entails that welfare-maximizing proposals are likely to be unrealistic proposals.

By addressing the issue of efficiency of international law through enforcement mechanism such as human welfare treaties, the welfarist approach to international law relies upon ontological claims that are not coherent with the proclaimed teleology of international law as well. Equally they do not comply with any structured, normative conception of modern international law. If the welfarist approach is to be made operational, subsequent proposals for institutional reform of international law should take into consideration the empirical and economic basis as well as the normative justification of the structure and functioning of modern international law.

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