Based on the domestic model of law, many assume that the global rule of law requires a world government with a central law-making body, a hierarchical court system, and a supranational system of coercive enforcement. Since there are important problems with the practicality and desirability of a world government, I defend a decentralized conception of the global rule of law without a world government.

I begin by examining Immanuel Kant’s theory since he argued that a supreme sovereign is required for a lawful condition within states while recognizing certain limitations with applying this idea to the international level. I argue that Kant proposed a voluntary league of states without coercive public law in part because a supreme coercive authority at the global level would conflict with the sovereignty of nation-states and undermine the civil condition within states.

In Chapter Two, I argue that theories of dispersed or shared sovereignty can resolve this problem. However, since there are further problems with even a federal world government, I consider whether the rule of law can be developed without a world government. I argue that the most important feature for the global rule of law is the impartial determination, interpretation and application of international law by various authoritative adjudicative and administrative institutions.
There are two important challenges to my view. First, many argue that international law is not really “law” unless it is effectively enforced through a central system of sanctions; without this, it can at most create moral obligations but not true legal obligations. To the extent that such arguments assume a coercion-based conception of law, my response draws on H.L.A. Hart’s rejection of the command theory of law. The second challenge concerns democratic legitimacy. I argue that global administrative law can partly address concerns with legitimacy by using rule of law principles to limit the arbitrary exercise of power by transnational institutions and increase their accountability.
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**TABLE OF CONTENTS**

**CHAPTER ONE: WHAT IS REQUIRED FOR A LAWFUL COSMOPOLITAN CONDITION FOR KANT: A WORLD REPUBLIC OR A VOLUNTARY FEDERATION OF STATES?** .......................... 1

1. KANT’S THEORY OF RIGHT AND HIS ARGUMENT FOR A COERCIVE WORLD REPUBLIC  
   1.1. THE ARGUMENT FOR A WORLD REPUBLIC IN KANT’S EARLIER POLITICAL ESSAYS

2. WHY DOES KANT PROPOSE A VOLUNTARY FEDERATION OF STATES IN HIS LATER POLITICAL WRITINGS?  
   2.1. PRAGMATIC CONSIDERATIONS: PRACTICAL PROBLEMS WITH A WORLD STATE  
   2.2. THE CONCERN FOR NATIONAL DIVERSITY

3. KANT’S NON-PRAGMATIC REASONS: HIS CONCEPTION OF STATE SOVEREIGNTY  
   3.1. THE RIGHTS OF STATES: KANT’S CONCEPTION OF THE AUTONOMY AND MORAL PERSONALITY OF STATES  
   3.2. EVEN IF ESTABLISHING A LAWFUL COSMOPOLITAN CONDITION IS A JUST END, STATES ARE NOT JUSTIFIED IN FORCING OTHER STATES INTO JOINING A WORLD REPUBLIC  
   3.3 WHAT IF A WORLD REPUBLIC IS CREATED THROUGH A VOLUNTARY AGREEMENT?

4. ANOTHER POSSIBILITY: RETHINKING SOVEREIGNTY

**CHAPTER TWO: THE MODERN IDEA OF INDIVISIBLE, ABSOLUTE SOVEREIGNTY AND PLURALIST CONCEPTIONS OF DISPERSED SOVEREIGNTY** ................................. 66

1. THE MODERN IDEA OF SOVEREIGNTY

2. THE PLURALIST CONCEPTION OF DISPERSED OR SHARED SOVEREIGNTY  
   2.1 LEIBNIZ’S DEFENCE OF THE PLURALIST MODEL OF SOVEREIGNTY THAT EXISTED DURING THE MEDIEVAL PERIOD  
   2.2 CONTEMPORARY CONCEPTIONS OF DISPERSED SOVEREIGNTY: THOMAS POGGE

3. OBJECTIONS TO THE IDEA OF DISPERSED SOVEREIGNTY  
   3.1 THE OBJECTION THAT DENIES THAT SOVEREIGNTY CAN BE DIVIDED AT ALL AND POGGE’S RESPONSE  
   3.2. THE MORE NARROW OBJECTION AGAINST A VERTICAL DISPERSAL OF SOVEREIGNTY AND POGGE’S RESPONSE  
   3.3. FIRST CASE: CANADIAN FEDERALISM  
   3.4. SECOND CASE: INTERNATIONAL LAW  
   3.5. THE KANTIAN OBJECTION TO A PLURALIST CONCEPTION OF DISPERSED SOVEREIGNTY
4. NORMATIVE ASSESSMENT OF MODELS OF DISPERSED AUTHORITY
   4.1. LIMITATIONS ON STATE SOVEREIGNTY WITHOUT DISPERSED SOVEREIGNTY: RAWLS
5. CONCLUSION

CHAPTER THREE: A DECENTRALIZED OR HORIZONTAL MODEL OF INTERNATIONAL LAW WITHOUT A WORLD STATE ................................................................. 119

1. PRACTICAL AND NORMATIVE DIFFICULTIES WITH A MINIMAL FEDERAL WORLD GOVERNMENT
2. THE ARGUMENT FOR CENTRALIZED LEGISLATIVE, ADJUDICATIVE AND ENFORCEMENT FUNCTIONS
   2.1. THE ARGUMENT FOR CENTRALIZED LEGISLATIVE, ADJUDICATIVE AND ENFORCEMENT FUNCTIONS IN MODERN SOCIAL CONTRACT THEORIES
   2.2 CONTEMPORARY CONCEPTIONS OF LAW
3. THE DECENTRALIZED OR HORIZONTAL MODEL OF LAW-MAKING IN INTERNATIONAL LAW
4. THE PROBLEM OF INDETERMINACY AND THE JUDICIAL FUNCTION: DECENTRALIZED ADJUDICATION BY INTERNATIONAL BODIES & DOMESTIC COURTS
   4.1. THE INTERNATIONAL COURT OF JUSTICE
   4.2. TREATY-BASED ADJUDICATIVE OR ADMINISTRATIVE BODIES
   4.3. DOMESTIC COURTS
5. CONCLUSION

CHAPTER FOUR: A DECENTRALIZED MODEL OF INTERNATIONAL LAW: THE PROBLEM OF ENFORCEMENT ................................................................. 157

1. IS COERCIVE ENFORCEMENT A CONCEPTUALLY NECESSARY FEATURE OF LAW? IS LAW INHERENTLY COERCIVE?
   1.1. HART’S REJECTION OF THE COMMAND THEORY OF LAW
   1.2. HART’S THEORY OF SECONDARY RULES AND INTERNATIONAL LAW
   1.3. OBJECTION: DESPITE HART’S CRITICISM OF THE COMMAND THEORY OF LAW IS COERCIVE ENFORCEMENT NONETHELESS A NECESSARY FEATURE OF LAW?
      1.3.1. RESPONSE: THE COMMUNITY OF SAINTS THOUGHT EXPERIMENT
      1.3.2. HABERMAS AND THE MORALITY BUT NOT LAW OBJECTION
2. THE DISTINCTION BETWEEN INTERNATIONAL LEGAL OBLIGATIONS AND MORAL OBLIGATIONS
3. IS COERCIVE ENFORCEMENT NECESSARY FOR INSTRUMENTAL REASONS? IS IT NECESSARY FOR THE EFFECTIVENESS OF LAW IN PRACTICE?
3.1 PRAGMATIC REASONS FOR COERCIVE LEGAL ENFORCEMENT

3.2 RESPONSE: HOW EFFECTIVE MUST LAW BE?

3.2 RESPONSE: DIFFERENT FACTUAL BACKGROUNDS

4. NORMATIVE PROBLEMS WITH DECENTRALIZED ENFORCEMENT

5. CONCLUSION

CHAPTER FIVE: THE RULE OF LAW AND OBJECTIONS REGARDING THE LEGITIMACY OF INTERNATIONAL LAW ............................................................ 209

1. CAN THE AUTHORITY OF INTERNATIONAL LAW BE JUSTIFIED IN THE ABSENCE OF A DEMOCRATIC LEGISLATIVE BODY THAT REPRESENTS ALL STATES?
   1.1. DEMOCRATICALLY ELECTED, REPRESENTATIVE WORLD PARLIAMENT
   1.2. OTHER FORMS OF GLOBAL DEMOCRATIZATION AND POLITICAL LEGITIMACY

2. LEGAL LEGITIMACY: INCREASING ACCOUNTABILITY, PARTICIPATION AND TRANSPARENCY THROUGH GLOBAL ADMINISTRATIVE LAW
   2.1. THE IDEA OF THE RULE OF LAW
   2.2 THE GLOBAL RULE OF LAW
   2.3. GLOBAL ADMINISTRATIVE LAW

3. THE LEGAL IMPERIALISM OBJECTION: A REASON FOR A MORE FLEXIBLE MODEL OF INTERNATIONAL LAW WITH LESS COERCIVE SANCTIONS
   3.1. THE CHARGE OF IMPERIALISM
   3.2. THE LACK OF STRONG ENFORCEMENT MAY BE A GOOD THING FOR DEMOCRATIC REASONS

4. CONCLUSION

CONCLUSION ........................................................................................................... 250

LIST OF SOURCES ............................................................................................... 257
INTRODUCTION

According to modern social contract theories, a supreme, absolute, unitary sovereign with centralized legislative, judicial and enforcement functions is required for a lawful condition in which rights can be secured. The idea of a centralized and supreme sovereign authority with these three functions is still a common conception of what is required for a domestic legal system today. If we apply this conception to the global level, then a world government with a centralized legislative body, a hierarchical international court system with compulsory jurisdiction, and a centralized supranational system of coercive enforcement seems to be required for a lawful condition at the global level. In its absence, some argue that international law is not really law and that it is not able to give rise to legal rights and obligations.

If international law is not actually law, then what is it? According to the Realist view of international relations, without a world government there are no normative restrictions on the relations between states. Rather, states act solely based on their national interests. States may make agreements and comply with treaties when doing so is in their interests, but they will disregard treaty obligations and the rules of international law when this better serves their interests. Consequently, the Realist not only argues that states are not governed by law; the Realist also argues that states are not bound by moral obligations. The relation between states remains a lawless state of nature.

Another view, which I call the “Morality But Not Law” view, opposes the Realist position by conceiving of states as moral entities and by accepting the existence of moral rights and obligations between states. However, absent a world government, this view
holds that the rules, processes, instruments and institutions of what is called “international law” can only create self-binding moral obligations akin to obligations of promise keeping rather than distinctively legal obligations that are externally binding. Consequently, the relation between states is subject to moral rights and obligations, but not law. According to these two views, a world government with centralized legislative, enforcement and judicial functions is required for law and legal obligations, and without these, we either have a lawless state of nature based solely on power politics and state interest, or at best, the relation between states may be subject to moral constraints but not legal obligations.

Since there are important practical and normative problems with developing even a minimal federal world government with centralized legislative, enforcement and judicial functions, I argue for the more modest proposal of developing international law and the global rule of law in the absence of a world government with these centralized functions. I defend the idea that a law-governed condition is possible under a polycentric or horizontal model of law and governance with decentralized law-making,

1 I will use the term “international law” to refer to the complex body of rules, instruments, processes, and institutions that exist between states and other transnational actors since the common usage of this term. However, this term is misleading for two reasons. First, the issue here is whether what is called “international law” is indeed a legal system. In the second half of this dissertation, I provide arguments as to why I think what is referred to by the name “international law” should in fact be thought of as law. Second, the term “international law” suggests rules and principles that apply between states. The rules and principles that are called “international law” have moved beyond inter-state relations to include rules and institutions that apply to individuals and non-state agents as well. Hence, it seems more accurate to use the term “global law” or “cosmopolitan law” to the extent that there are rules and institutions that contribute to a lawful condition at the global level. The term “transnational law” is a more accurate term to refer to legal rules and processes that are more decentralized, particularly rules and institutions that apply to individuals or collective agents or institutions across state borders (for example, mercantile law).

enforcement, and adjudicative functions. I defend this decentralized model against objections based on the traditional, centralized model of law and governance. Can the rule of law exist without a central law-maker and without a centralized coercive body or system of sanctions to enforce international law? In the absence of a coercive world government, does international law matter, or is it but a “fairy ship upon a fairy sea: a beautiful construct of the legal imagination floating upon a sea of false assumptions”?

The most common and serious objection against international law appears to be the argument that without a coercive power that can effectively enforce international law, first, it is not really law, and secondly it is in meaningless and ineffective at achieving the goals that law ought to achieve. I challenge this view, and instead, I argue for two central features that institute a law-governed condition at the international or global level: first, that states, other subjects of international law, and officials of international law (for example, judges in international courts, regional courts, domestic courts, and officials in transnational governmental institutions) generally regard the rules and processes of international law as authoritative and binding on them; and second, that impartial, authoritative bodies such as international and domestic courts and international monitoring bodies are able to authoritatively determine what international law requires and to apply international law to particular cases and conflicts.

**Chapter 1: Kant**

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Immanuel Kant provides an important starting point for the question of global justice and the global rule of law for many reasons. While Thomas Hobbes and other 17\textsuperscript{th} and 18\textsuperscript{th} century philosophers viewed the relation between states as an ongoing state of nature and rejected the possibility of a world government or law between states, Kant promoted the creation of a law-governed condition between states. While classical international theory was exclusively concerned with the right of states, Kant recognized a cosmopolitan right for individuals – the right to hospitality. Consequently, many contemporary cosmopolitan theories appeal to Kant.

There are, however, various conflicting interpretations of Kant’s position. While some writers use Kant to support their arguments for a world government, others use Kant to support their arguments for the opposite view – that we should reject the idea of a world state. On the one hand, Kant argues that a coercive world republic is the only way to secure a lawful cosmopolitan condition, and on the other hand, he realizes that there are problems with this ideal and he consequently proposes a voluntary, non-coercive league of states.

In Chapter One, I analyze different interpretations of Kant’s theory. A common interpretation of Kant’s position is that Kant’s theory of right leads to the conclusion that a coercive world state is required for a rightful condition between states, and that Kant only proposes a voluntary federation of states as a “negative substitute” due to pragmatic reasons. For example, Kant worries that a world state would not be able to effectively govern over such a vast area and that it could either lead to a despotic tyranny, or to anarchy and war as coalitions of states fight for control. Some writers argue that Kant was wrong to place such pragmatic considerations over the dictates of reason, while other
writers argue that Kant was right to reject a world state for these reasons. Other writers argue that these practical concerns can be addressed in the contemporary world, particularly given technological developments and the experience of large federal states, such as the United States, and regional governing bodies, such as the European Union. This debate concerns the practical assessment of whether a world federal government can be created in such a way that it can govern effectively and legitimately, with safeguards against the danger of world despotism. Yet another interpretation argues that Kant presents the voluntary federation as a transitional stage in the gradual development towards the ideal of a world republic.

Against the view that Kant rejects a world state for pragmatic reasons alone, I argue that there are more important non-pragmatic problems with the idea of a world state for Kant. Kant’s conception of the sovereignty and moral personality of states, as well as his idea of the kind of supreme coercive authority that is required for a rightful condition within states, present a problem for the idea of a world state. If a rightful condition between states requires a supreme coercive authority along the same lines as the kind of authority that is required for public right within states, then this would conflict with Kant’s conception of the sovereignty of states and it would undermine the civil condition within states. Hence, there is an internal tension within Kant’s political and legal theory.

**CHAPTER TWO: DISPERSED SOVEREIGNTY**

In Chapter Two, I consider whether a pluralist model of dispersed sovereignty (sovereignty that is divided or shared between different political authorities) is able to
counter the problems raised by Kant’s conception of sovereignty, particularly the idea that there must be a supreme sovereign authority in order to have a lawful condition in which rights are conclusive. Since other important modern political philosophers similarly defend the idea that a unified, unitary, supreme authority is required for a lawful condition, including Jean Bodin, Thomas Hobbes, and Samuel Pufendorf, I examine their articulation of this distinctively modern idea as well. In addition to the pragmatic concerns for peace, order and political stability, the modern idea of sovereignty was developed by these writers to justify the coercive authority of the modern state.

While I primarily examine Thomas Pogge’s conception of dispersed sovereignty and his arguments for a greater dispersal of sovereignty, it is important to keep in mind that such a model is not entirely new, contrary to what many seem to assume. Rather, the political and legal organization of Medieval Europe is an example of dispersed, pluralistic, or overlapping sovereignty. Since Gottfried Leibniz defended a pluralist conception of sovereignty against Hobbes’ and Pufendorf’s arguments for absolute, unitary sovereignty, I consider Leibniz’s criticism of this conception of sovereignty before examining Pogge’s defence of dispersed sovereignty.

The common contemporary view of sovereignty is based on the modern idea of sovereignty: many continue to assume that sovereignty is something unitary, supreme, and exclusive. Sovereignty is regarded as something that cannot be divided or shared, and the idea of dispersed sovereignty is thought to be a contradiction. Many continue to believe that there has to be a single, clear, supreme source of sovereign authority. As Hobbes and Kant argue, if there is more than one political authority, or if one political authority can be challenged by another political authority or entity, what happens when
they disagree? How could this conflict be settled in a determinate way? Doesn’t there have to be a final, supreme authority to determine this? If there is not a final authority, then for Hobbes and Kant, rights are indeterminate and inconclusive, as in the state of nature.

In Chapter Two, I support Pogge’s response to such common objections against the dispersal of political and legal authority by examining the limits placed on traditional state sovereignty by contemporary international law, and by considering the example of Canadian federalism and the process by which conflicting claims over jurisdiction are resolved. In the case of Canada, the British North America Act sets out the division of powers between the federal and provincial governments. When conflicts arise, courts can determine which level of government has jurisdiction over a given area. While the Canadian example illustrates the importance of having clear agreements and rules regarding how political authority should be divided or shared, it also illustrates that boundary disputes between different political authorities cannot be exhaustively settled by constitutional documents, rules or other agreements alone. Courts play a crucial role by settling conflicts over jurisdiction in an impartial, authoritative way. The need for an impartial authority to settle boundary disputes is also important for a pluralist model of dispersed sovereignty in the international case. This is an instance of my broader argument in this dissertation that adjudicative and administrative bodies have an important and central role for law and the rule of law at the international and global levels.

I also consider Canadian cases that illustrate the importance of negotiation and renegotiation in the distribution of political authority. Leaving the distribution of
political authority open to political negotiation and renegotiation goes against Kant’s and Hobbes’ view that rights and law must be conclusively determined by a supreme authority. While this introduces some indeterminacy, I argue that this need not undermine the civil condition of a political society. However, allowing these matters to be settled by political negotiation also goes against Locke’s and Kant’s concerns about bias, power imbalance and the unilateral imposition of one state’s will on another. I argue that impartial, judicial and administrative bodies continue to have an important role in ensuring that negotiations are fair and carried out in good faith.

If one accepts a more pluralist conception of sovereignty, then a minimal federal world government can resist the objection that it would be inconsistent with the sovereignty of states and what is required for a lawful condition within states. A world government could have limited jurisdiction over issues that concern conflicts between states and global problems that require cooperation between states, and states, regional political institutions, and intrastate political authorities can have authority over other matters. Despite this solution, the problem of how to create this world federal government remains.

**Chapter Three: Defending A Decentralized or Horizontal Model of International Law**

I argue for the less ambitious project of developing the global rule of law without a central law-making and law-enforcing world government because there are practical and theoretical problems with a world government (even a minimal federal one). In the last three chapters, I consider whether a law-governed condition is possible under a
decentralized or horizontal model of law and governance with decentralized legislative, enforcement, and adjudicative functions.

I begin Chapter Three by outlining some of the practical and normative problems with the creation of a world government (even a minimal federal one) and its ability to function in democratically legitimate ways. It seems highly unlikely that such an arrangement could be created through the voluntary agreement of all states. Various theories have tried to justify the use of coercion against states that are considered “illegitimate” because they fail to meet certain features that justify the right to state sovereignty. For example, if one argues that a state’s sovereignty should be respected and protected because it secures a lawful or civil condition for its citizens, then if a state fails to secure a lawful condition for its citizens, the use of coercion against it to bring it under a global lawful condition may be justified. The problem is that this justification of coercion is not successful against democratically legitimate states that are able to secure a lawful condition for their citizens. If such states refuse to join a world government (the United States, for example), the use of coercion to force them to join cannot be justified by these theories. Even if one could provide a convincing argument justifying the use of coercion against all states in order to bring about global lawful condition through a world federal government, there are still other serious practical and normative problems with this. In addition, some have argued that given current circumstances, a world government would not be able to function in democratically legitimate ways. I consider Jürgen Habermas’ arguments as an example of this view.

According to the modern social contract theories of Hobbes, John Locke and Kant, a lawful or rightful condition requires a centralized, supreme law-making body, a
centralized adjudicative system, and a centralized enforcement system of coercive sanctions. Why are these three functions needed? First, a supreme law-making authority is required to provide determinacy regarding what people’s rights are. Second, since conflicts will inevitably arise, the judicial or adjudicative function is required to settle conflicts in a determinate way. Locke in particular emphasizes the importance of having an independent judiciary in order to settle conflicts in an impartial way. Third, the idea that law requires a coercive power to enforce legal rules through sanctions is most strongly defended by Hobbes. Consequently, I focus on Hobbes’ justification of the enforcement function, but I also consider how he differs from Locke and Kant on this issue. In my defence of a decentralized model of law in the second half of this dissertation, I address objections based on these arguments for a centralized model of law.

I examine the decentralized manner in which international legal rules and principles have been developed in practice, as well as the way they have been interpreted and adjudicated by various bodies including the International Court of Justice, national courts, and various treaty-based adjudicative and monitoring bodies. The fact that a large, complex system of international law has developed without a world government or global law-making body demonstrates that decentralized or horizontal forms of law-making is possible and can function to guide and constrain behaviour. The argument given by modern social contract theorists for a supreme law-making power is that it is required to make law and rights determinate. International customary law and treaty law has been able to do this: it sets out the rights and obligations of states and other agents. Since the ways in which international law is created and developed are more complex
than in the domestic case where there is a clear law-making body, I argue that adjudicative and administrative bodies with the recognized authority to determine, interpret and apply international law will have a crucial role in addressing the problem of indeterminacy and the Lockean concern for impartial adjudication.

There are, however, a number of weaknesses with the decentralized model of international law and there are important objections against it connected to the arguments provided by Hobbes, Locke and Kant. I will address some of these problems in the last two chapters.

**CHAPTER FOUR: THE ENFORCEMENT-BASED OBJECTION**

The lack of centralized enforcement by a coercive, supranational body appears to be the most common and serious challenge presented against a decentralized model of international law and the global rule of law. In Chapter Four, I respond to different objections that are based on this idea. First there is the conceptual argument that assumes that a system coercive sanctions is a conceptually necessary feature of law or a necessary feature for a rule or obligation to be a *legal* rule or *legal* obligation. Since international law lacks a central system of effective coercive sanctions, then according to this view, it is not *really* law. This conceptual objection is important because many seem to share the intuition that enforcement is a distinctive and necessary feature of law. For example, many assume that this is what distinguishes moral rules and obligations from legal rules and obligations. This issue consequently raises broader questions about the nature of law and the distinction between law and morality. Consequently, in addressing this objection I also respond to the Morality But Not Law View.
To the extent that enforcement-based objections assume that the threat of external coercion is a necessary feature of law, I reject this assumption and I argue that coercive sanctions are not a necessary or even central feature for the concept of law. This is a conceptual issue that concerns the nature of law. I argue that the coercion-based view of law is not an accurate account of law and that it does not provide a good account of law’s normativity. I defend my response by developing H.L.A. Hart’s rejection of John Austin’s command theory of law. Hart convincingly argues that the conception of law as commands backed by force distorts the role that the idea of obligation and duty play in legal discourse. Instead, Hart emphasizes the internal normativity of law or the internal point of view. What makes laws binding for Hart is that officials and individuals generally recognize the authority of valid laws. For laws to be valid, they must be made in accordance with foundational rules that specify the sources of law and the provide criteria for the creation, change and adjudication of law. Hart calls these “secondary rules.”

Hart’s conception of law as the union of primary and secondary rules also challenges the modern idea of a supreme sovereign law-maker as an “uncommanded commander” since law’s authority and validity is grounded on foundational rules rather than in a political entity with supreme sovereignty. Against Hart’s own account of international law, I argue that this view of law is particularly important for a decentralized model of international law that lacks a global law-making body.

While my argument begins by drawing on Hart, I go beyond Hart in another important respect. Hart’s criticism of Austin’s view of law as commands of a sovereign

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4 Primary rule are rules of conduct that are addressed to the subjects of law (for example, the rules of criminal law). Secondary rules are foundational rules that are addressed to officials and that determine how valid laws can be created, changed, and adjudicated.
backed by the threat of sanctions does not support my argument that sanctions are not
countually necessary for law. Hart’s account only proves that they are not sufficient
and that other features are also required. One may agree with Hart that a system of
commands backed by threat alone does not constitute a legal system and that the focus on
sanctions leads to an inadequate understanding of legal obligations. However one may
still hold that coercive sanctions are required for law or legal obligations: law may still be
inherently coercive. I consider Habermas’s legal theory as an example of this more
sophisticated account of the connection between law and coercion.

Is it conceptually possible to have law without coercive sanctions? If so, what
would the role of law be in such a society? Drawing on Joseph Raz’s imaginary example
of a community of saints that are motivated to comply with their obligations, I argue that
it is possible to imagine a legal system without coercive sanctions. Such a society
highlights what is distinctive about law’s normativity and law’s primary function – to
coordinate behaviour through common rules and settle conflicts.

However, given the fact that in the non-ideal world of flawed human beings the
internal normativity of law itself is not sufficient to motivate all agents to always comply
with their legal obligations, enforcement and the threat of sanction can increase
compliance and protect those who abide by the law against those who do not. Such
pragmatic arguments for enforcement should not be dismissed since it can increase
compliance and contribute to the effectiveness of law in guiding behaviour and achieving
the goals that are associated with law. However, it is a mistake to confuse the
conceptual issue regarding the nature of law and legal obligations with these instrumental
arguments. Conceptually, it is a mistake to tie the idea of law too closely to coercion
since this leads to an inadequate understanding of the concept of legal obligation and law’s normativity, but in practice, coercive enforcement may be needed for instrumental reasons. However, while the effectiveness of law within states significantly depends on the use of coercive sanctions against individuals, I argue that there are important differences between the domestic case and the international case that make reliance on force less effective and much more problematic in the international case.

Regardless of the conceptual issue of whether coercive sanctions are conceptually necessary for law and the pragmatic issue of whether they are necessary in practice for the effectiveness of domestic law and international law, decentralized coercive sanctions are currently used by certain states to enforce international law. This raises important normative concerns. To the extent that decentralized enforcement of international legal rules and agreements depends on the will and power of states, states can choose to enforce international law or not based on their own national interests. The current way that international law is enforced does not meet Locke’s requirements for impartiality or Kant’s argument that rights be universal and reciprocal. Even the appearance of bias can undermine the perceived legitimacy and authority of international law, thereby weakening normative reasons for compliance.

These normative arguments present the strongest challenge to a decentralized system of enforcement. However, this is not a reason to argue that international law is not really law or to fail to recognize that a decentralized model of international law nonetheless gives rise to binding legal obligations. Given the serious problems of creating a coercive global authority with an independent military, if all is not to be lost, the issue to consider is how these normative concerns with the partiality and unevenness
of decentralized enforcement can be addressed in the absence of a coercive world government.

To address these normative concerns, I propose that the use of forceful sanctions and non-forceful sanctions and counter-measures must be authorized by the rules of international law and monitored by impartial, adjudicative bodies, as does the authorization of more forceful measures by the Security Council. This again points to my overall argument concerning the central role of impartial and authoritative bodies to determine, interpret and apply international law: absent a world government, the most important feature for the global rule of law is not coercive enforcement but the authoritative and impartial determination, interpretation, and application of the principles and rules of international law by adjudicative and administrative bodies with the recognized authority to do so.

**Chapter Five: The Global Rule of Law and Democratic Legitimacy**

In the final chapter, I consider Kant’s arguments for a centralized legislative power as an objection to a decentralized model of international law, as well as objections based on contemporary theories of democratic legitimacy. First, how can the creation and application of international legal rules be democratically legitimate without an elected global parliament comprised of state representatives or representatives of world citizens? Second, there is the charge of judicial imperialism and legal imperialism: the objection that my focus on the role of adjudicative and administrative bodies places significant power in the hands of judges, lawyers and administrators, and that this leads to
“the rule by judges and lawyers” rather than the democratic ideal of “the rule by and for the people.”

While this dissertation focuses on the development of international law and the rule of law at the global level, this alone is not sufficient for global justice. The rule of law and impartial adjudication are necessary for global justice, but so is the democratic legitimacy of the institutions that create, apply, and adjudicate international law. For example, Habermas argues that the rule of law and democratic legitimacy are equiprimordial. However, he has been criticized for giving priority to the rule of law in the international case. By focusing on the rule of law, I am not suggesting that it should be regarded as having priority over democratic legitimacy. On the contrary, I take democratic legitimacy to be important to the rule of law itself. The issue of legitimacy becomes all the more important in the absence of strong and effective supranational enforcement because the effectiveness of the rule of law will depend more on the internal strength of legal obligations and other reasons for compliance, including the motive of respecting and complying with laws that are legitimate. Hence, democratic legitimacy is not simply an independent feature that is important for global justice in addition to the rule of law; there are important connections between the rule of law and legitimacy.

In response to the first objection, I argue that it is a mistake to assume that the same conception of democratic legitimacy that applies within democratic states should be applied to the international case. Against the view that a democratically elected and representative world parliament is required, I argue that other standards of political legitimacy are more appropriate for international law, international legal processes, and international institutions. Instead of a single conception of international legitimacy, I
argue for a more differentiated and contextual account of legitimacy that considers the
type of authority that is exercised by a given institution or system, the kind of coercion it
can exercise, and the degree to which it constrains states and impacts the lives of
individuals.

In the absence of a world government with a globally representative democratic
parliament, power is exercised by states and global institutions in undemocratic ways. I
argue that the application and development of global administrative law by adjudicative
bodies can at least limit the arbitrariness of this exercise of power and make it more
accountable by subjecting it to rule of law principles.\(^5\) The central idea of “the rule of
law” is best understood by contrasting it with “the rule of man.” The ideal behind the
“rule of law” is that we are governed by rules and laws that apply to all, rather than being
governed by the arbitrary will of rulers who are above the law. Hence, this conception
of the rule of law can be used to constrain the exercise of political power by limiting
arbitrariness and by ensuring transparency, accountability, and impartiality. There is an
overlap here with conceptions of political legitimacy since they too emphasize
transparency and accountability in the exercise of political power.

\textit{A Minimal Conception of the Global Rule of Law}

In this dissertation, I adopt a minimal conception of the rule of law in which legal
rules and institutions are able to clearly set out rights and duties, and settle conflicts. The
central function of law is to provide certainty, to allow states and other actors to

\(^5\) Benedict Kingsbury, “Omnilateralism and Partial International Communities: Contributions of
the Emerging Global Administrative Law,” \textit{Journal of International Law and Diplomacy} 104
(2005), 98.
coordinate their behaviour, and to settle conflicts in an impartial, authoritative and legitimate way. Others argue for a more substantive conception for the rule of law. For example, some argue that the rule of law requires the protection of individual human rights, or more substantive notions of justice and equality. Because there are such significant differences between states in the international case in terms of political and legal systems, political and legal cultures, socio-economic conditions, and cultural practices and beliefs, I argue that a more minimal, procedural conception of the rule of law is more appropriate as a starting point. If a minimal conception of the global rule of law can be defended, then we can consider if more substantive ideas should or must be included, particularly as international law develops further.

While my dissertation focuses on the rule of law, I believe that a complete theory of global justice should include democratic legitimacy, the protection of individual rights, the reduction of political inequality between states, and duties of global distributive justice that will develop and increase as legal and governing institutions develop at the global level and exercise greater power that affects important aspects of people’s lives. I think much can be gained by focusing on a minimal conception of the rule of law as a starting point. While there are good reasons to be skeptical about the creation of an effective, democratically legitimate world legislature, I think a stronger case can be made for a more minimal conception of the rule of law at the global level in the absence of a world government. However, once a minimal conception of the rule of law is defended, it is important to address more substantive elements of global justice, including democratic legitimacy, human rights, economic justice, and greater equality. I hope to address these issues further in my future research.
Kant is regarded as having made a significant development in international relations theory. While Hobbes and other modern philosophers viewed the relation between states as an ongoing state of nature, Kant proposed the creation of a law-governed civil condition between states. Kant also rejected the balance of powers approach to international relations and argued for the development of a cosmopolitan constitution. While classical international relations theory was exclusively concerned with the rights of nations, Kant attributed a cosmopolitan right to individuals – the right of hospitality. Consequently, many contemporary cosmopolitan theories appeal to Kant. Precisely what is required to institutionalize cosmopolitan law, however, is not so clear.

Although Kant’s theory of right leads to the conclusion that a coercive world republic is the only rational way to formally institute and secure a lawful cosmopolitan condition, he finds various problems with the idea of a world state in his later political writings. Kant argues that a coercive world state would be against the will of nations, it would be impossible for it to govern over vast areas and protect its people, and it could lead to a “soulless despotism.” He seems to conclude that a world republic is an unrealizable ideal and possibly dangerous. In its place, he proposes a voluntary, non-coercive league of states.
Despite all the attention given to Kant’s theory in contemporary debates about global justice, the correct understanding of his views remains elusive. Kant’s writings have led to many conflicting interpretations, allowing contemporary philosophers both for and against world government to appeal to Kant to support their opposing views. While some scholars claim that a coercive world state is required for Kant, others argue that Kant explicitly rejects a world government in favour of a voluntary federation of states.\footnote{The second interpretation is supported by most of the authors in James Bohman and Mattias Lutz-Bachmann’s \textit{Perpetual Peace: Essays on Kant’s Cosmopolitan Ideal} (Cambridge: MIT Press, 1997). For example, Kenneth Baynes argues that Kant’s conception of a world order did not include a single world government (contrary to the interpretation presented by Hedley Bull and others), but only a very loosely conceived federation of republican nation states based on voluntary acceptance of the rule of law and mutual respect for each other’s sovereignty. He claims that Kant dismissed the idea of a united world state or world republic as practically unachievable and as likely to give rise to a “soulless despotism.” “Communitarian and Cosmopolitan Challenges to Kant’s Conception of World Peace” at 219. See also: Jürgen Habermas, “Kant’s Idea of Perpetual Peace, with the Benefit of Two Hundred Years’ Hindsight,” at 116-7 and David Held, “Cosmopolitan Democracy and the Global Order” at 245 in this volume. John Rawls also presents this interpretation: \textit{The Law of Peoples}, (Cambridge: Harvard University Press, 1999) at 36.} A common interpretation that attempts to reconcile these conflicting aspects of Kant’s writings is the view that while Kant’s theory of right leads to the conclusion that a coercive world state is required, in the end Kant rejects a world state for pragmatic reasons – out of fear that a world government will turn into a “soulless despotism” or be too large to govern.\footnote{James Bohman writes that Kant realized that a universal state modeled on a republic is impossible due to various empirical conditions and social and historical facts: the sheer scale of global relations, which undermines the conditions necessary for a republican constitution; the natural discord among peoples due to linguistic, cultural and religious differences; and the lack of will among nations to limit themselves through a binding system of international law. “The Public Spheres of the World Citizen,” in James Bohman and Mattias Lutz-Bachmann’s \textit{Perpetual Peace: Essays on Kant’s Cosmopolitan Ideal} (Cambridge: MIT Press, 1997), 179.} Based on this interpretation, some writers criticize Kant for going against his own principles by placing mere pragmatic concerns above the dictates of reason since his political and legal philosophy requires a compulsory, coercive world
They claim that Kant *should* have argued for a world government with coercive public law instead of proposing a voluntary federation. On the other side of this debate, other writers argue that Kant was right to reject a world state for pragmatic reasons. For example, John Rawls argues that Kant was right in thinking that a world state (“a unified political regime with the legal powers normally exercised by central governments”) would either be a global despotism or would rule over a fragile empire torn by frequent civil strife as different peoples tried to regain their autonomy.9 10

I will argue that Kant’s position seems contradictory and unclear because there is a genuine tension within Kant’s political theory. The first interpretation (that Kant’s background political theory clearly supports a world government) oversimplifies the issue by dismissing Kant’s concerns with a world government as *mere* pragmatic

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10 There are also various in-between interpretations. Some writers argue that it is not accurate to say that Kant “rejects” a world state since this remained the ideal for him even though he considered it to be unrealizable. Kant’s voluntary federation is then viewed as a way to approximate this ideal, or as a transitional stage that should eventually lead towards the gradual development of a federal world republic with coercive public law.

For example, Georg Cavallar argues that Kant’s theory is best understood as an evolutionary theory in which a voluntary federation is a first and indispensable step in the gradual development towards the true ideal: a world republic with coercive authority. Georg Cavallar, *Kant and the Theory and Practice of International Right* (University of Wales Press, 1999), 14 and 113. This view has recently been defended by Sharon B. Byrd and Joachim Hruschka: “From the State of Nature to the Juridical State of States,” *Law and Philosophy: An International Journal for Jurisprudence and Legal Philosophy*, 27 (2008).

considerations. The second interpretation (that Kant is right to reject a world government for pragmatic reasons) also oversimplifies the issue by too easily dismissing Kant’s arguments for a world republic. A more compelling interpretation is one that acknowledges that there are elements in Kant’s political theory that support a coercive world government as the ideal and that there are elements in his theory that oppose a world state.

I will argue that, contrary to common views of Kant’s position outlined above, there are also important non-pragmatic reasons behind Kant’s criticism of a world government and his proposal for a voluntary federation that are rooted in his legal and political philosophy, particularly in his conception of state sovereignty and what is required for a lawful condition within states.\textsuperscript{11} While Kant moves beyond the state-centred focus of classical international law with his theory of cosmopolitan right, he still accepts the modern conception of absolute, unitary state sovereignty. Kant also affirms the external sovereignty and freedom of states as moral persons. According to Kant’s theory of public right, a supreme sovereign with the coercive authority to enforce public law is required to create a civil and lawful condition within states. The sovereign must be supreme and cannot be questioned from within or outside the state in order for rights to be completely determinate and conclusive. If this kind of supreme sovereign authority is also required at the international level for rights between states to be conclusive, then this will conflict with state sovereignty and what is required for a civil condition within states.

The difficult issue then is whether this tension within Kant’s theory can be resolved, and if so, how? Kant’s own proposal is a voluntary federation of states without coercive law. This solution avoids undermining the juridical condition within states, and

\textsuperscript{11} Cavallar argues that there are reasons based on Kant’s moral philosophy as well.
it provides a middle road between a lawless state of nature at the international level and a coercive world republic. However, as we shall see, it does not seem to go far enough.

It is important to distinguish the kind of world state that Kant criticizes from other models of global governance that may be able to resist his objections. As McCarthy argues, many of Kant’s objections are directed towards a universal despotic monarchy: a single world state, under a single ruler, which fuses together nation-states and distinct peoples. A minimal federal world republic comprised of independent national republics may be able to resist the threat of despotism if it only used public coercion in accordance with the principle of freedom (in order to protect states from having their freedom infringed upon by other states), and if it instituted the rule of law rather than the rule of a single ruler’s will. However, to the extent that Kant’s objections to a world government are based on his modern conception of supreme, exclusive sovereignty, a more decentralized model of governance and law at the global level and a more dispersed conception of sovereignty may be needed. In Chapter Two, I will examine contemporary conceptions of dispersed sovereignty in which sovereignty is divided and shared, not only between nation-states and a global government, but also between other levels of governance within and beyond nation-states.

1. Kant’s Theory of Right and His Argument for a Coercive World Republic

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13 See Baynes and Held in Perpetual Peace: Essays on Kant’s Cosmopolitan Ideal.
I will begin by briefly explaining Kant’s theory of right and why it leads to the ideal of a world republic with coercive public law.\textsuperscript{14} Central to Kant’s political theory is the right to external freedom: the ability to set and pursue ends for oneself without being subject to the choices of others. For Kant, a lawless state of nature between individuals is a state of war because there is a constant threat that violence and war will break out. However well-disposed individual human beings may be, they can never be secure against violence from one another in a state of nature because as long as individuals interact with each other, their actions may interfere with each other’s external freedom and conflicts may arise. While Kant recognizes that there are rights within a state of nature, including contract and property rights, these are only provisional; rights can only be made conclusive and secure when they are guaranteed under a civil constitution. Without a law-making authority that can set down what is right in such matters and an impartial arbiter that can settle conflicts in particular cases, each individual has a right to what seems right and good to each (DR 6:312). For example, two good-natured individuals may have a genuine disagreement about where the boundary line of their shared property ought to be drawn, or they may have a genuine disagreement regarding the terms of their contract.

In addition to this determinacy problem, rights in the state of nature cannot be secured in a way that is consistent with the external freedom of all. In the case of a contract, I have no assurance that the other party will comply with her obligations under our contract, and no redress if she does not, other than self-enforcement. The problem with using coercion to enforce one’s own rights in a state of nature is that the ability to do

\textsuperscript{14} Since I want to focus on the international case, my discussion of Kant’s theory of right within states will be brief.
this depends on people’s respective power. Some individuals will be powerful enough to get away with violating the rights of others. Hence, rights in the state of nature are not universal since in practice, some are able to actualize their rights while other are not. In addition, when I use coercion to enforce my rights in the state of nature, I am imposing my unilateral judgment on other individuals and limiting their external freedom.\footnote{For a good explanation of Kant’s argument, see Arthur Ripstein, “Authority and Coercion.” \textit{Philosophy and Public Affairs} 32 (2004) 2-34 at 32. Ripstein argues that the state’s legislative and adjudicative functions are required to solve the indeterminacy problem, while the state’s enforcement mechanism is required to make the enforcement of rights reciprocal and universal (27). He argues that all three functions of government are required for external freedom because we can only be subject to limits on our freedom that are reciprocal; otherwise we only have various exercises of unilateral force (32). I will examine these details of Kant’s argument further in the chapters that follow.}

In order to avoid this state of war, a civil condition must be formally instituted. Kant argues that individuals have a duty to leave the state of nature, unite themselves with all others with whom they cannot avoid interacting, and enter into a civil condition in which they subject themselves to lawful external coercion. What is right will then be conclusively determined by an external power with supreme authority that represents the united will of all. In order to preserve the autonomy of each individual, it is not sufficient for a group of people to form an agreement to respect each other’s rights, for then each individual would still be subject to the arbitrary choices of other individuals. An external authority that represents the united will of all is required in order to preserve and protect the autonomy of each individual and ensure that rights are reciprocal and universal. According to Kant's principle of external freedom, coercion can only be used to restrict individuals from interfering with the freedom of other individuals. The state’s use of coercion to protect the freedom of each in this way can be harmonized with the freedom of all others.
The principle that underlies the articles of “Perpetual Peace” and “The Doctrine of Right” is that “all men who can at all influence one another must adhere to some kind of civil constitution” (PP 98). In other words, as long as individuals interact with other individuals such that they can affect or interfere with one another’s freedom, they need a rightful condition under a will uniting them (a constitution) (DR 6:311). They have a duty to join together in a civil society and subject themselves to lawful external coercion so that what is right is determined by law and by an external power. If they do not this, they do something morally wrong by continuing to live in a state that is devoid of justice. Not only does Kant claim that individuals have a duty to leave a lawless state of nature, he also argues that they may impel others to enter into a civil condition by force, if they cannot avoid interacting with each other (DR 6:312). In “Perpetual Peace,” he states:

...man (or an individual people) in a mere state of nature robs me of any such security and injures me by virtue of this very state in which he coexists with me. He may not have injured me actively (facto), but he does injure me by the very lawlessness of his state (statu iniusto), for he is a permanent threat to me, and I can require him either to enter into a common lawful state along with me or to move away from my vicinity. Thus the postulate on which all the following articles are based is that all men who can at all influence on another must adhere to some kind of civil constitution (PP 98; emphasis added).

As long as there is interaction with other individuals (or even the possibility of interaction), the use of coercion to compel them into a civil society is justified and required in order to have rightful, just relations. Does this same argument apply to states?

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Kant’s draws an analogy between civil right and international right, between a juridical condition within states and a cosmopolitan juridical condition between states. He claims that states may be judged in the same way as individual men living in a state of nature. In a state of nature, in the absence of an external tribunal to put their competing claims to trial, states can only seek their rights through war (PP 104; DR 6:346). Although no state can be wronged by another state in this lawless condition, the condition itself is wrong in the highest degree since it is devoid of justice (DR 6:344). Because of this, states have an obligation to leave this state of nature. Kant’s concern is not simply with the constant threat to each nation’s security or the provisional status of the rights of nations; in a state of nature among nations, the rights of individuals within states are also provisional to a certain extent. For example, our property can be taken or destroyed by another state during a war. Therefore, rights only come to hold conclusively, not only between states, but within states as well, if there is a “universal association of states (analogous to that by which a people becomes a state).” (DR 6:350). This is an important point. Rather than viewing domestic justice and cosmopolitan justice as two separate issues, as many political theories do, Kant recognizes that these are interconnected: in order to have conclusive rights within states, this requires a juridical condition between states. Kant states that if the principle of equal freedom limited by law is lacking between individuals within a nation (a constitution based on civil right), or between states in their relationship with one another (a constitution based on international right) and in their relationships with individuals (a constitution based on cosmopolitan right), then the framework of all the others is undermined and will collapse (DR 6:311).
1.1. The Argument for a World Republic in Kant’s Earlier Political Essays

In Kant’s earlier essays on this issue (“The Idea of a Universal History with a Cosmopolitan Intent” and “On the Common Saying: ‘This May Be True in Theory, But it Does Not Apply in Practice’”), the analogy between individuals and nation-states leads to the conclusion that states ought to form a union of states and submit themselves to enforceable cosmopolitan law, under an external coercive authority.17 In these two earlier pieces, Kant more clearly promotes the creation of a union of states with centralized, coercive power than in his later writings (“Perpetual Peace” and “The Doctrine of Right”).

In the “Idea for a Universal History” (1784), Kant draws a parallel between the development of civil constitutions within states and the development of a cosmopolitan political system. Just as individuals must leave a state of barbarous freedom and enter into a civil constitution to ensure their security, freedom and rights, so too must states leave their condition of barbarous freedom and enter a law-governed union of states that could ensure their security and rights through “a united power and the law-governed decisions of a united will” (UH 47). In this article, Kant appeals to a progressive account of history and nature to show how this development is possible. He argues that it is our very “unsocial sociability” that drives us out of a state of savagery into a civil constitution, and similarly, that it is the negative effects of war that force us to leave a state of barbarous freedom between states and enter a law-governed union of states (UH 47). He writes that nature compels us to discover a law of equilibrium that will regulate

17 “Idea for a Universal History with a Cosmopolitan Purpose” & “On the Common Saying: ‘That May be Correct in Theory, But it is of No Use in Practice’” in Hans Reiss (ed.), Kant’s Political Writings, trans. H.B. Nisbet (Cambridge: Cambridge University Press, 1970); cited in text as “UH” and “TP” respectively.
the healthy hostility that prevails among states, and to reinforce this by developing a cosmopolitan system of united power that provides general political security (UH 49). These passages clearly support the idea that a global coercive authority is needed to guarantee general political security and reinforce cosmopolitan law. Kant argues that a “union of states” (Staatenverbindung) is the final step in the development of the human species because it is only when states stop wasting their resources on war that they will be able to support the moral development and education of their citizens (UH 49).

In this earlier article, Kant also raises a possible danger associated with this union of states: the danger that human energies would lapse into inactivity. In order to maintain a healthy competition that will continue to motivate human progress, he states that this union of states must be based on a law of equilibrium or balance (UH 49). This passage demonstrates some concern for preserving and promoting some kind of diversity and competition between states. While Kant does not specify how this balance is to be maintained, Cavallar suggests that this ambiguous passage may imply a looser union without centralized authority.\(^\text{18}\)

In his “Theory and Practice” essay (1793), Kant again draws an analogy between a civil and a cosmopolitan constitution, and between civil and international right (TP 90). He states that global violence and distress will eventually make a people decide to enter into a civil constitution and submit to public coercion (TP 90), so that the freedom of each can be secured and harmonized with the freedom of others (TP 73). He rejects the alternative view that a permanent universal peace can be achieved through a European balance of powers because it would be too fragile: “like Swift’s story of the house which the builder had constructed in such perfect harmony with all the laws of equilibrium that

\(^{18}\) Cavallar, 114.
it collapsed as soon as a sparrow alighted on it” (TP 92). Instead, he argues that a cosmopolitan constitution with enforceable public laws is needed.

Kant considers the possibility that a cosmopolitan constitution may be more dangerous to freedom “for it may lead to the most fearful despotism” (TP 90). He notes that historically, this is what happened with states that grew too large. He probably had in mind the decline and fall of the Roman Empire.\(^\text{19}\) Kant suggests that this possible danger could force human beings to form “a state which is not a cosmopolitan commonwealth under a single ruler, but a lawful federation under a commonly accepted international right” (TP 90, emphasis added). It is here that Kant first suggests that a federation may be a better way to institute international right because a cosmopolitan state under a single ruler may become despotic.

As I will explain further in the next section, the kind of federation that Kant presents as an alternative in the “Theory and Practice” essay is significantly different from the looser, non-coercive league of nations of “Perpetual Peace” (1795) and “The Doctrine of Right” (1797). While the federation of the later two essays does not have coercive authority or enforceable public laws, the federation here is still described as a state that has the coercive authority to enforce public law. In “Theory and Practice,” Kant argues that there is only one possible way to end the state of war between states: “a state of international right, based upon enforceable public laws to which each state must submit (by analogy with a state of civil or political right among individual men)” (TP 92). The main distinction he presents in the passage above is between a despotic universal monarchy (a world state with a single ruler), and a world federal republic under commonly accepted and enforceable international law (“a state which is not a

\(^{19}\) Cavallar, 116.
cosmopolitan commonwealth under a single ruler, but a *lawful federation* under a commonly accepted international right,” TP 90). It may be more accurate to describe the alternative he presents to a universal monarchy as a “universal federal state,” rather than a “universal federation.” Consequently, Kant’s concerns in “Theory and Practice” are specifically directed towards a universal monarchy or a world state under a single ruler rather than to the more general idea of a world state. Kant seems to still support a world federal republic under enforceable public law.

One similarity between the universal federal state of “Theory and Practice” and the looser federation presented in his later writings is that they are both formed through the voluntary agreement of states. In “Theory and Practice,” Kant does not address the question of whether coercion can be used to force states to enter a cosmopolitan constitution. He writes that states would voluntarily submit to the powers of a universal federal state (TP 92). How can Kant assume that states would voluntarily give up their external sovereignty and submit to such external coercive laws? The obvious objection here is that states would never voluntarily submit to this. Kant responds to this objection by putting his trust in what the relationships between men and states *ought to be* according to the principle of right. He argues that we should assume that it is possible, and that we should act in such a way that it may be established. To show that it is possible, Kant appeals to providence: that the very nature of things will force men to do what they do not willingly choose (TP 92). He observes that the distress produced by constant wars will lead states, even against their will, to enter into a cosmopolitan constitution (TP 90).

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20 Cavallar argues that Nisbet’s translation of *allgemeiner Völkerstaat* as a “universal federation” in “Theory and Practice” is misleading, and he translates it as a “universal state” instead. Cavallar, p.191, n.5.
Since this appeal to providence and nature’s plan is probably the most questionable part of his argument for contemporary readers, is it possible to interpret his argument in a non-teleological manner? We can make more sense of his argument if we consider it in dialectical terms, as an analysis of the effects of important historical developments. In fact, the grave distress and negative effects caused by the two world wars led to the creation of the United Nations and to the development of international conventions aimed at preventing wars and limiting the horrors of war. However, this has not led to the end of war, nor to a universal federal state that can effectively enforce cosmopolitan or international law. Despite these historical developments, there is still good reason to be skeptical that states will voluntarily form a world state to end or limit the negative effects of war. Habermas, Bohman and Lutz-Bachmann argue that the historical evidence reveals that all the basic trends that Kant identified are two-sided: they have promoted the conditions of peace in some respects, but they have also made the task more difficult in other respects. For example, Habermas notes that liberal societies have failed to be peaceful in all their relations to other states and global markets have produced significant inequalities. Bohman and Lutz-Bachmann point out that even if global social relations diminish nationalist feelings at the nation-state level, they may intensify ethnic or regional identities at a more local level.

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21 Habermas, “Two Hundred Years’ Hindsight.”
22 Bohman & Lutz-Bachmann, at 11.
2. Why does Kant Propose a Voluntary Federation of States in His Later Political Writings?

In “Perpetual Peace” (1795) and “The Doctrine of Right” (1797), Kant still regards a world republic (civitas gentium) or a “universal association of states (analogous to that by which a people becomes a state)” as the ideal. However, while its development is characterized as inevitable in the earlier essays based on Kant’s idea of history and progress, in these later political writings, he claims that it is “an unachievable idea” (DR 6:350; PP 105). Since international right must be formally instituted in some way for Kant in order for rights to be secure, he proposes the more practicable federation of free states as a substitute – a voluntary and revocable federation without public laws or coercive power. Why?

Let’s first examine the features of this voluntary federation or league of states. The “federation of peoples” (Völkerbund) in “Perpetual Peace” differs from his earlier idea of a “union of states” (Völkerstaat) in a few important respects (PP 104). Kant explains that, “a federation of this sort would not be the same thing as an international state” (PP 102). Kant calls it a “pacific federation” because its only purpose is to protect against external attacks and to secure the freedom of each state (DR 6:344-345; PP 104). It should not meddle in the internal affairs of other states or attack other states (DR 6:344-45; 6:349). States do not need to submit to public laws or to a coercive power that can enforce these laws (PP 104). Unlike the civil constitution within states, the

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23 McCarthy notes that in the “Universal History” essay, the cosmopolitan condition is characterized as a “federation of peoples” (Völkerbund) and that this clearly refers to a federal union with a “united power.” In the later essays, this kind of union is designated as a Völkerstaat or “state of nations,” while Völkerbund refers to the voluntary league of nations (271, n.13). I will use the term “federation” to refer to the voluntary, non-coercive league of nations, and “world federal state” to refer to a stronger union under united political power with coercive public law.
federation does not involve a sovereign authority. Rather, it is an association that can be renounced at any time (DR 6:345). He also calls it a “permanent congress of states” and explains that “congress” is to be understood as a “voluntary coalition of different states which can be dissolved at any time, not a federation (like that of the American states) which is based on a constitution and can therefore not be dissolved” (DR 6:351).

Although he still claims that there must be a lawful condition and a general will which publicly assigns to each that which is his due in order for international right to exist, he states that this must be based “on some sort of contract, and not coercive laws” (PP 127).

The federation envisioned here is a weak and loose association of states. Unlike individuals in a civil condition within states, nations cannot be impelled to join, they are free to leave or dissolve the federation at any time, and they do not have to submit to coercive public laws or to a coercive sovereign authority. This raises many questions. How can this weak model of a federation secure the freedom of each state or secure a rightful condition between states without a coercive authority to enforce this, and without any kind of enforceable public laws? How can this be a “permanent congress” without something analogous to a constitution that externally binds states?²⁴

While a voluntary association of states is able to provide some way to institutionalize international right, so that states have some kind of assurance against member states (more than they would have in a state of nature or in a balance of powers model of international relations), this condition is threatened by the fact that states are free to leave or dissolve the federation. This does not seem to provide the kind of

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²⁴ As Jürgen Habermas asks, how can it be permanent without externally binding law that is based on the establishment of something analogous to a constitution, or a common government with coercive authority? “Kant’s Idea of Perpetual Peace, with the Benefit of Two Hundred Years’ Hindsight,” in J. Bohman & M. Lutz-Bachmann (eds.), Perpetual Peace: Essays on Kant’s Cosmopolitan Ideal (Cambridge: MIT Press, 1997), 113-154.
guarantee Kant requires for rights to be conclusive and universal. Why does Kant promote this weaker model of a voluntary league of states?

In a very important passage at the end of the “Second Definitive Article of a Perpetual Peace,” Kant states:

There is only one rational way in which states coexisting with other states can emerge from the lawless condition of pure warfare. Just like individual men, they must renounce their savage and lawless freedom, adapt themselves to public coercive laws, and thus form an international state (civitas gentium), which would continue to grow until it embraced all the peoples of the earth. But since this is not the will of the nations, according to their present conception of international right (so that they reject in hypothesi what is true in thesi), the positive idea of a world republic cannot be realized. If all is not to be lost, this can at best find a negative substitute in the shape of an enduring and gradually expanding federation likely to prevent war. The latter may check the current of man’s inclination to defy the law and antagonize his fellows, although there will always be a risk of it bursting forth anew (PP 105)

This passage is significant because Kant clearly acknowledges that an international state (civitas gentium) or world republic with public coercive laws is the only rational way in which states can leave a state of lawless freedom and secure peace. He realizes that with a voluntary federation, there is always a risk that war will break out again. It is odd, however, that he throws this in at the end of the Second Definitive Article, after he argues that the right of nations should be based on a federation of free states without public laws or coercive power. The reason Kant gives in this passage for promoting this “negative substitute” instead of the “positive idea of a world republic” is that a world republic is not the will of states, according to their present conception of international right, and consequently, a world republic cannot be realized. But why should the existing will of nations matter if he believes that a world republic is the only rational way in theory?
We might expect Kant to argue that since a world republic is the positive ideal according to reason, states have a duty to establish and submit to a world republic with enforceable public laws and that this duty justifies the use of economic and military coercion. While he suggests that we have a duty to work towards the goal of perpetual peace elsewhere,\(^{25}\) why does he not argue that states have a duty to work towards establishing a world republic? While some scholars argue that we should interpret Kant as presenting an evolutionary theory in which a voluntary federation is only the first step towards the proper goal of establishing a coercive world republic,\(^{26}\) this interpretation is at odds with Kant’s description of a federation as a “negative substitute.” Why doesn’t Kant explicitly present his federation of free states as a transitional step towards the gradual development of the positive idea of a world republic? Why does he instead call the federation a “negative substitute,” suggesting that this is the closest we can come to achieving the ideal of a world republic?

### 2.1. Pragmatic Considerations: Practical Problems with a World State

A common interpretation is that Kant’s conclusion that a world republic is an unachievable ideal is based on pragmatic considerations, particularly his fear that it would become a “soulless despotism.” While Kant does consider such pragmatic reasons, we will see in the next section that they are only part of the story.

In “Perpetual Peace,” Kant tries to prove that his idea of a federation can become a reality and that it is not a mere utopian ideal. While Kant elsewhere writes that “[r]ight

\(^{25}\) PP 114, TP 92, and DR 6:350.

\(^{26}\) For example, Cavallar (124).
must never be adapted to politics, but politics must always be adapted to right,”27 in his political writings on international and cosmopolitan right Kant is concerned with presenting a theory that is practical – a theory that is able to mediate between pure reason and practice.28 For example, he argues that a federation of states is “practicable and has objective reality” (PP 104). He attempts to show how a federation can develop from one simple starting point: all that is needed is that one powerful and enlightened nation form a republic. He argues that states that have a republican constitution are less likely to go to war since they have to obtain the consent of their citizens.29 Since it will be inclined to seek perpetual peace for this reason, one powerful republican state can then provide a focal point for a federal association among other states that will secure the freedom of each state in accordance with the idea of international right. The federation will gradually spread further by a series of alliances of this kind until it encompasses all states and leads to perpetual peace (PP 104). Kant also tries to show that an association of states for the keeping of peace is achievable by suggesting that something of this kind already took place in the first half of the eighteenth century with the States General at the Hague (DR 6:350).

Kant’s concern with presenting a theory for perpetual peace that is achievable and practicable seems to be an important factor behind his proposal for a voluntary federation of free states. Kant argues that his idea of a federation is to be preferred to an “amalgamation of separate nations under a universal monarchy” because in the latter case, “the laws progressively lose their impact as the government increases its range, and

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27 Kant, VIII 429; quoted by Cavallar, at 4.
28 Cavallar, 113.
29 While this factor does place some restrictions on states since they have to convince a majority of their citizens to support a war, many democratic states have nonetheless entered into many wars, primarily on distant lands.
a soulless despotism, after crushing the germs of goodness, will finally lapse into anarchy” (PP 113). Since Kant is concerned that a world government would become a “soulless despotism” or “the most fearful despotism,” it is important to understand his conception of despotism.

Kant classifies different forms of states according to forms of sovereignty and forms of government. A state’s form of sovereignty depends on whether the ruling power is in the hands of one individual (autocracy), several persons in association (aristocracy), or the people who together constitute civil society (democracy). A state’s form of government relates to the way in which the state makes use of its power. A government is republican if the executive power (the ruler) is separated from the legislative power (which ought to belong to the united will of the people) (PP 101, DR 6:314). It must be based on a representative system. A government is despotic “if the laws are made and arbitrarily executed by one and the same power, and it reflects the will of the people only insofar as the ruler treats the will of the people as his own private will” (PP 101). Kant explains that a government that is not representative is an anomaly because one and the same person cannot at the same time be both the legislator and the executor of his own will (PP 101). A true republic is a system that represents the people and protects their rights. All citizens are united together and act through their delegates. The supreme authority from which all the rights of individuals as mere

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30 Kant distinguishes this from a monarchy, for the monarch is the one who has the highest authority, whereas an autocrat, who rules by himself, has all the authority. The autocrat is the sovereign, whereas the monarch merely represents the sovereign (DR 6:338-339).

31 Kant here simply refers to the traditional conception of different forms of government.

32 Kant notes that democracy in the truest sense of the word is despotic because it establishes an executive power through which all the citizens may make decisions about the individual without his consent, so that decisions are made by all the people and yet not by all the people. This means that the general will is in contradiction with itself (PP 101).
subjects must be derived is originally found in the people (DR 6:341). This is the only constitution that accords with right because it makes freedom the principle and the condition for any exercise of coercion (DR 6:341). Under a republican constitution, law itself rules rather than the unilateral will of any particular ruler or rulers.

Based on this, can a world government be established as a true republic? Rather than having a ruling power that governs according to its particular, unilateral will, the sovereign power would have to represent the united will of all. Coercion could only be used in accordance with the principle of freedom. In the case of conflicts between states, this would mean that a world republic could use coercion to prevent one state from interfering with the freedom and autonomy of another state. But if this issue relates to the kind of government that is established – whether it is a despotic ruler who exerts his own particular will or a republican and representative government governed by law – then it is unclear why this provides an argument against a world government. State governments also face the danger that they may become despotic. The more significant problem then is whether a world government could be based on a representative system: whether it could represent all the world’s people and reflect the united will of all the world’s people. Could this kind of representative government be effective at a global level, given its size and scope? Kant suggests that it is not possible. Some contemporary political theorists look to the experience of large states with representative government and the European Union to argue that this is possible, while others point to the democratic deficit in the European Union to argue that it is not. An additional concern for contemporary political theorists is whether a world government would be able to effectively and adequately represent the united will of the world’s people given existing
national diversity. Even though national diversity is still an issue for the European Union, particularly between Western and Eastern Europe, the significant differences in political, legal, economic, and social cultures between the nations of the world pose greater challenges for a world government.

It is important to recognize that some of Kant’s objections to a world state are directed towards a world state that takes the form of a universal monarchy and that they may not apply to a federal world republic. For example, in the passage quoted above, Kant’s worry against a “soulless despotism” is specifically directed at the “amalgamation of the separate nations under a single power which has overruled the rest and created a universal monarchy” (PP 113). Many scholars, including Rawls and Habermas, seem to ignore this detail in their discussion of Kant’s rejection of a world state in this passage. They take Kant’s objection in this passage to be a more general rejection of world government in any form. McCarthy argues that this is a mistake:

[T]here is overwhelming textual evidence for distinguishing [Kant’s] conception of a ‘world republic,’ which he consistently upholds as the most encompassing idea of political-practical reason, from the conception of a ‘universal monarchy’ or any other form of world state that might result from one power subjugating all the others. It is the latter which he characterizes as a ‘soulless despotism’ that would inevitably give rise to widespread resistance and ultimately lapse into anarchy.”

Other scholars who defend the view that Kant’s theory supports a coercive world government argue that Kant’s fear of despotism in the above passage does not apply to Kant’s ideal of a federal world republic of nation-states.\[34\]


\[34\] Most recently, Sharon Byrd and Joachim Hruschka make this argument in their defence of a world republic with coercive laws.
One could interpret another passage in this manner. Kant argues that out of fear that a world state will lead to the most fearful despotism, people may be forced “to form a state which is not a cosmopolitan commonwealth under a single ruler, but a lawful federation under a commonly accepted international right” (TP 90). As noted above, Kant’s reference to a federation in his article on “Theory and Practice” seems significantly different from his reference to a federation in “Perpetual Peace” and the “Doctrine of Right.” In “Theory and Practice,” the term “federation” seems to refer to a federal world state with coercive public law rather than to a voluntary federation or league of states. As a result, we could interpret this passage as suggesting that in order to avoid the danger that a world state could become the worst kind of despotism, states could develop a federal world republic that is governed by law and international right rather than allowing a single ruling power to impose its unilateral will on all.

The claim that Kant’s objections only apply to a despotic, universal monarchy and not to a federal world republic is complicated by a few factors. Kant raises other objections to a world state that are not exclusively directed towards a universal monarchy. For example, he expresses similar concerns with “a universal association of states (analogous to that by which a people becomes a state)” in “The Doctrine of Right” (DR 6:350). Kant worries that “if such a state made up of nations were to extend too far over vast regions, governing it would finally have to become impossible, while several such corporations would again bring on a state of war” (DR 6:350). Kant presents two opposing concerns. On the one hand, given the difficulty of governing over such a vast area, there is the possibility that a world government would fall apart and lead to anarchy
and war as coalitions of states vie for control. This suggests that a world government would be too weak and that it would not be able to effectively govern over such a vast area. This objection applies to all forms of world government, including a federal world republic. On the other hand, there is the danger that if a world government were able to become powerful enough to govern over such a vast area, it would become despotic and it would illegitimately exert its unilateral will over all.

In addition, Kant’s proposal for a voluntary federation of states is based on a problem he finds with the ideal of a world republic. Rather than arguing that a universal monarchy is to be avoided and that we should instead ensure that a federal world republic is established, in “Perpetual Peace” and in “The Doctrine of Right” Kant argues that a world republic is an unrealizable ideal and that states should work towards the goal of perpetual peace by forming a voluntary federation of states (DR 6:350). While the ideal of a world republic is unrealizable, he argues that the political principles that are directed toward the ultimate goal of perpetual peace, such as developing alliances of states, are not unachievable; instead, they serve as a continual approximation to the goal of perpetual peace (DR 6:350). He claims that the continual approximation to this goal is a task based on duty and the right of human beings and states (DR 6:350). Kant does not go further and argue that while a world federal state or a world republic is difficult to achieve, we have a duty to work towards realizing this ideal form of world government because it is the only way to secure perpetual peace and to complete the transition from a state of nature to a cosmopolitan civil condition in which rights are conclusive.35 The fact that he does not argue this undermines the evolutionary view that Kant proposes a voluntary

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35 For example, McCarthy argues that Kant seems to go too far in limiting the extent to which we can approximate the goal of perpetual peace to a voluntary and revocable league of states (248).
federation as a transitional stage in the gradual, inevitable creation of a federal world republic.

Some writers have criticized Kant for letting these pragmatic considerations alter his theory. They argue that regardless of these practical concerns, we should still strive towards the ideal of a coercive world republic because that is what duty requires in Kant’s theory. Others have argued that these pragmatic issues can be addressed today. For example, one could argue that recent developments in technology can enable a world government to govern over the vast area of the globe in ways that would not have been even conceivable in Kant’s time. One could appeal to the fact that large federal states like the United States have been able to effectively govern over vast areas, and one could point to the European Union as an example of the practical possibility of supranational government. If Kant’s objections to a world government were solely based on these pragmatic considerations, then these could be addressed by assessing whether, given contemporary circumstances (such as globalization, technological developments, the experience of large federal governments and regional institutions), a world government could govern effectively over a vast area. However, I will argue in the next section (Section 3) that Kant’s statements in “Perpetual Peace” and in “The Doctrine of Right” suggest that he did not view a world federal state as merely unachievable due to these practical considerations, but as having deeper problems.

2.2. THE CONCERN FOR NATIONAL DIVERSITY

36 Matthias Lutz-Buchmann, Thomas Carlson, and Sidney Axinn.
37 A problem with the former point is that Kant was aware of the size of the United States and he even refers to it as a contrast to his voluntary federation.
Before considering these more significant non-pragmatic problems, I would like to consider an issue that is connected to the pragmatic considerations addressed in the previous subsection. Despite the fact that Kant’s theory of perpetual peace can be criticized for being too universalistic, particularly given his uniform, progressive account of human history, there appears to be some concern for national diversity in his consideration of the dangers of a despotic world state. Kant suggests that a world state would be despotic if it fused together distinct peoples. The first possible danger that Kant attributes to a universal union of states in the earlier “Idea for a Universal History” essay is that it may cause human energies to lapse into inactivity (UH 49). For Kant, a healthy hostility and competition between peoples is needed to motivate human progress (UH 49). However, this healthy hostility must be regulated and kept in an equilibrium so that human beings do not destroy each another (as may happen with a state of war between nations) or lose all drive and motivation (as may happen if nations were amalgamated into a union which extinguished the differences between them) (UH 49).

Kant also associates this danger of fusing together distinct peoples and extinguishing their differences with a despotic universal monarchy in “Perpetual Peace.”39 In the famous passage quoted above, Kant warns that a universal monarchy that amalgamates separate nations under a single power will turn into a “soulless despotism” (PP 113). He claims that, “unlike the universal despotism which saps all man’s energies and ends in the graveyard of freedom,” the peace that is gradually developed by a federation of states “is created and guaranteed by an equilibrium of forces

38 McCarthy argues that the fusing or melting together [zusammenschmelzen] of distinct peoples is the very source of danger that Kant cites against the idea of a universal monarchy in “Perpetual Peace” (246).
39 McCarthy, 245.
and a most vigorous rivalry” (PP 114). This indicates that part of Kant’s reasons for preferring a federation of free states is that it is able to maintain this healthy competition or equilibrium of forces between distinct peoples or nations.

Kant claims that nature uses two means to separate nations and prevent them from intermingling: linguistic and religious differences (PP 113-114). These differences help to prevent an individual state from uniting other nations under its own power by force or cunning (including states that may try to justify such action by appealing to international right) (PP 114). Although Kant recognizes that these religious and linguistic differences may lead to mutual hatred and provide pretexts for war and violence, he expresses the hope that “as culture grows and men gradually move towards greater agreement over their principles, they lead to mutual understanding and peace” (PP 114).

Kant claims that nature also counters the tendency towards violence by uniting peoples through the spirit of commerce.\(^{40}\) He argues that nations are compelled to promote peace by means of their mutual self-interest since commerce cannot exist side by side with war (PP 114). According to Kant, nature comes to the aid of our rational will, which can be impotent in practice, by making use of our self-seeking inclinations (PP 112).\(^{41}\) Kant also observes that there is more interaction between states with the growth of commerce. It is possible to drop the problematic role of providence in his account and interpret these statements as Kant’s understanding of important social facts and historical developments. While the growth of commerce has increased interaction between the peoples of different states, this has not always been a positive interaction as some states

\(^{40}\) Kant also notes that although the seas might seem to separate nations, they in fact promote commerce by means of navigation (DR 6:353).

\(^{41}\) Kant explains that when he says that nature wills that this or that should happen, this does not mean that nature imposes on us a duty to do it. Duties can only be imposed by practical reason (PP 112).
have exploited the peoples and resources of weaker, less developed states for economic gain. In addition, while it is difficult for commerce and a nation’s economy to flourish during times of war, unfortunately, the desire for economic gain does not always lead to the avoidance of war; instead, economic interests may provide an important motive for war even if they are not openly acknowledged as such.

Rather than regarding the religious and linguistic differences between nations as something that presents an obstacle to the creation of a cosmopolitan constitution, Kant views them as a safeguard that prevents one nation from dominating the world. Kant promotes the gradual development of mutual understanding and greater agreement over principles, rather than the imposition of these principles by force, and he opposes the total homogenization of all cultures. He promotes the equilibrium between two extremes: between the complete separation of distinct peoples and their amalgamation under a single power. Of course some interaction is needed in order to gradually move towards mutual understanding, greater agreement over principles, and peace. While peoples are separated by their religious and linguistic differences, they are connected by the fact that they share the earth in common. In his discussion of cosmopolitan right, Kant observes that nature has enclosed all nations together within determinate limits by the spherical shape of the earth such that they stand in a community of possible physical interaction (DR 6:352). He claims that “[t]he peoples of the earth have thus entered in varying degrees into a universal community, and it has developed to the point where a violation of rights in one part of the world is felt everywhere” (PP 107-8). Kant’s cosmopolitan right to hospitality promotes this gradual development towards mutual understanding and

42 Unfortunately, as James Tully argues, Kant’s stages view of historical development still legitimates European imperialism, particularly since it can be regarded as coinciding with nature and history. “The Kantian Idea of Europe: Critical and Cosmopolitan Perspectives,” at 341-2.
peace since it protects and promotes the interaction between peoples. It protects the right of individuals to visit other lands without being treated with hostility. Kant suggests that as people from distant continents enter into peaceful mutual relations that may eventually be regulated by public laws, this will bring the human race closer to establishing a cosmopolitan constitution (PP 106).

McCarthy argues that Kant’s principled opposition is to a universal monarchy that ignores the ethnocultural differences among peoples and not to a federal republic of nations that builds these into its institutional arrangements. Kant’s objections concerning national diversity do appear to be directed against a universal monarchy that fuses together distinct peoples and extinguishes the differences between them. Consequently, a pluralist world government that recognizes and protects national diversity may be able to address these concerns, provided that it is able to resist homogenizing tendencies. Of course this would not be sufficient to address the contemporary issues of pluralism since Kant is only interested in preserving diversity between nation-states. As McCarthy argues, Kant’s understanding of nations as racially, ethnically and culturally homogeneous has to be revised to allow for the internal heterogeneity of political communities. This means dropping his claim that it is through racial and cultural differences that nature prevents the intermingling of peoples. This also means making room for pluralism within states and within Kant’s idea of constitutional republicanism. Since Kant is concerned with national diversity between nation-states, the passages discussed in this section also relate to the preservation of state sovereignty and the self-determination of peoples.

43 McCarthy, 272, n.21.
44 McCarthy, 251.
45 McCarthy, 251.
3. **Kant’s Non-Pragmatic Reasons: His Conception of State Sovereignty**

I want to argue that there is more to Kant’s proposal for a voluntary federation than the above pragmatic concerns. In the very important, yet ambiguous passage at the end of the “Second Definitive Article of a Perpetual Peace,” Kant presents another reason why the idea of a world republic is unrealizable: because it is not the will of nations, according to their present conception of international right (PP105). But why should the existing will of nations matter if he believes that a world republic is the only rational way in theory? Why doesn’t Kant to argue that since a world republic is the ideal in theory, states have a duty to establish and submit to a world republic with enforceable public laws, and perhaps even that this duty justifies the use of economic and military coercion? While he insists that we have a duty to work towards the goal of perpetual peace, why does he not argue further that we have a duty to work towards establishing a non-despotic world republic (a world republic that meets Kant’s own positive conception of republican government) in the hopes that the practical obstacles may be overcome? Perhaps Kant did not view a world republic as merely unachievable due to the pragmatic considerations discussed above, but as impossible for deeper, non-pragmatic reasons – reasons that are based on his own legal and political theory. I believe that Kant’s conception of state sovereignty and his conception of what is required for a rightful condition within a state present an important conceptual limitation to the idea of a world state.

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46 See quote above on p. 35.
47 PP 114, TP 92, and DR 6:350.
While Kant begins his analysis of international right by presenting an analogy between individuals and states, in “Perpetual Peace” he presents an important limitation to this analogy based on his conception of the state. While individuals in a state of nature can impel others to enter into a civil condition by force if they cannot avoid interacting with each other, Kant argues that the same right to use force does not apply to states because they “already have a lawful internal constitution, and have thus outgrown the coercive right of others to subject them to a wider legal constitution in accordance with their conception of right” (PP 104). Instead, a cosmopolitan constitution can only be secured with a general agreement between states; it can only be secured through voluntary agreement without the use of coercion (PP 104). Hence, Kant recognizes an important limitation to the “domestic analogy” argument (an argument that infers from the experience of individual persons to that of states) due to the different juridical nature of states.48

48 Many writers have challenged the “domestic analogy” argument by pointing to relevant differences between individuals and states at the empirical level. For example, Hedley Bull refers to the fact that states are not as vulnerable to violent attack as individuals in a state of nature. The Anarchical Society: A Study of Order in World Politics (London: Macmillan, 1977). A similar argument against the domestic analogy is made by Charles Beitz (regarding the application of Hobbes’ political theory to the international case), Political Theory and International Relations, (Princeton: Princeton University Press, 1979) and H.L.A. Hart, The Concept of Law, (Oxford: Clarendon Press, 1994).

As Cavallar argues, while Hedley Bull and others argue against the domestic analogy based on significant empirical differences between individuals and states, Kant rejects the domestic analogy because of the juridical/moral question of who is entitled, under which circumstances, to use coercion against whom. Cavallar, 117-118.

Arthur Ripstein points to another important juridical difference between individuals and states that limits the domestic analogy. Ripstein argues that unlike natural persons, states do not have a right to purposive freedom (to set and pursue whatever ends they choose) because states cannot set and pursue their own purposes. Instead, each state has the sole purpose of creating and preserving itself as a rightful condition. A state may only use its powers to create and sustain a rightful condition for its citizens. Force and Freedom: Kant's Legal and Political Philosophy, (Cambridge Mass: Harvard University Press, 2009), at 174, fn.15 and 197, fn.42.
This suggests an explanation as to why the will of states matters in his assessment of the possibility of a world republic: states do not have a right to coerce others to join a society of nations. Hence, the problem is not simply that it would be difficult to establish an effective, non-despotic world republic in practice, or that it would be dangerous since states could use this idea as a way to dominate other states; rather, the very right to create a world state without the consent of all states is absent.\textsuperscript{49} Although in his earlier political writings Kant seems to assume that the state of nature between individuals and among states is analogous and that the resolution to both is a united coercive power, in “Perpetual Peace,” he realizes that the parallel between individuals and states is not a complete one since states have a different juridical condition. But why does the fact that states have a lawful internal constitution justify the denial of the right to use coercion to end a lawless external condition?

\textbf{3.1. The Rights of States: Kant’s Conception of the Autonomy and Moral Personality of States}

Kant’s conception of the sovereignty and autonomy of states as moral-legal persons appears to be an important factor behind his proposal for a voluntary federation.\textsuperscript{50} This is demonstrated by his statement that, “a federative association of states whose sole intention is to eliminate war is the only lawful arrangement which can be reconciled with their freedom” (PP 129). Kant defines a state (\textit{civitas}) as “the whole of individuals in a rightful condition, in relation to its own members” (DR 6:311). He writes that a state is

\textsuperscript{49} Cavallar, 117-9.

\textsuperscript{50} Habermas also seems to believe that Kant proposes the idea of a voluntary federation that can be dissolved at any time because he is concerned with preserving the sovereignty of member states (p.118).
also called a “commonwealth” because its members are all united through their common interest in being in a rightful condition (DR 6:311). He uses the word “nation” as another term for the political state (it does not refer to the cultural nation): it is a people unified by common laws and a common external authority.

Kant argues for the autonomy of states as moral persons in the preliminary articles of “Perpetual Peace.” The Second Preliminary Article declares that no independently existing state may be acquired by another state by inheritance, exchange, purchase, or gift (PP 94). Kant explains that a state is not a possession; it is a society of men, which no one other than itself can command or dispose of (PP 94). Like a tree, it has its own roots: “to graft it on to another state as if it were a shoot is to terminate its existence as a moral personality and make it into a commodity” (PP94). He argues that this would contradict the idea of the original contract, which is the basis of the rights of a people (PP 94). This conception of the relation between a state and its people is crucially important to understanding Kant’s claim that states do not have a right to coerce another state into a world republic. Since a state is a society of individuals which no one other than itself can command or dispose of, a state should not be coerced into joining a world republic. Doing so undermines the original contract and the civil condition within states.  

The Fifth Preliminary Article further supports the autonomy of states by establishing the principle of non-interference in their internal matters. While Kant places some limitations on the external sovereignty of states in his articulation of the rights of nations, their internal sovereignty remains absolute. The article declares that no state

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51 Pauline Kleingold develops this argument in “Defending the Plurality of States: Cloots, Kant and Rawls.” *Social Theory and Practice* 32.4 (2006), 559.
shall forcibly interfere in the constitution and government of another state (PP 96). Kant suggests that it would be virtually impossible to justify such interferences. Even if a state suffered from internal conflict or a lawless condition, the interference of external powers would be a violation of the rights of an independent people. He adds that it would be an active offence and would make the autonomy of all other states insecure (PP 96). Kant discusses one exception to this in “Perpetual Peace”: the case of a civil war in which a state is split into two parts, each of which sets itself up as a separate state. If an external state supported one of these, then it would not be seen as interference in another state’s constitution because their condition is one of anarchy (PP 96).

Kant also defends a people’s rights to self-determination and territorial sovereignty in his argument against colonization. In “The Doctrine of Right,” he argues that the right to hospitality when visiting foreign lands does not include a right to make a settlement on the land of another nation. For this, a specific contract is required (DR 6:353). Even in the case of newly discovered lands, such as the Americas, he argues that other nations do not have a right to settle and take possession of the land if other people have already settled in the region, unless they obtain their consent (DR 6:353). As indicated by the Fifth Preliminary Article as well, Kant does not limit a peoples’ right to autonomy and non-interference to nation-states that have a lawful condition or a republican constitution.

Thus, Kant’s conception of states in the Preliminary Articles of “Perpetual Peace” explains why a state should not be dissolved or welded together with other states in the formation of a world state. It also explains why a state cannot be coerced by other states to form a world republic. A state is a society of individuals that no one other than itself
can command or dispose of. Kant’s conception of the juridical nature of states poses an important limitation to the creation of a world state since the use of coercion to force other nations to join a world republic is not justified based on Kant’s conception of the right of states. Hence, it is a mistake to think that Kant is merely influenced by pragmatic reasons when he promotes the gradual development of a voluntary federation rather than the creation of a coercive world republic and that this goes against his own legal and political theory.

3.2. Even if Establishing a Lawful Cosmopolitan Condition is a Just End, States are Not Justified in Forcing Other States into Joining a World Republic

Even if a powerful group of republics sought out to create a world federal republic for the right reasons (to secure perpetual peace), and even if the other pragmatic problems could be addressed, it is clear that for Kant, coercion cannot be used to force other states to join: the voluntary agreement of all states is required.

For Kant, a just end (creating a lawful cosmopolitan condition) cannot justify using unjust means. We must make a case for why states have the right to use coercion to force other states to join a world republic. Kant gives consideration to this means/ends issue is his criticism of European colonization. Kant rejects the specious reasons that are given for colonization, such as the argument that it will be to the world’s advantage to

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52 One might argue that these rights against interference should only apply to republican states that do in fact protect the rights of their citizens and that they should not be applied to corrupt, unjust states that do not represent the people’s united will. However, Kant’s reasoning in his rejection of a right to rebel seems to apply here. Any attempt to establish a more just government through violent means, by an internal group or by an external state, destroys the civil condition that is the basis for all rights. For Kant, while there is a duty to create a republican constitution this ought to be done through gradual reform.
civilize these peoples, arguing that “all these supposedly good intentions cannot wash away the stain of injustice in the means used for them” (DR 6:353). This principle can be used to explain his rejection of the use of coercion to impel other nations to join a federation: the good intention of establishing perpetual peace does not wash away the injustice of using coercive means. Similarly, in his objection against revolutions, he rejects the idea that people may be “unjust once and for all so that afterwards they can establish justice all the more securely and make it flourish” (DR 6:353).

Kant considers the objection that such scruples about using force in the beginning, in order to establish a lawful condition, might well mean that the whole earth would still be in a lawless condition. Kant responds that this consideration cannot annul the condition of right (DR 6:353). Even if the use of violent means to establish a lawful condition cannot be considered just, it does not undermine the resulting rightful condition. This suggests that, for Kant, one cannot question an existing lawful condition based on the fact that it was created through unjust means. As a result, while Kant’s theory can be used to criticize the unjust means used to colonize the Americas, it cannot be used to question the authority of the resulting colonial governments or to justify a revolution against them. Even in the case of corrupt and oppressive governments or defective constitutions, Kant argues that it is wrong in the highest degree for people to revolt and use force to overthrow the government or reshape the constitution (PP 126 and DR 6:353). The reason why this is wrong is because it would annihilate the existing rightful condition and throw everyone into a state of nature. Also, if such justifications of rebellion were to be made into a maxim, Kant states that it would make all lawful constitutions insecure (TP 82 and PP 126).
Kant’s argument against the right to revolution can help to shed light on his rejection of the right to use force to compel states to join a world republic. The use of force in the case of a rebellion is wrong because it annihilates an existing rightful condition and makes all lawful constitutions insecure. Although the use of force is justified in the case of individuals in a state of nature based on our duty to establish a cosmopolitan constitution and perpetual peace, the same cannot be said for states because they already have an internal civil condition. On the one hand, the use of coercion seems to be based on the duty to create a lawful cosmopolitan condition, but at the same time, it undermines the lawful condition within states. Just as a revolution is a problem for Kant since it annihilates an existing rightful condition within a state, so too the use of coercion by other states to force a state to join a world republic and to give up some of its sovereign powers to this world republic is a problem since it undermines the civil condition within a state. Kant makes this clear in the following passage:

…The attempt to realize this idea [the ideal of a rightful association of human beings under public laws as such] should not be made by way of revolution, by a leap, that is, by violent overthrow of an already existing defective constitution (for there would then be an intervening moment in which any rightful condition would be annihilated). But if it is attempted and carried out by gradual reform in accordance with firm principles, it can lead to continual approximation, to the highest political good, perpetual peace (DR 6:355, emphasis added).

Therefore, a rightful association between states may only be brought about by non-coercive means.

One case in which other states can intervene in the internal constitution of another nation is when it constitutes an “unjust enemy”: an enemy whose publicly expressed will reveals a maxim which, if it were made a universal rule, would make any condition of peace among nations impossible. The example he provides is the violation of public
contracts. Since this is a matter of concern to all nations whose freedom is threatened, they are called upon to unite against the unjust state and deprive it of its power to perform such misconduct (DR 6:349). While they cannot divide up its territory among themselves and dissolve the state, since this would be an injustice against its people, which cannot lose its original right to unite itself into a commonwealth, Kant states that they may make it adopt a constitution that will be unfavourable to the inclination for war (i.e. a republican constitution) (DR 6:349). Thus, it is only when their own freedom is actually threatened by an unjust enemy that other states can intervene. Given that Kant characterizes the relations of states as a state of war in which the freedom of each is threatened and in which states that refuse to join a cosmopolitan condition harm other states by doing so, why can we not extend this right to use coercion against an unjust enemy to states that simply refuse to institute a just and lawful cosmopolitan condition? One possibility is that the use of coercion against an “unjust enemy” state is justified based on grounds that are analogous to the right to self-defence. Here, coercion is used not to institute a cosmopolitan constitution but to protect oneself against an aggressive or unjust state. This would be similar to the right to self-defence that individuals possess in the state of nature.

3.3. WHAT IF A WORLD REPUBLIC IS CREATED THROUGH A VOLUNTARY AGREEMENT?

As we have seen, the use of coercion to bring other states into a world republic is unjust and against Kant’s theory of right within states because it undermines the rightful condition within states. A state is a society of individuals that no one other than itself
can command or dispose of (PP 94). However, what if a world republic is created
through the voluntary agreement of states? If we assume that this is possible (even if it
seems unlikely given current political circumstances), and if the other pragmatic
problems can be addressed, are there further problems with a world republic according to
Kant’s political and legal theory?

The first reason Kant provides for a voluntary federation in “Perpetual Peace”
relates to his conception of the sovereignty of states. Kant suggests that the idea of an
“international state” or a “state of nations” gives rise to a contradiction: “every state
involves a relationship between a superior (the legislator) and an inferior (the people
obeying the laws),” but a number of nations forming one state would constitute a single
nation or a single state (PP 102). It would mean the dissolution of nation-states, and
this would conflict with Kant’s affirmation of the moral personality and autonomy of
nation-states. This passage also indicates that a nation-state cannot be both superior over
its people, and inferior to a world state. A voluntary, revocable association of free
states seems to avoid this problem because nation-states retain their supreme sovereignty.

53 McCarthy challenges H.B. Nisbet’s translation of this passage. He argues:
Kant did not write that the federation he espouses “would not be” the same thing as an
international state, but that it “need not be” such. Nor did he write “the idea of a Völkerstaat is
contradictory.” The German phrase here, “darin aber wäre ein Widerspruch” could refer to the
idea of a civil condition among independent nation states, which he is discussing in this paragraph
(272. n.21).
Given the context of the passage, I disagree. I think Kant’s phrase, “darin aber wäre ein
Widerspruch,” (which can be translated as “but therein lies a contradiction”) seems to refer to the
contradictory nature of the idea of an international state. At the very least, the rest of this passage
seems to explain why the idea of an international state or “state of nations” would be
contradictory: because every state involves a relationship between a superior and an inferior,
whereas a number of nations forming one state would constitute a single nation; and secondly,
because it contradicts his initial assumption that the rights of nations involves their relation to one
another as separate, independent states which ought not to be welded together.

54 In “The Doctrine of Right” he argues that in a civil union, there is no partnership between the
commander and subjects; they are not fellow-members. Rather, one is subordinated to the other
One can make sense of Kant’s argument that the head of a state (the executive authority) must have supreme authority by connecting it to his rejection of rebellion and in his criticism of constitutional or limited monarchies. On these two issues, Kant argues that the sovereign’s authority cannot be challenged, limited, or overthrown without undermining civil society. In “Theory and Practice,” Kant argues that even if the supreme legislative power or its agent, the head of state, has violated the original contract by authorizing the government to act tyrannically, subjects are not entitled to rebel. The reason for this is that the people under an existing civil constitution no longer has any right to judge how the constitution should be administered (TP 81). If it had such a right, and if it disagreed with the judgement of the head of state, then who would decide which side is right? There must be an ultimate source that can determine what people’s rights are and what the constitution requires in order for rights to be conclusive and determinate.\(^{55}\) It seems another head above the head of state would be needed to mediate, but this would be self-contradictory (TP 81). Kant concludes that the decision must rest with whoever controls the ultimate enforcement of the public law – the head of state himself. No one in the commonwealth can have a right to contest his authority (TP 82).

In the same passage on page 102 of “Perpetual Peace,” Kant adds that the idea of an “international state” contradicts his initial assumption that the right of nations concerns the relation between separate states, since an international state welds them together into a single unit (PP 102). This suggests that a state of nations is problematic because it threatens the very moral personality and autonomy of nation-states Kant defends in his articulation of the right of nations. His federation avoids this problem because it is a voluntary, revocable association of free states; it does not undermine the

\(^{55}\) I will provide further analysis of this aspect of Kant’s theory in Chapters Two and Three.
supreme authority of the heads of states and it does not transfer this supreme authority to a global sovereign. Thus, even if a powerful group of republics sought to create a world federal republic for the right reasons (to secure perpetual peace), and even if the other pragmatic problems could be addressed, coercion cannot be used to force other states to join: the voluntary agreement of all states is required. For those states that agree to join, using coercion to force them to stay or to abide by the republic’s decisions may also undermine the supreme authority of state governments and the source of their authority – the united will of their people.

It seems possible that a more federal form of a world republic with enforceable public laws may not be inconsistent with the sovereignty and autonomy of states. As McCarthy points out, there is an important difference between a world state understood as a “state of nations” that annihilates nation-states and simply transfers political sovereignty from the level of nation-states to the level of a world state, and a federal world republic of states or a “republic of republics.”

If the latter’s power to use coercion was limited by Kant’s principle of external freedom, then a federal world republic would actually protect the freedom of nation-states against other states which threaten their freedom; states would only lose their natural, lawless freedom in order to secure their rightful freedom. A minimal federal world republic could protect the autonomy of each state and its internal civil condition against unjust interference by other states.

An important underlying problem with the idea of a world republic for Kant is that, according to his own theory, it would have to acquire the same powers of sovereignty that he believes belongs to the nation-state as an independent moral-legal

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56 McCarthy at 272.
person. If a true cosmopolitan condition requires a world republic to also have a supreme coercive authority over the united community of humanity in order for rights to be conclusive, then nation-states cannot retain their supreme authority over their people. Thus, there is a structural limitation to Kant’s idea of a world republic. As Habermas argues, the problem here is not the empirical issue of how to approximate the idea; rather there is a conceptual problem with the idea itself. Even if the other pragmatic problems can be addressed, and even if a world federal republic could be created through voluntary and peaceful means, a world republic with sovereign authority and coercive public laws still seems to conflict with Kant’s conception of the sovereignty of states because of Kant’s theory of what is required for a civil condition within states.

4. ANOTHER POSSIBILITY: RETHINKING SOVEREIGNTY

Despite the different interpretations that are defended by commentators on Kant, many agree that Kant’s voluntary federation of states does not go far enough in instituting a lawful cosmopolitan condition. Without a coercive world republic or at least some kind of external authority that can enforce the rights of nations, these rights remain provisional, indeterminate and inconclusive according to Kant’s theory.

Theories of dispersed sovereignty may be able to address this last objection against a world republic while supporting something stronger than Kant’s voluntary federation. For example, David Held argues for a minimal world government with a world parliament and international court, while others argue for the development of

58 Habermas, 118,
political and legal institutions at the global level without a world government. Theorists who support the dispersed sovereignty model reject the modern idea that there must be a supreme, exclusive authority over clearly defined subjects and territory – the very idea that creates a conflict within Kant’s theory. Instead, they defend a conception of sovereignty in which political authority and jurisdiction is divided and shared at different levels, between different political and legal authorities. Consequently, there may be multiple political authorities over a particular territory and over a particular individual. According to this conception, a nation-state can be superior over its citizens and territory in most respects, and yet inferior to a world government in matters that involve all states, and in matters of conflict between them; this is not viewed as a problem that undermines the civil or juridical condition within states.\(^{59}\)

The idea of “dispersed sovereignty” may appear to be a contradiction given the traditional idea of sovereignty: something either is sovereign or it is not. As suggested by Kant’s own argument for a supreme sovereign, there is a concern that a dispersal of political authority would lead to instability and uncertainty. If we recall Kant’s criticism of a constitutional monarchy, the absence of a single, ultimate sovereign authority or head of state undermines the conclusiveness of rights for Kant. How can we be certain what our rights are if we have different competing political authorities over us? When there is a conflict, how do we determine which authority has jurisdiction over us? I will address these challenges in the next chapter.

Because of the theoretical possibility that there may be conflicts between different political authorities that cannot be conclusively resolved by a higher authority and that this may lead to a power struggle, the dispersed sovereignty model would of course not

\(^{59}\) Kenneth Baynes.
be able to satisfy Kant’s own view of what is required for rights to be conclusive. Consequently, a strict Kantian may not accept this as a solution to the conflict created by Kant’s conception of supreme sovereignty. Despite this, there is another important aspect of Kant’s theory that could be used to support a greater dispersal of sovereignty within and above the nation-state if this would more effectively promote justice and democracy in the contemporary world than the traditional concentration of power in nation-states.

While Kant goes beyond Hobbes and other seventeenth and eighteenth century social contract theorists with his theory of international right, the starting point of his political theory is still the nation-state. For Kant, the nation-state is based on the idea of the original contract. He does not explain why the united will of a civil society is best expressed and limited at the level of the nation-state. This was of course how political society happened to be organized in Europe at the time. Theories of nationalism provide a reason for circumscribing the political state to the cultural nation. However, Kant’s starting postulate that “all men who can at all influence one another must adhere to some kind of civil constitution” suggests a more dynamic model of legal and political organization based on the actual interactions between human beings, as opposed to the nationalist model which is based on a nation’s common language, ethnic heritage, or religion (PP 98). The actual interactions between human beings may require more local forms of political and legal organization in some cases, and wider forms in other cases. For example, to the extent that we have entered into a global community, Kant’s starting principle requires some kind of political and legal organization at the global level. However, this principle may also require multiple levels of overlapping civil societies, each one united by ongoing interactions between people, and by different levels of
common public laws and political institutions which can be seen as representing the united will of those over which they govern.

5. Conclusion

In this chapter, I have argued that there is more to Kant’s support for a voluntary, non-coercive and revocable federation of states as a substitute for the unrealizable ideal of a world republic than mere pragmatic considerations. While Kant begins his theory of cosmopolitan right by presenting a domestic analogy, he recognizes an important difference between how a rightful condition may be created between individuals and how it may be created between states. The relevant difference is that while individuals in a state of nature are in a completely lawless condition, states in an international state of nature have an internal lawful condition. The sole purpose of a state is to establish and maintain rights for its citizens. A state is a society of people that no one other than itself can command or dispose of. Consequently, while individuals have the right to use coercion to force other individuals into a civil society if they cannot avoid interacting with each other, Kant does not recognize a similar right to use coercion to force other states into a world republic. As a result, a world republic would have to be created based on the voluntary will of states and their peoples, and it would have to be maintained based on their will as well. The latter suggests that states have the right to leave any such world republic and cannot be coerced to stay. Kant does not explicitly address this point but it explains why he argues that the voluntary federation of states is revocable and states are free to leave.
Kant’s legal and political theory creates an additional problem for the idea of a world republic, even one that is created through voluntary means. There is an internal tension within Kant’s legal and political theory between what is required for a lawful condition within states and what is required for a lawful condition between states. How can we reconcile the political sovereignty of nation-states with the political sovereignty that would be required for a world government? This is an important challenge that is raised by contemporary defenders of nationalism and that needs to be addressed by contemporary defenders of world government. The modern idea of absolute, supreme sovereignty makes this reconciliation impossible. Kant defends this conception of supreme sovereignty because of his view that the determination of rights must be conclusive in order to have a rightful condition. I will examine his reasons for this further in the next chapter.

While many contemporary political theorists and Kantian scholars are skeptical about the idea of a coercive world republic, most would also agree that Kant’s voluntary non-coercive league does not go far enough. However, there may be other forms of global political and legal governance that can address the issues discussed in this chapter and provide a further approximation towards Kant’s ideal of a juridical condition at the global level. Rather than simply transferring sovereignty from nations to a world republic, theories of dispersed sovereignty and contemporary examples of federal forms of governance demonstrate that political authority can be divided and shared, not just between institutions of global governance and states, but at other meaningful levels of governance, within and beyond states. Kant’s starting postulate seems to provide a
fruitful basis for such dispersed conceptions of political community and political authority. In the next Chapter, I will examine this possibility further.
CHAPTER TWO

THE MODERN IDEA OF INDIVISIBLE, ABSOLUTE SOVEREIGNTY

AND PLURALIST CONCEPTIONS OF DISPERSED SOVEREIGNTY

As I argued in the previous chapter, a problem that arises with Kant’s analysis of cosmopolitan right is how to reconcile the sovereignty of nation-states and what is required for a lawful condition within states with the sovereignty of a world government and what is required for a lawful cosmopolitan condition. I suggested that this problem could be addressed by moving away from the modern idea of unitary, exclusive, supreme state sovereignty towards a pluralist model of political sovereignty that is commonly described as dispersed, divided, or shared sovereignty.

Many contemporary theorists do not see the tension between the sovereignty of nation-states and the sovereignty of a world government as a difficult tension that needs to be resolved. Supporters of a world government welcome the weakening of state sovereignty, while nationalists argue that the fact that a world government would limit and undermine the sovereignty of states is a reason to reject world government. There are various arguments given in defence of state sovereignty. In addition to the more obvious ethnic or nationalist arguments, there are also democratic-based arguments based on the idea that state sovereignty is required for social cooperation and political cohesion. I will focus on the argument that state sovereignty is required to maintain a civil or lawful condition within states as found in Kant and other modern philosophers, namely Bodin, Hobbes, and Pufendorf. Based on this modern justification of state sovereignty, a world
government is rejected because it would undermine the political and legal order created within states.

A model of dispersed sovereignty could be used to respond to these modern arguments and to contemporary versions of these arguments against a world government. Such arguments are strongest against the idea of a centralized, unitary world state with ultimate supreme authority. However, they seem to have less force against a minimal world government with a federal, dispersed structure of authority. In attempting to address such objections even further, some contemporary political philosophers have proposed a model of global governance and the rule of law without a world government. I will consider the strengths and weaknesses of a more decentralized model of international law in Chapters Three and Four.

In the first part of this chapter, I will provide a historical overview of the modern idea of absolute sovereignty and I will examine the arguments given for this idea by Kant and other modern philosophers. In the second part, I will consider the model of dispersed or shared sovereignty as defended in the modern period by Leibniz and more recently by Thomas Pogge. In the third section, I will consider objections against pluralist conceptions of dispersed sovereignty, including the objections raised by Kant’s theory of public right. I will consider the example of Canadian federalism and developments in international law in response to these objections.

Supporters of dispersed sovereignty accept that there can be multiple political authorities over a particular territory, area of jurisdiction, or particular individual, and they support the development of supranational political authorities and increasing self-

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government for intra-national political authorities. There are two reasons in favour of this conception of sovereignty. First, it more accurately reflects the diverse forms of political organization in the contemporary world. Second, it supports the development of political authorities within, beyond, and above the nation-state that may be better able to promote justice and democracy in the contemporary world. In the fourth section of this chapter I will consider and support such normative arguments for dispersed sovereignty.

1. THE MODERN IDEA OF SOVEREIGNTY

The idea of “shared sovereignty” or “dispersed sovereignty” appears contradictory when considered against the modern conception of sovereignty – a conception that continues to have a strong influence in contemporary political thought and practice. Conceptions of sovereignty in the modern period posited a single entity as having exclusive, supreme authority and power within the territory of a state and over its citizens. Under this conception, either there is a sovereign authority or not; the idea that sovereignty can be shared seems an impossibility since there can only be one ultimate supreme authority. Some contemporary theories of sovereignty also conceive of sovereignty as something that is either present or absent rather than something that can exist partially or in degree.  

Under the modern Westphalian model of the state system, state governments were thought to have exclusive internal and external sovereignty over their territory and citizens, free from external interferences from other states and agents, and free from internal interferences from other authorities, including religious authorities. This differs

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61 For example, Alan James, "The Practice of Sovereign Statehood in Contemporary International Society," Political Studies 47 (1999), 463-4. I will consider his arguments below.
from the conception of authority in the Middle Ages, in which emperors, kings, popes, bishops, nobles and vassals possessed significant authority over people and land. In some cases, this led to conflicting claims of supremacy between kings, other feudal authorities, and religious authorities. Since the Peace of Westphalia (1648) recognized the political authority of kings over the authority of the Church, it marked a significant change toward the idea that state governments had supreme authority within their territory.

Despite the significance of this treaty, the development of the sovereign state system began in Europe a few centuries before the Peace of Westphalia, and it took another few centuries to develop and encompass the world (even though the Westphalian idea of states has never existed fully). As Held argues, the modern regime of sovereignty (what he calls the regime of classic sovereignty) did not receive its fullest articulation until the late 18th and early 19th centuries when the following features of states became the core principles of international society: supreme authority over all subjects and objects within a given territory (territorial sovereignty), recognizing no temporal authority as superior to themselves; the formal equality of states; non-intervention in the domestic affairs of other recognized states; and state consent as the basis of international legal obligations. 62 Under this model, states form separate and discrete political orders with their own interests, backed by their organization of political power, and act under the principle that might makes right in the international world. 63 While the historical

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63 Held, 4.
reality was more complex and compromised,⁶⁴ Held argues that this should not lead us to ignore the structural and systematic shift in the principles underlying the political order during this period.⁶⁵ The end of the Westphalian period is marked by the end of World War II, as external state sovereignty became more and more circumscribed by developments in international law in the late 20th century. Of course, many important elements of the Westphalian sovereign state system are still present today.⁶⁶

Jean Bodin is commonly regarded as the first to develop a modern theory of sovereignty.⁶⁷ In the 16th century, during a time of intense religious and civil struggles in France, Bodin argued that the only way to achieve order was to unite every state or political community under a determinate sovereign authority whose powers would be decisive, supreme and recognized as the rightful or legitimate basis of all political authority.⁶⁸ According to this account, sovereignty is the undivided and untrammeled power to make and enforce the law – it must be absolute.⁶⁹ As Bodin states, “it is the distinguishing mark of the sovereign that he cannot be subject to the commands of another, for it is he who makes law for the subject.”⁷⁰ Under this conception, the sovereign is the ultimate source of law and outside and above all law. The sovereign is not subject to its own laws or any positive laws, nor can it be subject to any other

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⁶⁶ For example, the principle of state sovereignty is a fundamental principle in The Charter of the United Nations. Article 2 (1) affirms: “The Organization is based on the principle of the sovereign equality of all its Members.”
⁷⁰ Bodin, Chapter VIII.
authority, political or religious. There is one limitation on the sovereign’s power: the sovereign is bound by natural and divine law. However, despite this normative limitation, the sovereign is not subject to any external temporal authority that can judge whether it has violated natural or divine law. Thus, such violations can never justify rebellion for Bodin.

Thomas Hobbes presents a similar model of supreme sovereign authority in *Leviathan*, but on more secular foundations. Like Bodin, Hobbes also wrote in a time of civil war and this appears to have motivated his argument for absolute sovereignty. For Hobbes, a single, ultimate sovereign authority is required to end the war of all against all in the state of nature (where life is brutish, nasty and short), and secure order and peace. It is also required to ensure the rule of law or a civil condition. An external sovereign power that stands above its citizens is required to ensure rights and justice. In a state of nature, individuals can never be secure in their rights and agreements for two reasons. First, since each rational person will act according to what she perceives to be in her interests, any agreement one makes is insecure. There is no assurance that the other party will comply, and given this, it may be in one’s own interests to not comply. The external threat of force gives everyone a reason to fulfill their contracts and respect the rights of others. Consequently, a sovereign coercive power is required to enforce rights and contracts. I will discuss this further in Chapter Four. In addition, since individuals may also disagree in their interpretation and application of the terms of a contract or what their rights are, a supreme judge is required to resolve this indeterminacy and settle

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71 Thomas Hobbes, *Leviathan*, C.B. Macpherson (ed.), (New York: Penguin Classics, 1982). According to pre-modern accounts of sovereignty, the authority of kings and princes was delegated from God, and the obligation to obey Christian sovereigns was derived from one’s obligation to obey God. Bodin appears to retain this idea whereas Hobbes provides a secular justification for political authority and our obligation to obey the sovereign.
conflicts. For Hobbes, the sovereign is the supreme law-maker (it determines people’s general legal rights and duties), the supreme judge and the supreme enforcer of law. For Hobbes, the rights and powers of sovereignty must be indivisible in order to have order and a stable civil condition, and the rights and powers of sovereignty must be indivisible. In this way, what peoples’ rights are can always be conclusively determined: it is whatever the supreme, sovereign authority determines.

For Hobbes, the single source of sovereign authority is absolute, unlimited, and above the law. The sovereign ruler must be unitary and centralized because otherwise, dividing supreme power among several persons or corporations would cause disagreements and the state might be dissolved, leading back to a brutish state of nature. Similar to Bodin, Hobbes also recognizes certain normative limitations on the sovereign’s power: the sovereign is bound to follow and apply the laws of nature. However, like Bodin, Hobbes argues that subjects cannot disobey or rebel on the grounds that the sovereign has failed in this duty, nor is there any other authority superior to the sovereign that can judge whether or not it has failed in this duty.

This idea of sovereignty as supreme and exclusive authority is also found in the theories of Pufendorf, Locke, Rousseau, and of course Kant (as discussed in Chapter One), even though there are significant differences in their political theories. Bodin and Pufendorf argue that the idea of sovereign authority is compatible with monarchy, oligarchy or democracy, but they regard monarchy as superior. Hobbes also suggests that the allocation of sovereign authority to a single person or an absolute monarch is superior, but his theory is compatible with other forms of government provided that there is one, single, indivisible, clear source of ultimate authority. While Kant also argues for a

72 Ch.18, pp. 236-237.
supreme sovereign authority, one that is absolute in the sense that it cannot be questioned or challenged from within (for example, through revolution) or from external entity, his conception of government is less unitary than that of Hobbes because he proposes some separation between the legislative, executive and judicial branches of government.73 Kant also differs from Hobbes and other modern philosophers by proposing international rights and duties that limit the external sovereignty of states. For example, in the “Preliminary Articles for a Perpetual Peace,” he proposes that no state shall be acquired by other states through exchange, purchase or gift (Article 2), and that states shall not interfere in the internal matters of other states (Article 5) (PP 94-6). For Hobbes, the relation between states is and will remain a state of nature: states do not have any rights or duties against other states. It is a condition determined by might, not right.

Locke most clearly differs from these other modern philosophers in his recognition of a right of revolution. Sovereign authority is transferred from the people to the governing body, but it can be transferred back if the governing body fails to fulfill its obligations under the social contract.74 For Rousseau, it is the collective people within a state that has ultimate sovereignty, not the government. Laws must be based on the general will of the people, and the government is bound to represent the general will. Rousseau’s theory allows for revolution. If all the citizens together were to form an

agreement to break the social contract, they may do so. In both Locke and Rousseau, there is still a supreme sovereign authority – the people.

The idea of sovereignty as supreme authority still prevails in contemporary conceptions of political rule. In contemporary theories of republicanism and democracy, the people are regarded as the ultimate source of sovereign authority. In some conceptions of constitutional governments, a body of constitutional law is regarded as having ultimate sovereignty since it limits the powers of government.

An example of a contemporary theory of sovereignty that conceives of sovereignty as an absolute condition is provided by Alan James. He argues that sovereignty is either present or absent, with no intermediate possibilities; it cannot exist partially or in degree. He defines sovereignty in terms of constitutional independence, an attribute which political entities either have or not; it is what distinguishes states from non-states. He criticizes other conceptions of sovereignty which are relative, such as those that define sovereignty in terms of jurisdictional independence and political independence, things which a political entity can possess in degree. For James, constitutional independence means that no other entity is in the position of being formally able to make decisions regarding either the internal or the external affairs of the territory. Although a sovereign state can transfer over to another state or international body the legal right to make decisions with respect to certain internal matters which are binding on the state, the crucial point is that the decision to grant such rights rests on the decision of the sovereign state. For example, while former British colonies may have had

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76 James, 463.
77 James, 464.
a considerable measure of self-government, they were not sovereign because they did not have ultimate governmental authority over their territories – Britain did. They acquired sovereignty and became sovereign states when Britain relinquished its legislative and executive power over them, and ultimate governmental authority rested with the new states.

James provides a narrow conception of sovereignty. One of the reasons for limiting the idea of sovereignty as he does is that it is helpful internationally because it distinguishes which political communities count as states and which do not. As will be discussed below, theories of dispersed sovereignty use the term more broadly, in terms of political and jurisdictional independence. A reason to favour such broader conceptions is that they more accurately reflect the distribution of political power in the contemporary world. In addition, there are normative reasons to favour a broader conception of sovereignty since it provides greater recognition to political communities below and above the nation-state. As will be discussed below, Thomas Pogge appeals to both reasons in his own conception of dispersed sovereignty.

2. THE PLURALIST CONCEPTION OF DISPERSED OR SHARED SOVEREIGNTY

Some contemporary writers who criticize the absolute, exclusive, unitary nature of the modern conception of sovereignty argue that the concept itself ought to be abandoned. Others, however, argue that the concept should be revised by recognizing that political sovereignty need not be understood as unitary, absolute and exclusive; rather, political

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78 James, 465.
sovereignty is something that can be divided and shared. Under the idea of “dispersed sovereignty” or “shared sovereignty,” political authority and power is divided or shared between different governments and political entities. It may be more accurate to think of this in terms of dividing political power, legal jurisdiction, and authority between different governing bodies within an overarching system, as demonstrated by contemporary examples of federalism. Different governing bodies have jurisdiction over different territorial areas, different groups of people, or different issues. In some cases, political authority over a given area is shared between different levels of government, but in other cases, a governing body may have exclusive authority over certain areas of governance. This model conflicts with the modern idea that there must be a single, supreme political authority over the entire territory of a state and its citizens.

2.1 Leibniz’s Defence of the Pluralist Model of Sovereignty that Existed During the Medieval Period

The idea of dispersed sovereignty is not entirely new, even if the term itself was not used until recently. This concept can be used to characterize the Medieval period and the political situation Bodin, Hobbes and Pufendorf argue against. For example, in his defence of centralized sovereign states, Pufendorf argues that states that have a unified and centralized arrangement of power and authority are strong and coherent while states that lack centralization of power and authority are weak, incoherent, and prone to disorder. He refers to centralized states as regular and perfect states, and he refers to the non-centralized states as irregular and imperfect. Pufendorf uses this normative

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distinction to reject theories that supported mixed, balanced, or federal arrangements of political authority.\(^{81}\)

The two most significant philosophers at the time who supported mixed, balanced or federal arrangements of political authorities were Gottfried Leibniz and Johannes Althusius. They defended the greater dispersal of political authority that was present in the late Medieval period against the development of centralized states with supreme sovereignty. I will focus on Leibniz’s arguments.

Leibniz explicitly criticizes Hobbes’ and Pufendorf’s arguments for attributing supreme, exclusive sovereignty to nation-states. Leibniz undermined the classic, modern conception of sovereignty by defining the term sovereignty simply in terms of internal control and influence in political affairs. Unlike the concept of sovereignty we see in Hobbes and Kant, Leibniz’s conception of sovereignty does not include the idea that sovereignty must be supreme, absolute, or exclusive. For Leibniz, the sovereign “is he who is master of a territory” and who is “powerful enough to make himself considerable in Europe in time of peace and in time of war, by treaties, arms and alliances,” whether the sovereign “holds his land as fief, nor whether he recognizes the majesty of a chief, provided that he be master at home and cannot be disturbed except by arms.”\(^{82}\) If one had some authority over a territory or over a group of people, one could be considered “sovereign” even if one was also subject to a higher authority. Rather than understanding sovereignty in absolute and exclusive terms whereby either “x is sovereign” or “x is not sovereign,” Leibniz conceives of sovereignty as a comparative standard that characterizes various political entities below and above the state. Leibniz tried to preserve something

\(^{81}\) Tully, “Introduction”, Pufendorf, xxxv.

\(^{82}\) Patrick Riley, “Introduction,” The Political Writings of Leibniz (Cambridge: Cambridge University Press, 1972), 27, FN 150 & 151; citing Leibniz F de C VI, p.347.
of the hierarchy and balance of social forms from the late Middle Ages, to which the state was only one part, above households and other natural voluntary societies, and below the universal authorities of the Church and Emperor.\textsuperscript{83}

Against Hobbes’ argument that the sovereign ruler must be unitary and centralized because otherwise, dividing supreme power among several persons or corporations would cause disagreements and the state might be dissolved, Leibniz argues that Hobbes’ fallacy lay in thinking “that things which can entail inconvenience should not be borne at all.”\textsuperscript{84} While Leibniz recognizes that when supreme power is divided, many dissensions and even wars could arise, he argues that experience shows us that “men usually hold to some middle road, so as not to commit everything to hazard through their obstinacy.”\textsuperscript{85} He considers the example of Poland and Holland at that time. Although the disagreement of one territorial representative could upset important plans or dissolve the assembly, he notes that most matters turned out well enough because of the prudence and moderation of those who preside over them.\textsuperscript{86} Leibniz also argues that Hobbes’ idea of absolute sovereignty is unreal, “neither possible nor desirable – unless those who must have supreme power are gifted with angelic virtues.”\textsuperscript{87} In contrast to Hobbes, Leibniz thought that political life was not made possible by “mandates given

\textsuperscript{83} Riley, 30
\textsuperscript{84} Gottfried Wilhelm Leibniz, “Caesarinus Fürstenerius (De Jure Suprematus ac Legationis),” in Patrick Riley (ed.) The Political Writings of Leibniz (Cambridge: Cambridge University Press, 1972) at 118.
\textsuperscript{85} Riley, 28, FN 154; Leibniz at 119.
\textsuperscript{86} Riley, 28, FN 155; Leibniz at 119. Riley argues that the advantage of Leibniz’s conception of sovereignty is that he was able to see Switzerland and the Netherlands as real governments, on par with the more centralized European states. Under the modern idea of sovereignty, these were seen as mere alliances of smaller sovereign political units (the cantons of Switzerland and the provinces of the Netherlands), or as imperfect or irregular states (as in Pufendorf’s terminology). “Federal Theory in International Relations,” 114.
\textsuperscript{87} Leibniz, “Caesarinus Fürstenerius”120.
from the plenitude of power,” backed up by the threat of force, but by “negotiations and discussions.”

Leibniz’s arguments are directed at Hobbes, not Kant. Leibniz argues against Hobbes’ pragmatic arguments for an absolute, exclusive sovereign. While Hobbes believes this is necessary for peace and order and that civil wars and disorder will arise without it, Leibniz believes that concentrating political power in one ruling power is both not feasible and dangerous. Against Hobbes’ worry that we will have civil wars and disorder without an absolute sovereign power, Leibniz points to historical examples of divided sovereignty to show that in practice, it can work quite well.

Since Leibniz’s arguments against Hobbes are pragmatic and consequentialist, they may not work against Kant. Kant does not simply argue that a supreme sovereign is required as the best way to achieve peace and order. Instead, a supreme sovereign authority that represents the united will of all is required for rights to be conclusive and for the autonomy of citizens to be respected. Even if matters turned out well enough without a supreme sovereign authority, and even if private rights to property and contract were generally respected and conflicts were settled in ways that we were agreeable to all, this would not be a just condition. No matter how good natured people are, there is always the possibility that rights to property will be infringed upon, or contracts not respected. When such infringements occur, a rightful condition for Kant requires that conflicts be settled in a conclusive way by an impartial authority that represents the united will of all rather. For Kant, this requirement is based on his very conception of rights. Rights must be conclusive, universal, and reciprocal. There must be a single,

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88 Leibniz, 119.
89 Of course this would be an oversimplification of Hobbes’ view as well.
supreme authority that can determine what people’s rights are and that can conclusively settle conflicts between them. If there is more than one possible authority that can settle this, then we have a problem of indeterminacy and rights are not conclusive or universal. After examining contemporary conceptions of dispersed sovereignty, I will return to Kantian-based objections against this model.

Other important writers in the history of legal and political thought have similarly rejected the modern idea of sovereignty as indivisible, exclusive and supreme. For example, in the 19th century, John Dewey argued that the concept of sovereignty applied to all political institutions and not just the modern, centralized nation-state: “Every institution then has its sovereignty, or authority, and its laws and rights. It is only a false abstraction which makes us conceive of sovereignty, or authority, and law and rights as inhering only in some supreme organisation, as the national state.”

Henry Sumner Maine, a late 19th century legal theorist, argued against John Austin’s idea of indivisible sovereignty. He argued that according to international law, sovereignty was a bundle of divisible rights:

The powers of sovereigns are a bundle or collection of powers, and they may be separated one from another. Thus a ruler may administer civil and criminal justice, may make laws for his subject and for his territory, may exercise power over life and death, and may levy taxes and dues, but nevertheless he may be debarred from making war and peace, and from having foreign relations with any authority outside his territory.

2.2 CONTEMPORARY CONCEPTIONS OF DISPERSED SOVEREIGNTY: THOMAS POGGE

Once sovereignty is viewed as a bundle of rights, this bundle can be pulled apart. Allen Buchanan argues for such an “unbundling” of sovereignty. By this he means unbundling the set of powers, claim-rights, liberties and immunities that have traditionally been thought to define sovereignty.\textsuperscript{92} As a result, states may not have all the rights, powers, liberties and immunities that were thought to attach to traditional sovereignty. This also allows for intrastate political communities to have some of these rights, powers and liberties, but less than fully recognized states.\textsuperscript{93}

Many writers simply refer to “dispersed sovereignty” or “plural sovereignty” without clearly specifying what this means and how it differs from more traditional ideas of sovereignty.\textsuperscript{94} As a way of understanding this concept, I will focus on Thomas Pogge’s definition of sovereignty in his defence of the vertical dispersal of sovereignty and how he distinguishes it from the idea of “absolute sovereignty.” Pogge defines sovereignty as follows: a governmental body or officer (G) is sovereign over a group of persons (P) if and only if G has unsupervised and irrevocable authority over P:

\begin{enumerate}
\item to lay down rules constraining their conduct, or
\item to judge their compliance with rules, or
\item to enforce rules against them through preemption, prevention, or punishments, or
\end{enumerate}

\textsuperscript{92} Justice, Legitimacy and International Law (Oxford University Press, 2005) at 56.
\textsuperscript{93} Justice, Legitimacy and International Law at 56-7.
\textsuperscript{94} In general, there is much confusion and lack of clarity regarding what people mean by the term sovereignty. As Oppenheim notes: “There exists perhaps no conception the meaning of which is more controversial than that of sovereignty. It is an indisputable fact that this conception, from the moment when it was introduced into political science until the present day, has never had a meaning which was universally agreed upon.” Lassa Oppenheim, International Law: A Treatise, Vol.1, ed. Ronald F. Roxburgh, (Clark, New Jersey: The Lawbook Exchange Ltd., 2005), 129,
(iv) to act on their behalf vis-à-vis other agencies (ones that do or do not have authority over them) or other persons (ones whom G is sovereign over, or not).95

The first three features of sovereignty refer to the legislative, judicial and executive functions of government. While the first three features correspond to internal functions of sovereignty, the last feature captures an important element of external sovereignty: the authority to represent and act on behalf of those one is sovereign over vis-a-vis other agents, such as other states.96

Pogge distinguishes this conception of sovereignty from the idea of “absolute sovereignty” in which no other agency can have any authority over G or any authority over P that is not supervised and revocable by G. If one defines “sovereignty” in terms of this kind of conception of “absolute sovereignty,” then the expression “distribution of sovereignty” would be an oxymoron.97 Those who reject the idea of dispersed, divided or shared sovereignty for being contradictory seem to have this conception of sovereignty in mind. This is the conception that was defended in the modern political theories of Hobbes, Bodin, Kant and others. Pogge still defines sovereignty strongly as “unsupervised and irrevocable” governing authority, but unlike the conception of “absolute sovereignty” there can be more than one such governing authority over a person.

95 Thomas W. Pogge, “Cosmopolitanism and Sovereignty,” *Ethics* 103 (1992), 48 at 57.

96 Under the modern conception of state sovereignty, the relationship between individuals and other states is mediated through their state of nationality. This corresponds to the Westphalian model of international law and the idea that states are the only legal agents in international law. For example, individuals or non-state groups cannot bring an action before the International Court of Justice against other states that have harmed them; instead, an individual’s state must bring an action.

97 Pogge, 57.
As Pogge notes, the idea of the autonomous territorial state as the pre-eminent model of political organization is central to contemporary political thought and reality.\(^\text{98}\) In our current world, sovereignty is heavily concentrated at a single level – the state. For nearly every human being, and for almost every piece of territory, there is exactly one government with supreme authority over this person or territory and with primary responsibility for this person or territory. Each person is thought to owe primary political allegiance and loyalty to this government with supreme authority over him or her.

National governments dominate and control the decision making of smaller political units as well as supranational decisions, which tend to be made through intergovernmental bargaining. The one exception to this is the European Parliament.\(^\text{99}\)

Pogge argues that this concentration of sovereignty at one level is no longer defensible from the standpoint of a cosmopolitan morality that centers around the fundamental needs, interests and rights of all individual human beings.\(^\text{100}\) Based on his cosmopolitan morality,\(^\text{101}\) he argues that persons should be citizens of, and govern themselves through, a number of political units of various sizes, without any one political unit being dominant and thus occupying the traditional role of state. He argues that this

\(^\text{98}\) Pogge, 57-8.
\(^\text{99}\) Pogge, 58.
\(^\text{100}\) Pogge, 58.
\(^\text{101}\) Pogge theory of moral cosmopolitanism is formulated in terms of a minimal conception of human rights. He argues that all cosmopolitan theories share three elements.
(1) Individualism: the ultimate units of concern are persons rather than nations, states, family lines, tribes, ethnic, cultural or religious communities. The later may be units of concern only indirectly in virtue of their individual members or citizens.
(2) Universality: the status of this ultimate unit of concern attaches to every living human being equally, regardless of nationality, ethnicity, religion, etc. In the case of Pogge’s theory, this means that all human beings have human rights.
(3) Generality: this special status has global force. Persons are ultimate units of concern for everyone, not only for their compatriots, members of their cultural or religious communities, etc. (48-9)
kind of institutional framework would provide the best fulfillment of human rights.\textsuperscript{102}

political allegiance and loyalties should be widely dispersed over these units: neighbourhood, town, county, province, state, region, and world at large. People should be politically at home in all of them, without converging upon any one of them as the lodestar of their political identity.\textsuperscript{103} He recognizes that many individuals might identify more with one of their citizenships than with the others. But in a multilayered scheme such prominent identification would be less frequent, and would not converge. For example, some residents of Glasgow may see themselves primarily as British, but others would identify more with Europe, Scotland, Glasgow or humankind.\textsuperscript{104}

3. Objections to the Idea of Dispersed Sovereignty

Pogge considers two types of objections to a vertical division of sovereignty. The first kind of objection denies that sovereignty can be divided at all.\textsuperscript{105} The second type of objection is specifically directed at a vertical division of sovereignty.\textsuperscript{106}

3.1 The Objection That Denies That Sovereignty Can Be Divided at All and

Pogge’s Response

\textsuperscript{102} Pogge presents a broadly consequentialist assessment of what global institutional scheme produces the best pattern of human rights fulfillment (54).
\textsuperscript{103} Pogge, 58.
\textsuperscript{104} Pogge, 58, fn.18. Thomas Franck similarly observes that individuals have multiple identities and multiple loyalties and that these are increasingly facilitated by changes in legal systems and cultures. The type of loyalty once pledged only to a national government can also be simultaneously pledged to various other political entities (supranational, global and more local), as well as to religious, familial, and business groups, or clans. Multiple citizenship laws are an example of this change. He argues that there is a growing recognition of a personal right to develop one’s identity as individuals forge their own personal identities in an unprecedented way. Thomas Franck, “Clan and Superclan: Loyalty, Identity and Community in Law and Practice”, \textit{The American Journal of International Law}, Vol. 90, No. 3 (Jul., 1996), 359-383.
\textsuperscript{105} Pogge, 59.
\textsuperscript{106} Pogge, 60.
Pogge argues that the first objection rests on the belief that a juridical state (as distinct from a lawless state of nature) presupposes an absolute sovereign. A juridical state is thought to involve a recognized decision mechanism that can resolve disputes conclusively. According to this view, a written or unwritten code (constitution) all by itself cannot settle disputes because questions of interpretation will arise.\(^\text{107}\) As argued by Hobbes, Bodin and Kant, an ultimate, supreme, unconstrained sovereign is required to settle disputes in a conclusive manner (i.e. by a supreme law-maker or judge). If such a political authority or governmental agency is limited or divided, whether horizontally (by territory or governmental function) or vertically as Pogge proposes, then according to the Hobbesian and Kantian conception of sovereignty, a juridical condition has not been achieved since conflicts will arise over the precise location of the limit or division; a conclusive, authoritative way to settle these boundary issues is required for a juridical condition. Although a political authority may still be limited by obligations (such as by laws of nature (Hobbes), the dictates of reason (Kant), or principles of justice), these can only obligate \textit{in foro interno}; they cannot authorize subjects or some other agency to determine whether the sovereign is overstepping its powers since there would then be no conclusive way to resolve such conflicts.\(^\text{108}\) This conception of a juridical condition requires an absolute, exclusive sovereign.\(^\text{109}\) When this conception is applied globally, it requires a world sovereign with ultimate, overriding sovereignty.

\(^{107}\) Pogge, 59.
\(^{108}\) This argument for an absolute sovereign is presented most strongly in Hobbes’ \textit{Leviathan} (Chapters 14, 26, and 29). Pogge notes that it is prefigured in Aquinas, Dante, Marilius, and Bodin. As discussed in the previous chapter, Kant also defends this view in his argument against revolution. Pogge states that this dogma maintained its hold well into the twentieth century, when it declined together with the Austinian conception of jurisprudence. I will consider Hart’s rejection of Austin’s conception in Chapter Four. Pogge, 59, fn 20.
\(^{109}\) Pogge, 59.
In response to this objection, Pogge argues that from a practical point of view we know that law-governed coexistence is possible without a supreme and unconstrained agency.\footnote{Pogge, 59. This is similar to Leibniz’s argument against Hobbes.} The most common example of this is a constitutional democracy with a division of powers between the legislative, executive and judicial branches. There is the possibility of ultimate conflicts between these branches in which the correct method of resolution is contested. For example, the three branches of government in a constitutional democracy might engage in an all-out power struggle, each going to the brink of its constitutionally authorized powers, as each understands it.\footnote{Pogge, 59.} From a theoretical point of view, this possibility shows that we are not insured against the danger of constitutional crises. However, from a practical point of view, this does not undermine our confidence in a genuine division of powers because the history of constitutional democracies have shown us that such crises need not be frequent or irresolvable, and that constitutional democracies can endure and can ensure a robust juridical state.\footnote{Pogge, 60.}

Pogge argues that the same point applies in the vertical dimension as well. Just as the assumption that sovereignty must ultimately rest with one of the branches of government is not justified, neither is the assumption that in a multilayered scheme, sovereignty must be concentrated on one level exclusively.\footnote{Pogge, 60.} As the history of federalist regimes shows, a vertical division of sovereignty can work quite well in practice, even while it leaves some conflicts over the constitutional allocation of powers without a legal path of authoritative resolution.\footnote{Pogge, 60.}
Michael Blake argues that Pogge’s argument is ingenious, but ultimately unsuccessful.\(^{115}\) He notes that the three branches of American government, however distinct their powers, ultimately owe their authority to the consent (tacit or hypothetical) of the same set of persons – citizens who are under the coercive web of American law. Each part of the American government is responsible to the same set of people, each in its own way.\(^{116}\) Blake suggests that a more appropriate analogy may be the separation of states within the American union. However, he finds it tempting to suppose that the success of American federalism has more to do with the legal supremacy of the United States Constitution. If so, then a functioning global federal society might require more powerful global political institutions.\(^{117}\) Since Blake considers the legal supremacy of the United States Constitution to have a central role in the success of American federalism, his argument also supports global constitutionalism: the creation of a global constitution that clearly delineates each state’s powers and authority, as well as the powers and authority of international political institutions.\(^{118}\)


\(^{116}\) While this is true, it seems to ignore the significance of the conflicts that can occur between these three branches of government and how they can be resolved. For example, courts can restrict the political authority of governments by finding that certain laws or governmental actions violate the constitution or are *ultra vires* (outside the government’s jurisdiction). In this respect, the courts seem to have supreme, ultimate sovereignty. However, while governments are constitutionally bound to follow a court’s decision, they also have the authority to revise the constitution, but only through recognized procedures that are often difficult to fulfill. As I will argue in Chapters Three and Four, it appears that it is the foundational rules that determine how laws are created, changed and applied that is the source of supreme authority in such cases (what H.L.A. Hart calls “secondary rules”), rather than a central federal government or a supreme court. If so, this idea can be extended to the international case.

\(^{117}\) Blake.

\(^{118}\) Some have argued for the juridical importance of developing global constitutionalism through the UN, and based on the *UN Charter*. Ex. Bardo Fassbender, “The United Nations Charter as Constitution of the International Community,” 36 *Columbia Journal of Transnational Law* (1998), 531618. See also Jürgen Habermas, “Does the Constitutionalization of International Law
Whether or not one agrees with Blake’s assessment of the success of American federalism, this does not mean that more dispersed and less centralized forms of federal political systems would not work well. In Section 3.3 below, I will address Blake’s criticism of Pogge’s argument by considering the example of Canadian federalism. In Section 3.4 I will briefly consider how international law restricts state sovereignty without the kind of global constitutionalism or centralized global political institutions that are suggested by Blake’s assessment of American federalism.119

One should be able to notice that Pogge’s reasoning is very similar to Leibniz’s argument against Hobbes. Against Hobbes, Leibniz argued that while conflict is always a theoretical possibility when there are multiple political authorities over a given territory or group of people, from a practical point of view, such arrangements generally worked quite well in Europe. Pogge’s defence of the practical viability of the dispersed sovereignty model can be supported further by Leibniz’s assessment of how this model worked in Medieval Europe.

3.2. THE MORE NARROW OBJECTION AGAINST A VERTICAL DISPERSAL OF SOVEREIGNTY AND POGGE’S RESPONSE

Pogge also considers objections that are specifically targeted against a vertical dispersal of sovereignty. This kind of objection claims that there are certain vertically indivisible governmental functions that form the core of sovereignty. At the most, there can only be a top-down vertical distribution of sovereignty. Any political unit exercising these core

119 This will also be generally addressed by my defence of a decentralized model of international law without a world government in Chapters Three and Four.
functions must be dominant over smaller units within it. It must be free to determine the extent to which these smaller units may engage in their own local political decision making, while itself being immune from regulation and review from these political units. For example, under a strongly centralized federal political system there is one supreme political authority – the federal government. It can delegate some powers to lower levels of government and determine the limits of these powers, but its own authority remains supreme and cannot be reviewed or limited by these lower levels of government. I will consider to what extent Canada fits this model in the next section.

Pogge argues that this objection requires two clarifications that are rarely supplied. First, it fails to show what governmental functions are vertically indivisible. He argues that such functions as economic policy, foreign policy, judicial review, the control of natural resources, the control of security forces, education, health care, income support, the regulation and taxation of resource extraction, pollution, work and consumption, and so on, can all be handled at various levels and indeed are so handled in existing federal regimes and confederations. Secondly, he argues that this objection often does not specify whether the indivisibility of certain governmental functions at the core of sovereignty is derived from a conceptual insight, from empirical exigencies, or on moral grounds.

Pogge considers Michael Walzer’s version of this objection to be a paradigm case. Walzer claims that the authority to fix membership, to admit and exclude, is at least part of an indivisible core of sovereignty: “At some level of political organization something like the sovereign state must take shape and claim the authority to make its

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120 Pogge, 60.
121 Pogge, 60.
122 Pogge, 61.
own admissions policy, to control and sometimes to restrain the flow of immigrants.”¹²³ Pogge argues that Walzer’s “must” does not reflect a conceptual or empirical necessity, for in those senses, the authority in question can be divided. For example, Pogge suggests that it is possible that political units on all levels could be allowed to veto immigration. Rather, it is on moral grounds that Walzer rejects such an authority for provinces, towns, and neighbourhoods since he believes it would “create a thousand petty fortresses.”¹²⁴ Pogge argues that there are reasons for believing that Walzer’s rationale – that cohesive neighbourhood cultures ought to be protected without becoming petty fortresses – is actually better served by a division of the authority to admit and exclude than by the conventional concentration of this authority at the level of the state.¹²⁵ For example, it would be better served if the state were constrained to admit only immigrants who are planning to move into a neighbourhood that is willing to accept them. Neighborhoods may often want to bring in new members from abroad with whom they have special ethnic, religious or cultural ties, and they would benefit from a role in the national immigration control process that would allow them to facilitate the admission of such persons.¹²⁶ Pogge’s discussion of Walzer and immigration illustrates that some of the normative arguments given for a concentration of sovereignty at the level of the state can go either way. It is important to distinguish conceptual arguments (is “sovereignty” something that can be divided or shared), from arguments about what is feasible in practice (would a greater dispersal of sovereignty function well or would it lead to

¹²⁵ Pogge, 61.
¹²⁶ Pogge, 61.
disorder and chaos), and from normative arguments about which model best achieves certain normative goals.

Pogge, Held and other writers on cosmopolitan democracy and legal pluralism argue that pluralist conceptions of sovereignty are not only possible and feasible, but they more accurately reflect the actual division of political authority in the contemporary world. For example, Held writes that “[s]overeignty itself has to be conceived today as already divided among a number of agencies – national, regional and international – and limited by the very nature of this plurality.” In addition, Pogge provides moral grounds for a greater vertical dispersal of sovereignty. As will be discussed in Section 4 below, based on Pogge’s cosmopolitan morality, he argues that a greater dispersal of sovereignty provides greater fulfillment of human rights. I will first consider to what extent a greater vertical dispersal of sovereignty is theoretically possible and feasible in practice, and to what extent it better reflects current political realities. In the final section of this chapter, I will return to Pogge’s normative defence of this model.

While the example of European federalism is often given as a case of vertically divided sovereignty, I will examine ways in which sovereignty is divided in federal states by considering the example of Canada. I will also examine how contemporary international law challenges the Westphalian model of the exclusive sovereignty of states by restricting sovereignty externally and internally. After discussing empirical examples of dispersed sovereignty, I will consider how the idea of dispersed sovereignty can be defended in terms of Kant’s framework. In the final section, I will provide a normative

assessment of this model by considering Pogge’s moral justification of a greater vertical dispersal of sovereignty.

3.3. FIRST CASE: CANADIAN FEDERALISM

In Canada, the British North America Act (the BNA Act, 1867) divides areas of jurisdiction over different political matters between the federal and provincial governments. The Federal Parliament’s areas of jurisdiction include criminal law, naturalization, military service and defence, the regulation of trade and commerce, currency and banking (Section 91 of the BNA Act). In general, the Federal Government has the power to make laws for the peace, order and good government of Canada in all matters that are not assigned to the exclusive jurisdiction of the provinces (Preamble of Section 91). Provincial Governments have exclusive jurisdiction over such matters as civil rights and property within the province, the management of hospitals, and the management and sale of provincial lands. In general, Provincial Governments have jurisdiction over matters of a local or private nature within the province (Section 92 of the BNA Act). If the Federal Government legislates or acts in an area that falls under provincial jurisdiction, courts can rule that such acts are ultra vires and unconstitutional.

Although the BNA Act enumerates specific areas of jurisdiction for both levels of government for greater certainty, the lists are not exhaustive. Courts can determine which government has jurisdiction over other matters by appealing to the general provisions.

In addition, aboriginal peoples in Canada have the right of self-determination and self-governance with respect to certain matters. Such authority is recognized by the
Federal or Provincial Governments, established by treaties, or recognized by courts. For example, the *Nisga’a Final Agreement* (also known as the Nisga’a Treaty) defines various areas in which the Nisga’a Government may make laws, and areas over which it has principal authority, including administration of its own government, management of its lands and assets, Nisga'a citizenship, language and culture. It may also make laws in areas where local authority is appropriate, such as environmental protection, health and social services, and traffic and transportation. However, in these areas, federal or provincial laws have priority. The Nisga’a Treaty includes rules that set out what will happen to address any conflicts regarding which laws should govern.

Political sovereignty in Canada is thus divided and shared at different levels, in various ways. The laws of the different levels of government exist alongside each other, such that one may be subject to federal, provincial, and municipal laws simultaneously.

The main objection to the dispersed or shared model of sovereign authority that is presented by the modern conception of sovereignty is that it undermines the conclusive nature of rights. In order for law and rights to be conclusive, we need the certainty that comes from recognizing one supreme authority. The importance of such certainty is suggested by Kant’s argument against revolution, and his arguments against limited monarchies. One may similarly object that a dispersed, federal model of sovereignty allows individuals to challenge a government’s authoritative decisions by appealing to other levels of governance. However, this problem can be resolved by establishing clear

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128 In various areas, such as education, child and family services, adoption, and forestry, the authority of the Nisga'a Government is contingent on whether or meets or exceeds federal or provincial standards. For example, if a Nisga'a law exceeds the provincial standards for child protection, it will have priority.

129 This is the first objection that Pogge considers.
divisions in areas of jurisdiction, and by establishing rules and mechanisms for settling disputes.

For example, the *BNA Act* clearly outlines the different areas of jurisdiction between Provincial and Federal Governments. Any conflicts that arise can be settled by a court of law. For instance, in *R. v. Crown Zellerbach Canada Ltd.*, the Supreme Court of Canada had to determine whether the application of the Federal Parliament’s *Pollution Act* to provincial inland waters was outside its jurisdiction. Although Section 91 of the *BNA Act* states that the Federal Government has jurisdiction over seacoasts and inland fisheries, the Court found that this did not include restricting activities that may pollute inland lakes. However, the Court found that the *Pollution Act* fell under the Federal Government’s general power to make laws for the peace, order and good government of Canada. Hence, through structural design, the *BNA* includes general provisions that can be used to address cases that do not clearly fall under the enumerated categories, and Canadian courts have the recognized authority to settle disputes.

As we saw above, a central concern behind objections to dispersed sovereignty is the problem of uncertainty as to who has the authority to make law or decide disputes. A dispersed model of sovereignty can address this problem to a large extent through structural design. In the global context, David Held envisions a globally interconnected legal system with a “Boundary Court” to settle disputes of jurisdiction. The problem with relying on an international court to settle disputes of international jurisdiction is that it gives extraordinary power to judges. As I will discuss in Chapter Five, this gives rise

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to the charge of “judicial imperialism” at the global level. According to this account, Courts begin to appear to be the ultimate source of sovereign power.

However, as we see from the federal context within states, not all boundary conflicts can be settled by legal documents and by courts. As some political communities and institutions demand greater authority over issues that matter to them, the division of jurisdiction will be continually renegotiated politically. For example, in some aboriginal rights cases, Canadian Courts have affirmed a duty on the Government to negotiate in good faith without determining how the conflict should be settled. In the Quebec Secession Reference case, the Supreme Court of Canada emphasized the importance of good faith negotiations over secession and constitutional changes. While settling such matters through political negotiation creates some uncertainty, it does not lead to the extreme uncertainty and indeterminacy inherent in an anarchical state of nature.

An important limitation of using these examples of federalism in Canada to defend a model of dispersed sovereignty is that in federal political systems, there still seems to be a clear supreme authority – the Federal Government. For Blake, this fact limits Pogge’s use of the American case to defend the viability of dispersed sovereignty.

The Federal Government must recognize and agree to the authority of intrastate political


133 Delgamuukw v. B.C., [1997] 3 S.C.R. 1010

134 Reference re Secession of Quebec, [1998] 2 S.C.R. 217. In this case, the Federal Government proposed three questions to the Supreme Court of Canada: (1) whether Quebec had a right to unilateral secession under the Constitution of Canada; (2) whether Quebec had a right to unilateral secession under international law; (3) in the event of conflict between domestic and international of law on this issue, which would take precedence in Canada? In response to the first question, the Court found that unilateral secession was not legal under the Canadian Constitution. However, if the result of a Quebec referendum favoured independence, the rest of Canada would have no basis to deny Quebec the right to pursue secession. In such a case, the terms of Quebec independence would have to be settled through negotiations.
communities and institutions. However, this simply reflects the fact that in the last century, the modern centralized state has been the dominant form of political organization and governance. Prior to the nationalist movements and unification movements of the 19th century, cities, provinces, and smaller regions were the center of political authority. Many of the demands for self-determination or secession on the part of nations within states derive from this earlier history. This is demonstrated by the dissolution of the former Yugoslavia, as well as other nationalist movements within states. In many cases in which states recognize the political authority of intrastate political communities and institutions, these are not simply permitted from above. Rather, they are often strongly fought for by nations and political communities within the state.

In the case of aboriginal self-government, some of the rights that are now recognized were developed through the courts (although slowly and reluctantly), and through international forums. For example, when the governments of Alberta and Canada failed to recognize and respect the rights of the Lubican Lake Band over its land, the Lubican Lake Band pursued their rights with the UN Human Rights Committee. They argued that Canada was violating its right to self-determination and its right to culture under the International Covenant on Civil and Political Rights (Articles 1 and 27). The Committee held that Canada violated their right to culture under Article 27. Such cases reveal the possibility of, and the need for, external authorities to resolve

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135 A similar argument can be made with respect to the development of supranational institutions such as the European Union or restrictions on state sovereignty imposed by treaties since the authority over states initially arises from the consent of state governments. It is tempting to conclude from this that sovereignty still rests ultimately with states. I will deal with this objection in the next section.

conflicts not only between states, but also between states and other intranational political communities.

3.4. SECOND CASE: INTERNATIONAL LAW

Contemporary international law, particularly since World War II, demonstrates that contrary to the Westphalian model, states do not have exclusive external sovereignty against other states and international bodies. Although the right to sovereignty of all states continues to be a fundamental principle of international law and is recognized by the UN Charter, international law also restricts the actions of states against other states. For example, the right of states to go to war is limited to certain cases, such as self-defence or collective self-defence. Due to the recognition and development of the right of peoples to self-determination after World War II, states do not have a right to conquer other states and subject them to colonial rule. A recent development in international law is the right of states to intervene for humanitarian reasons, such as to stop crimes of genocide.\textsuperscript{137}

The development of international law since World War II also challenges the idea that states have complete internal sovereignty. The actions of states over their own people and territory are restricted by international law. For example, the Universal Declaration of Human Rights and international human rights conventions declare that individuals have rights against their governments. Under the Optional Protocol to the International Covenant on Civil and Political Rights, individuals can file complaints

\textsuperscript{137} As evidenced by the failure of the UN to act in Rwanda and NATO’s intervention in Kosovo without the authorization of the UN and contrary to international law, the conditions under which the right and/or duty of humanitarian intervention can authorize the use of force needs to be developed further in international law.
against their governments with the UN Human Rights Committee.\textsuperscript{138} While the growth of international human rights law since World War II is a significant development, international law placed restrictions on a state’s internal sovereignty prior to this. For example, some peace treaties placed restrictions on a state’s treatment of ethnic or religious minorities.\textsuperscript{139}

Of course it may be argued that since such treaties are binding on states only if they agree to be bound by them, international law is still based upon the supreme sovereignty of states. However, once states become parties to a treaty, claims can be made against them when they violate the treaty’s provision, according to the treaty’s adjudication, arbitration and enforcement provisions. Claims can also be brought before the International Court of Justice. A state that violates a treaty or international may be subject to countermeasures and economic sanctions.

More importantly, the voluntaristic conception of international law (the view that international law does not limit state sovereignty since it is entirely based on state consent) does not adequately explain international law.\textsuperscript{140} In addition to treaty law, states are also bound by international customary law. Usually, international customary law is based on implied consent since it is based on the ongoing practices of states and on official views regarding certain practices. However, international customary laws are also applied in cases where it would not make sense to assume tacit consent based on a state’s

\begin{flushleft}
\textsuperscript{138} For example, the Lubicon Lake Band filed a complaint against Canada under this Optional Protocol. \\
\textsuperscript{139} For example, The Treaty of Versailles (1919). \\
\end{flushleft}
practice, such as in the case of newly formed states.\textsuperscript{141} In the area of international humanitarian law and human rights, the prohibition on genocide, crimes against humanity and torture have come to be recognized as \textit{jus cogens} obligations: these are peremptory and non-derogable international obligations that bind \textit{all} states, even states that have not signed conventions on these matters.\textsuperscript{142}

Hence, even though contemporary international law preserves the sovereignty of states to a significant extent, states do not have absolute, exclusive external or internal sovereignty over their territory and people. As we will see in the following two chapters, some argue that the current international legal system does not go far enough in enforcing international law against states. According to this view, a world government with independent law-making, adjudicative, and enforcement powers is required. However, even under the current decentralized model of international law, there are still important limitations on state sovereignty.

\section*{3.5. The Kantian Objection to a Pluralist Conception of Dispersed Sovereignty}

I have proposed that moving away from the modern ideal of supreme, unitary, exclusive sovereignty and adopting a pluralist conception of dispersed, shared or divided sovereignty can resolve the important tension or structural limitation that arises within

\begin{footnotesize}
\begin{enumerate}
\item For example, a newly formed state will be subject to the international customary laws of the sea even though it has never been able to show tacit consent to these norms through its actions. An existing state that undergoes some change may similarly be bound by international customary obligations that apply to its changed circumstances even though it never had a chance to approve or disapprove of those norms. For example, if an existing state acquires new territory that includes territorial waters, it is bound by existing customary laws regarding territorial waters.
\item The above features of contemporary international law will be explained further in the next chapter.
\end{enumerate}
\end{footnotesize}
Kant’s political theory: the tension between the kind of sovereignty that is required for a lawful condition within states and the kind of sovereignty that would be required for a world republic that could institute a global lawful condition. However, to what extent is the pluralist conception of sovereignty inconsistent with Kant’s theory of public right?

Kant argues that a unitary, supreme authority is required for a rightful condition. Even though he argues that rights regarding property and contracts exist in the state of nature, they remain merely provisional outside a civil condition. No matter how good-natured people are, conflicts will arise. In such cases, individuals will have conflicting conceptions of what is right: each person will think that she is right, and she will try to impose her unilateral will on others. There is a problem of indeterminacy regarding what people’s rights are and how these should be applied to resolve particular conflicts. There is also a problem of bias. Locke similarly argues that even though natural rights exist in the state of nature, problems arise in the case of conflicts because each person will be biased in her own case.

One way to overcome these problems is to have an impartial third party resolve the conflict by determining what is right. This is insufficient for Kant, since the third party adjudicator would then be imposing his unilateral will on the parties involved in the conflict, as well as on everyone else since the determination may affect the way similar conflicts are resolved in the future. This undermines our autonomy and makes us subject to the unilateral will of others. Consequently, Kant argues that a supreme authority that represents the united will of all is required for a rightful condition. By conceiving of this authority as representing the united will of all, the subjects over whom the laws of a state apply are themselves the ultimate lawgivers; they are both subjects and citizens at the
same time. If laws and judgments are made by an authority that represents the united will of all, then the autonomy of each is preserved.

Kant’s idea of the united will should be distinguished from any actual aggregation of particular wills. His idea of a republican government is one that is representative. Consequently, he argues that a democracy in the truest sense of the word, in which people together directly legislate for themselves, is despotic. It is despotic because it establishes an executive power through which all the citizens may make decisions about the individual without his consent, so that decisions are made by all the people and yet not by all the people. This means that the general will is in contradiction with itself (PP 101). In a direct democracy, the majority can choose laws that will promote their own good. Thus, some people (those in the majority) are able to impose their wills on others (those in the minority). For Kant, the way to prevent this is by having a separate authority that represents the united will of all subjects, but which is itself not a subject. In that way, the ruling authority is in some way outside and above the civil society over which it governs.

Kant also argues that the ruler must have supreme, uncontested, sovereign authority. The problem with limited or constitutional monarchicalies is that the head of state is not in fact sovereign if the people can limit its power since then the people would then have sovereign authority. In order to have a republican, representative form of government, the authority that represents the united will of all citizens must have supreme authority over all. As Kant’s argument against revolution demonstrates, even if the supreme legislative power or its agent, the head of state, has violated the original contract by acting tyrannically, subjects are not entitled to rebel. The reason for this is
that the people under an existing civil constitution do not have a right to judge how the
constitution should be administered (TP 81). If it had such a right, and if it disagreed
with the judgment of the head of state, then who would decide which side is right?
Another head above the head of state would be needed to mediate, which is self-
contradictory, since the head of state would then no longer be the head (TP 81). Kant
concludes that the decision must rest with whoever controls the ultimate enforcement of
the public law – the head of state himself. No one in the commonwealth can have a right
to contest his authority (TP 82). If the head of state’s decisions can be challenged, this
would undermine an important purpose of a civil condition, that of making rights
conclusive. It also undermines an important feature of Kant’s idea of republicanism: that
the head of state must represent the united will of all.

While a dispersed model of sovereignty does diverge from Kant’s theory of public
right within states, can it be defended in a way that addresses Kant’s concerns? Can we
have different authorities over us, each with its own distinct area of jurisdiction, in a way
that is consistent with Kant’s idea of a lawgiving united will?

A dispersed model of sovereignty may be defended in a way that is consistent
with Kant’s theory of right if we think of each governing body as representing the united
wills of all those who are subject to its authority. In addition to the united will of citizens
of a state, citizens of that state may be members of other overlapping united wills, within
the state and beyond it. For example, the citizens of Spain can be part of two united
wills: one in relation to other Spanish citizens, which is represented by the institutions of
the Spanish government, under common Spanish laws, and as part of the united will of
the European Union, represented by the institutions of the EU, under common EU laws.
We can also think of peoples, nations, and other political communities within current political states as forming distinct united wills, such that they have laws and political institutions that govern over internal matters. For example, within Canada, provinces have supreme authority over certain political matters (such as education), while the Federal Government has supreme authority over other matters (such as criminal law). We can conceive of the provincial government as representing the united will of all those who are subject to its laws and policies: those who reside within the province. We can also conceive of aboriginal peoples as forming distinct united wills and as having distinct areas of self-government over their people.

Consequently, a pluralist conception of dispersed sovereignty seems to be consistent with Kant’s idea of the united will but it is contrary to Kant’s view of what is required for rights to be conclusive and what is required to solve the problem of indeterminacy in the state of nature. The objection that results from this falls under Pogge’s consideration of the conceptual rejection of the idea that sovereignty can be divided in any way (the first objection). Hence, while a dispersed conception of sovereignty can resolve the tension that is created between the supreme sovereignty of states and the sovereignty of a world republic in Kant’s theory and support a federal global system in which political authority is divided and shared between a global government and states, a Kantian may nonetheless reject this solution in order to preserve the absolute conclusiveness of rights.

4. NORMATIVE ASSESSMENT OF MODELS OF DISPERSED AUTHORITY
In the previous section, I tried to support Pogge’s defence of the idea of dispersed sovereignty against common objections by showing that it is both conceptually possible and that it can work in practice. I also tried to show that it reflects the sharing and division of political authority that already occurs in practice, particularly in the case of federal systems such as Canada, and in the case of contemporary international law. The development of regional political unions such as the European Union is another example that has been the main subject of analysis for pluralist theories of sovereignty.¹⁴³

The next question is whether there are normative reasons for favouring the current ways in which political authority is divided and shared, or for favouring a greater dispersal of sovereignty. The main reason for considering a model of dispersed sovereignty in this chapter was to try to resolve the tension between state sovereignty and the sovereignty of a world state. This tension is not limited to Kant; it also informs contemporary arguments against world government. There are good reasons for subjecting the relations between states and the relations between states, individuals and other actors to the global rule of law and more centralized and coordinated global governance. The traditional conception of exclusive, indivisible sovereignty leads to a dilemma: on the one hand, a world state with supreme sovereignty is the only way to create a juridical condition at the global level, but on the other hand, this solution is rejected because it is inconsistent with the supreme, exclusive sovereignty of nation-states. If accepting a more dispersed or divided model of sovereignty can resolve this problem and support the further development of law and governance at the global level, this is one reason to favour it over the modern conception. Conceptions of dispersed sovereignty allow for other possibilities since they do not limit legitimate political

¹⁴³ Neil Walker and Jo Shaw.
authority and the rule of law at the level of the nation-state, even though they accept that states are the most important and powerful political units. They also allow for other possibilities for global governance and law without a world state – possibilities that go further than Kant’s voluntary, revocable league of free states. For example, Pogge rejects a world state in favour of global governance without world government.\textsuperscript{144} Held also accepts a pluralist conception of divided sovereignty but he argues for greater global political and legal centralization than Pogge since Held argues for a world parliament and a compulsory international court. Hence, there are more viable options for instituting the rule of law and political governance under a pluralist conception of sovereignty.

There are other reasons in favour of a greater dispersal of sovereignty. Pogge argues that overall, dispersing political authority over nested territorial units would decrease the intensity of the struggle for power and wealth within and among states. In such a multilayered scheme, borders could be redrawn more easily to accord with the aspirations of peoples and communities. Consequently, this both increases peace and security and supports the self-determination of peoples and communities.\textsuperscript{145}

Pogge provides four additional reasons for favouring a greater vertical dispersal of sovereignty based on his cosmopolitan morality.\textsuperscript{146} First, he argues that a vertical dispersal of sovereignty would reduce oppression.\textsuperscript{147} Under the current global regime, national governments are effectively free to control their populations in whatever way they see fit. This can lead to oppressive activities, such as the violation of rights, torture

\textsuperscript{144} Pogge, 63. I will return to his reasons for this.
\textsuperscript{145} Allen Buchanan provides similar arguments for “unbundling sovereignty” in \textit{Justice, Legitimacy and Self-Determination}.
\textsuperscript{146} I will present these in an order that differs from Pogge’s presentation. I have grouped the last three points together since they specifically support greater global centralization of political authority.
\textsuperscript{147} Pogge, 62.
and subverting democratic procedures. He argues that a vertical dispersal of sovereignty over various layers of political units could check and balance one another as well as publicize one another’s abuses. Pogge seems to have in mind here an increase in political authority at the subnational and supranational levels.

Second, he argues that greater global centralization is needed to increase peace and security. In the current regime, interstate rivalries are settled through threat and use of military force. Under the prevalent idea of state sovereignty, states are virtually free to do what they like within their own borders, and this makes the proliferation of weapons of mass destruction more likely. He does not think that national control over such weapons will be reduced or eliminated through voluntary cooperation. What is needed is a centrally enforced reduction and elimination of such weapons. While this would limit state sovereignty, he believes that this program could gain the support of most peoples and governments, if it increases the security of all on fair terms that are effectively adjudicated and enforced.

Third, he argues that greater global centralization is needed to promote global economic justice, something that is also important as a means towards peace and security, and preventing oppression. While he argues that the magnitude of current economic deprivations calls for some modification in the prevailing scheme of economic cooperation, he does not think that this requires anything like a global welfare bureaucracy or world state. As an example of a plausible reform, he suggests the development of a global levy on the use of natural resources to fund economic development in the poorest areas. He thinks that this reform is justified by the idea that

148 Pogge, 62.
149 Pogge, 62.
150 Pogge, 62.
the world’s resources should be owned or controlled by all its inhabitants as equals. This idea is defended by Charles Beitz and Pogge elsewhere.\footnote{Beitz, Charles, \textit{Political Theory and International Relations}, (Princeton: Princeton University Press, 1979), 136-43; Thomas Pogge, \textit{Realizing Rawls}, (Ithaca: Cornell University Press, 1989), 250-52, 263-65.} While this reform and the arguments on which is based have come under some criticism, since it is suggested as one plausible example, I will not discuss its merits here.

Fourth, Pogge argues that a greater dispersal of sovereignty is better capable of addressing ecological problems that transcend state borders. Modern processes of production and consumption within states are liable to generate significant negative externalities. Pogge argues that very little progress can be made through treaties given the difficulty of bargaining and negotiating environmental treaties among a large number of very differently situated actors. In addition, doubts about the full compliance of other parties tend to erode each party’s own commitment to make good-faith efforts toward compliance.\footnote{Pogge, 63.} Against, he suggests that greater global centralization is needed.

Pogge connects his justification for this fourth reason to a broader, and deeper reason – democracy. He states that even though the degradation of our natural environment affects us all, most people are effectively excluded from any say about this issue. Instead, this issue is currently regulated by national governments unilaterally or through intergovernmental bargaining that is heavily influenced by large differentials in economic and military power.\footnote{Pogge, 63.} In accordance with his human rights based justification of institutional cosmopolitanism, he justifies this final reason in terms of a right to political participation: “people have a right to an institutional order under which those significantly and legitimately affected by a political decision have a roughly equal
opportunity to influence the making of this decision – directly or through elected
delegates or representatives.” In some circumstances, the right to political
participation is fulfilled by decentralization; in other circumstances, it demands greater
global centralization.

Overall, Pogge’s reasons promote a decrease in the authority and power of states
over its people and territories by increasing the authority and power of global institutions
of governance in certain matters: peace and security, preventing oppression, global
economic justice, and ecology. Despite the fact that these reasons support greater
centralization, he argues that they do not on balance support a world state. This is
because Pogge’s second reason (preventing oppression), as well as his concern for the
right to political participation, justify a transfer of some authority and power from states
to smaller political communities and institutions within states, such as minority nations
within a state that have been oppressed. While a world state could lead to significant
progress in terms of peace and economic justice, he thinks that it would pose significant
risks of oppression. He argues that his multilayered scheme has the advantages of
creating plenty of checks and balances, and of assuring that even when some political
units turn tyrannical and oppressive, there will be other fully organized political units
above, below or on the same level that can render aid and protection to the oppressed.

154 Pogge, 64.
155 Pogge, 63.
156 Pogge, 63. Pogge provides two other reasons against a world state. First, he argues that
cultural and social diversity are likely to be much better protected when the interests of cultural
communities at all levels are represented externally and supported internally by coordinate
political units. Second, he argues that his scheme could be gradually achieved from where we are
now, while a world state would seem reachable only through revolution or as a reaction to some
global catastrophe (63).
According to Pogge’s account, how can we determine whether greater centralization is required or whether greater decentralization is required? Pogge argues that the first consideration is that decision-making should be decentralized as far as possible. One of the reasons for this is that insofar as decisions are morally closed, outsiders are more likely to lack the knowledge and sensitivities to make responsible judgments. Insofar as decisions are morally open, then the goal should be to maximize each person’s opportunity to influence the social conditions that shape her life.\textsuperscript{157} Pogge argues that this first consideration does not rule out the voluntary creation of central decision-making mechanisms. Such centralization may be rational in cases of conflict between local and global interests, such as tragedy-of-the-commons cases (pollution, fishing, climate change), and with projects that require many contributors because they involve coordination problems or economies of scale, or because they are too expensive (transportation and communication systems, research and technology).\textsuperscript{158}

The second consideration favours centralization insofar as it is necessary to avoid excluding persons from participating in decisions that significantly and legitimately affect them.\textsuperscript{159} Pogge discusses three kinds of cases. First, since we inhabit the same natural environment and are significantly affected by what others do to it, we have a right to participate in regulating how it may be used. Second, since our lives are significantly shaped by prevailing social, economic and political institutions, we have a right to participate in their design. Third, and more controversially, there are contexts in which we act as a species and thus should decide together how to act (for example, our conduct toward other biological species, ventures into outer space, the preservation of our human

\textsuperscript{157} Pogge, 65. 
\textsuperscript{158} Pogge, 65. 
\textsuperscript{159} Pogge, 65.
heritage).\textsuperscript{160} Pogge argues that in these cases, it seems wrong for one person, group or state to take irremediable steps unilaterally.\textsuperscript{161}

These two considerations yield the result that “the authority to make decisions of some particular kind should rest with the democratic political process of a unit that (i) is as small as possible but still (ii) includes as equals all persons significantly and legitimately affected by decisions of this kind.” While these two considerations should suffice in ideal-theory, Pogge argues that in practice, there will be trade-offs between these two considerations because there may not be an established political process that includes as equal \textit{all and only} those significantly and legitimately affected.\textsuperscript{162}

Consequently, he adds a third consideration: “what would emerge as the proper vertical distribution of sovereignty from a balancing of the first two considerations alone should be modified – in either direction – if such modifications significantly increases the democratic nature of decision making or its reliability (as measured in terms of human rights fulfillment).”\textsuperscript{163} One must ask whether there would be a gain for human rights fulfillment on balance if decision-making authority was transferred “upward” to larger units (such as by making the political process of smaller units subject to regulation or review by the political process of the more inclusive units), or “downward” to smaller units (such as by investing the political process of subunits with review authority that

\begin{itemize}
\item[\textsuperscript{160}] Pogge 65-66.
\item[\textsuperscript{161}] Pogge, 66.
\item[\textsuperscript{162}] Pogge, 67. Pogge provides the following example. A matter affecting the populations of two provinces might (i) be referred to the federal parliament, or (ii) it might be left for the two provincial governments to settle. The former solution caters to (ii) at the expense of (i) since it involves many persons who are not legitimately affected. The latter solution caters to (i) at the expense of (ii): the persons legitimately affected may not have an equal opportunity to influence the matter given that the outcome will depend on the relative bargaining power of the two provincial governments (67).
\item[\textsuperscript{163}] Pogge, 67.
\end{itemize}
enables it to block the laws or acts of the more inclusive units).\textsuperscript{164} Pogge admits that how such matters ought to be weighed is a highly complex question.

The objections discussed in the previous sections focused on conceptual issues concerning the idea of dispersed sovereignty, as well as the more practical problems concerning the effectiveness of dispersed sovereignty to maintain a lawful condition within states. There is an additional objection that can be raised against Pogge’s reasons for the greater vertical dispersal of sovereignty.

While the devolution and dispersion of political power may expand opportunities for the exercise of democratic freedoms and prevent oppression, it may lead to weaker political units. As James Tully argues, new states, autonomous units within complex federations, and global political networks tend to be weak relative to the power of transnational corporations and their regulatory regimes, such as the World Bank.\textsuperscript{165} With the exception of powerful and democratic states, political units often lack the power to enforce democratic will, procedures, and outcomes that challenge global corporations and their ability to move elsewhere.\textsuperscript{166} The result is that relatively weak polities become trapped in a “race to the bottom” as they reduce constitutional democracy and basic democratic rights in order to attract the economic development they require to remain solvent. For example, in the poorest and weakest states, basic democratic rights of assembly, association, and free speech are curtailed and sweatshop conditions imposed. These political associations are unable to enforce the local self-determination, survival of

\textsuperscript{164} Pogge, 67-68.
\textsuperscript{166} Tully, 200-201.
linguistic and cultural diversity, and economic self-reliance they were set up to protect and promote.\textsuperscript{167}

An important issue to consider in deciding how best to divide political authority is effectiveness: given certain problems, such as how best to fulfill a particular human right or regulate transnational corporations, what level of political organization would be most effective at addressing these particular problems? In order to address global problems and effectively regulate transnational corporations, greater global concentration seems to be required. Pogge acknowledges that the developments of the past few centuries, such as the increased level of global interdependence, have greatly increased the significance of this second consideration in favour of centralization. In order to satisfy Pogge’s primary concern that people have a political right in shaping the institutions that affect them, greater participation in global political institutions is required, as is increasing the democratic nature of decision making by global political institutions. One way to do this is to increase international participation and recognition of subnational political communities in the development and application of international treaties.\textsuperscript{168}

5. \textit{Limitations on State Sovereignty Without Dispersed Sovereignty: Rawls}

I would like to briefly address an alternative contemporary theory of state sovereignty and international justice that is suggested by John Rawls’ influential \textit{The Law of Peoples}.

\textsuperscript{167} Tully, 201.

\textsuperscript{168} While only states can be direct parties to international treaties, subnational political communities can influence the creation and application of international law in other ways. For example, in the recent Copenhagen Conference on Climate Change, the provinces of Ontario and Quebec proposed more demanding targets than the Canadian federal government. Rather than relying on the Federal Government to represent Canadians in this international negotiation, they tried to make it clear to other countries that some Provincial Governments (and the residents represented by them) support an agreement with stronger targets. Cities and translational NGO groups have also tried to influence the terms and development of international treaties.
Rawls’ Law of Peoples is an example of a theory that recognizes internal and external limitations on state sovereignty without adopting a dispersed sovereignty model. As noted in chapter one, Rawls rejects a world state for pragmatic reasons that he attributes to Kant. He argues that Kant was right in thinking that a world state would either be a global despotism or would rule over a fragile empire torn by frequent civil strife as different peoples tried to regain their autonomy. Rawls does not argue against a world state based on a defence of the sovereignty of the states. Rather, Rawls moves away from the modern idea of absolute sovereignty by accepting limitations on state sovereignty based on the moral principles of a reasonable Law of Peoples.\textsuperscript{169} He uses the term “peoples” instead of “states” to distinguish his conception of “peoples” from the traditional, realist conception of states as non-moral. Rawls’ peoples are moral agents that act according to moral principles. The term “peoples” focuses our attention on the political community within a nation-state rather than on the state’s government or territory.

Despite this shift away from traditional state sovereignty, however, Rawls has been criticized for retaining a Westphalian or “thin statist” view of international relations since he views peoples as forming unitary political societies, each with their monopoly of power. Allen Buchanan argues that Rawls retains a Westphalian view of international relations that views states as more unified and politically homogenous than they in fact are and that he neglects the issue of internal political divisions – an issue that he believes a theory of interstate justice ought to address.\textsuperscript{170} Hence, he finds that Rawls’ theory is factually inadequate and normatively weak since it neglects issues of justice that arise

between political communities within states. Andrew Kuper similarly criticizes Rawls for its “thin statism” since Rawls’ theory continues to supports a system of unitary nation-states. Instead, Kuper defends the plural nesting of political structures.

I agree with this criticism of Rawls that is presented by Kuper, Buchanan and Pogge. First, a pluralist political theory that recognizes more diversified political authority is able to more accurately account for the diverse ways that political authority is currently structured. Second, I think that Pogge’s normative reasons in favour of recognizing greater political pluralism are persuasive. If one accepts that a theory of justice ought to protect at least a minimal list of human rights, or if one accepts the value of political self-determination, concentrating sovereignty at the nation-state does not seem to be the best way to fulfill these goals. As Buchanan reminds us, a significant number of violent conflicts in our current world occur within states, between distinct communities. The former Yugoslavia is the most obvious example here, but there are many nationalist movements in the current world as subnational peoples fight for greater political self-determination. A theory of international or global justice should address this.

6. CONCLUSION

In this chapter, I examined the modern conception of absolute, exclusive sovereignty as found in Kant and other modern philosophers, and I considered reasons to favour a pluralist model of political authority based on Pogge’s account of dispersed sovereignty. Under the modern conception, a single, unitary, sovereign with supreme and unlimited

authority is required to have a civil condition – in order to have peace, order and the rule of law. If there are overlapping sources of political authority, then this creates indeterminacy about what the law requires and what one’s rights are. The fear is that it could lead to the dissolution of civil society, back to a state of nature. We see this concern in Hobbes. For Kant, even if it does not lead to disorder and the breakdown of civil society, a supreme law-maker and supreme judge is required for rights to be conclusive rather than simply provisional, as they are in the state of nature.

The traditional, modern conception of unitary, supreme sovereignty has influenced the common understanding of sovereignty, leading contemporary writers to still argue that either one is sovereign or one is not, and to regard sovereignty as something that cannot be divided and shared. Since this leads some people to regard contemporary theories of dispersed sovereignty as contradictory and perhaps even strange, I introduced Leibniz’s defence of non-absolute and non-unitary sovereignty to show that historically, sovereignty was divided and shared before the development of the modern nation-state and the political theories of Bodin, Pufendorf, and Hobbes.

I addressed different arguments for and against dispersed sovereignty. First, I have argued that it is both conceptually and practically possible. It is a viable way to structure political authority. I discussed various examples to show this: (1) Leibniz’s discussion of examples of shared sovereignty during his time; (2) Pogge’s consideration of the division of authority between legislative, executive and judicial branches of government; (3) the division of political authority between the Federal and Provincial Governments in Canadian federalism; and (4) the limitations on internal and external sovereignty in contemporary international law. Another important example that I did not
consider is the limitation on the internal and external sovereignty of nation-states within the European Union, and how political authority is divided and shared between the national and supranational levels of government. There is a large body of literature on this. Secondly, through my analysis of Pogge, I have argued that there are normative reasons that support adopting the pluralist conception of dispersed sovereignty, and that support a greater dispersal of political authority.

If one accepts that political sovereignty can conceptually be divided and shared, that doing so is practically possible and viable (without leading to disorder or the dissolution of civil society), then this avoids the problem that arises from Kant’s modern conception of supreme, externally and internally unlimited sovereignty. In order to have the rule of law and political governance at the global level, a world state with ultimate sovereignty is not needed. Conversely, states do not have a claim to supreme, exclusive sovereignty that would then be undermined by a world government. This conception of sovereignty is consistent with a minimal, federal world government that has exclusive jurisdiction or political authority over some issues (such as conflicts between states and the environment), while national governments have exclusive jurisdiction or political authority over most matters, and other supranational and subnational political institutions have political authority over other issues. There may also be overlapping, shared areas of political authority.

There are two challenges with this pluralist political ordering. First, how should political authority over various areas, groups of peoples and territory be divided? Pogge provides a good guideline for what kinds of considerations will be involved in determining the best allocation of political authority. The second challenge is what
happens when there is a conflict? As we saw in the case of Canadian federalism, even when there is a recognized constitutional document that outlines the different powers and areas of exclusive jurisdiction for different levels of government, conflicts will still arise. Sometimes, there will be an open question of where the jurisdictional boundaries should fall (for example, new cases that were not previously contemplated or changing circumstances).

Even in the absence of a similar kind of constitution that divides up political authority at the global level, boundary disputes can be settled in a similar fashion. Domestic and international courts can interpret and apply international law to settle boundary conflicts. For example, where precisely do a state’s territorial waters end? According to a treaty, who has political authority over this piece of land? This would support strengthening the current International Court of Justice so that all states recognize its authority to settle such disputes. In other cases, there will be institutions that are created under a treaty with the authority to determine the authoritative interpretation and application of the treaty and to resolve such questions that arise under a treaty. Not all matters are best settled by an adjudicative or administrative institution. When possible, it is better to determine the proper boundaries of political authority through good faith negotiations between all affected parties.

A central defect of the state of nature for Kant and Hobbes is that rights are indeterminate since there is no impartial, conclusive way to solve conflicts; each party may genuinely disagree about what his or her rights are in a particular case. A supreme law-maker and supreme judge is required to solve this problem by conclusively and authoritatively determining what people’s rights are in general, and how the law should
be interpreted and applied to settle particular conflicts. While a model of dispersed sovereignty involves greater indeterminacy in cases in which it is not clear which political institution has overriding authority, courts can often provide an authoritative, conclusive way to settle such conflicts.

However, settling such conflicts through political negotiation or renegotiation may be preferred as a more democratic solution. Rather than seeing this as undermining all civil condition, it can be seen as a partial change or reform within a larger, underlying civil and legal framework. Kant’s concern that the stronger party will impose its unilateral will on the weaker party highlights an important problem with allowing conflicts to be settled through political negotiation. However, the requirement by Canadian courts that the Federal Government engage in good faith negotiations with First Nations is an example of how this problem can be addressed within a larger legal framework. Similarly, in international law, negotiations between states and or between states and other political institutions or agents could be subjected to certain standards of review. For example, treaties that are formed under duress could be considered null and void. Unfortunately the realities of international politics are such that treaties are formed based on power politics. Nonetheless, this suggests an important development that is needed in international law.
In Chapter One, I argued that there is a limitation with using Kant’s moral and political theory to argue for a world government since under Kant’s theory, a world government would undermine the sovereignty of nation-states and the lawful condition that is established within states. In Chapter Two, I argued that this problem could be addressed if we move away from the modern idea of sovereignty as absolute and indivisible and if we instead accept that political authority can be divided and shared between different levels of government and different political institutions without undermining the civil and lawful condition within states. Hence, a pluralist model of dispersed sovereignty can be used to defend a world government against the objection that a world government would undermine the sovereignty of nation-states and the lawful condition that is established within states. A minimal federal world government could acquire authority over limited matters that affect all states for which international governance is most needed, while leaving states and regional political institutions like the European Union with authority over all other matters. According to Kant and Hobbes, the problem with this arrangement is that it makes law and rights indeterminate and inconclusive. The challenges of this model are how to determine the precise jurisdictional boundaries between states, regional political institutions (such as the European Union), and a world government, and how to settle conflicting claims of
authority. I argued that courts can and should play an important role in resolving this problem by developing rules and procedures for settling jurisdictional conflicts when political negotiation fails, and by ensuring that political negotiation is done in good faith.

However, there are other important practical and normative difficulties with creating even a minimal, federal world government. Practically, given the current state of affairs, it seems unlikely that all states would voluntarily consent to the creation of even a minimal world government, especially if it involved submitting itself to supranational coercive enforcement. There are also normative constraints on the creation of a world government. For example, for Kant, states do not have a right to coerce other states into a cosmopolitan civil condition, so this must be done through the voluntary consent of states (see Chapter One). While I have used Kant primarily as a starting point, I think there are good reasons for this normative constraint independently of Kant’s theory. Consent also seems to be needed for contemporary political theories that value democratic legitimacy. Even if such theories can justify coercion against states whose authority over its people is not legitimate, consent seems to be required for democratically legitimate states. I will discuss this issue in the first section of this chapter.

Given these practical and normative problems with the creation of even a minimal federal government, a less ambitious aspiration is to argue that international society can nonetheless operate according to law without a world government. The hope is that even without a world government, states can establish a cosmopolitan legal condition in which they can subject themselves to laws and, as Kant suggests, settle their conflicts as

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if by a court of law. This raises certain questions. Can the rule of law be achieved globally without a world government with a sovereign legislature? Can there be law without a central law-maker? If legal rules and obligations can be created globally in decentralized ways, through the agreements of states and by various international institutions, what else would be required for this to constitute a law-governed condition?

Under the modern conception of law and state sovereignty, a lawful condition requires a centralized legislative power that makes law, a centralized adjudicative power that interprets and applies the law to cases, and a centralized coercive power that enforces the law. This appears to still be the most accepted conception of what is required for law within states. If we apply this conception of law to the global level, then: (a) a centralized world legislature would be required to make law; (b) a centralized, hierarchical global judicial system with compulsory jurisdiction would be required to interpret and apply law; and (c) a centralized global system of coercive sanctions would be required to enforce international legal rules and obligations. Based on this conception of law, skeptics argue that since international law as it exists today lacks these three centralized functions, it is not effective or genuine law. I will outline the arguments for these three centralized functions within modern social contract theory in the second section of this chapter.

In Chapter Four, I will focus on the third argument that an impartial, centralized coercive body that can effectively enforce legal rules is required for law because it appears to be the most common and most serious objection presented against a decentralized model of international law. To the extent that this kind of enforcement is either not possible or undesirable at the global level, this is regarded as an argument
against the global rule of law. This objection is an important one since a distinctive feature of legal rules seems to be the fact that they are enforced coercively, as well as the idea that they can be so enforced – that this kind of coercion is justified.

I will argue that absent a world government, the most important feature for the global rule of law is the authoritative and impartial determination, interpretation and application of the principles and rules of international law. In the modern social contract theories of Hobbes, Locke and Kant, the sovereign’s supreme authority is needed to address the problem of indeterminacy in the application of law to particular conflicts. As Locke emphasizes, impartial adjudication is also needed to avoid the problem of subjective bias. I suggest that the problem of indeterminacy and the Lockean concern for impartiality can be addressed by having various adjudicative and administrative bodies authorized to identify, interpret and apply international law, including domestic courts. Legal rules and obligations can be created in decentralized ways (such as through multilateral treaties), and their interpretation and application may also be decentralized. Most of this argument will be developed in Chapter Four, in response to enforcement-based objections. The last two sections in Chapter Three set the stage for my argument in Chapter Four by providing a brief overview of how the current decentralized model of international law functions.

1. PRACTICAL AND NORMATIVE DIFFICULTIES WITH EVEN A MINIMAL FEDERAL WORLD GOVERNMENT

Most proposals for a world government begin with reforming the United Nations. Proposals often include removing the veto power of the Security Council, transforming
the UN General Assembly into a world parliament with elected state representatives and giving this world parliament the power to make laws that are binding on all states, developing an international court of highest appeal with compulsory jurisdiction, and creating an independent UN military force to enforce international law.\footnote{Richard Falk, David Held, Danaiele Archibugi.} There is disagreement on whether the elected world parliament should represent states or individuals directly, or whether there should be two parallel assemblies, one that represents states and one that represents individuals directly.\footnote{Daniele Archibugi has proposed two parallel assemblies: a General Assembly that represents states, and a People’ Assembly that represents individuals directly. Daniele Archibugi, “From the United Nations to Cosmopolitan Democracy” in Daniele Archibugi and David Held (eds), \textit{Cosmopolitan Democracy: An Agenda for a New World Order} (Cambridge: Polity Press, 1995) at 137-143.} There is also disagreement about how centralized the world government should be and how much political authority should remain with states.

Given existing circumstances, there are practical difficulties and normative challenges to the creation of a federal world government, even a minimal one. I will briefly outline a few of these challenges. Even if one believes that a federal world government can be defended against the normative challenges, it is difficult to dismiss the practical difficulties of creating a world government. It seems highly unlikely that it could be created in the near future. One may think that a world government is theoretically necessary for global justice and that this ought to be our ultimate goal. However, given that even in the most optimistic accounts this will not be an easy task, this justifies the consideration of whether progress can be made in developing law and the rule of law at the global level without a world government, even if only in the meantime.
In addition to the practical difficulties, I think there are normative limitations on how a world government could be created. As we saw in Chapter One, Kant’s theory does not justify a right to use coercion to force states into joining a world government since Kant correctly observed important disanalogies between the relation of individuals in the state of nature and the relation between states. The foundational starting point for Kant’s theory of right is individual freedom. Once states already have an internal civil condition that establishes and maintains the rightful freedom of its citizens, using coercion against these states can undermine their internal civil condition and the individual freedom of a state’s citizens will then be insecure.

Many contemporary political philosophers also believe that individuals constitute the fundamental unit of moral concern in their theories of global justice and recognize that a state’s ability to secure the freedom and rights of its citizens is what justifies a state’s right to sovereignty and non-interference. However, rather than assuming that all states with de facto power are able do this, or that any civil condition (even a corrupt one) is better than none, some writers argue that a state’s rights to sovereignty and non-interference are contingent on its ability to secure the rights of its citizens in practice (de jure legitimacy). Charles Beitz and Allen Buchanan most clearly defend this kind of view.\textsuperscript{175} According to this view, the use of coercion against a state is justified if that state fails to secure the freedom and rights of its citizens or if it fails to secure the domestic rule of law. John Rawls also limits the right to non-intervention to liberal and decent non-liberal peoples. Intervention can be justified against “outlaw peoples” that fail to

\textsuperscript{175} Charles Beitz, \textit{Political Theory and International Relations}, (Princeton: Princeton University Press, 1979) and Buchanan, \textit{Justice, Legitimacy and Self-Determination}.
provide a minimal level of human rights protection within their states, are aggressive against other peoples, and do not honour their international agreements.\footnote{John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999).}

Theories that limit a state’s right to sovereignty based on whether it has \textit{de jure} legitimate authority over its people are able to justify the use of coercion against states that lack internal legitimacy and do not sufficiently protect the freedom and rights of its citizens. While this argument could be used to justify the use of coercion to establish a world government that would better protect the freedom and rights of individuals, it cannot justify the use of such coercion against a state that is democratically legitimate and has sufficient protection for the individual liberty and rights of its citizens if that state refuses to join a world government. One can think of the United States as an example of a democratic state that would almost certainly refuse to join a world government. In addition to the normative question of whether the use of coercion against a liberal democratic state could be justified, the example of the United States also illustrates the practical difficulty of using coercion to force powerful states to join a world government.\footnote{This is based on the view that democracy requires a certain level of social solidarity. For example, see Charles Taylor.}

I would like to briefly mention one further challenge: assuming a federal world government can be created within these normative constraints, would it be able to function democratically? Some argue that a world government cannot generate democratic legitimacy or sufficient solidarity for a political community. Despite the creation of a directly elected European Parliament, many have criticized the current democratic deficit of the European Union and have argued that a much greater
democratic deficit would occur with a world parliament.¹⁷⁸ Habermas holds this view. Habermas suggests that Europe is not sufficiently democratic because it lacks an integrated public sphere, a common political culture, and social solidarity.¹⁷⁹ He argues that to be legitimate, a world government would have to be based on a community of world citizens that could legitimize its political decisions on the basis of democratic opinion- and will-formation.

While Habermas is more positive about the possibilities of developing a global public sphere and world government in his earlier writings on this issue,¹⁸⁰ in “The Postnational Constellation and the Future of Democracy,” he worries that “the political culture of a world society lacks the common ethical-political dimension that would be necessary for a corresponding global community – and its identity formation.”¹⁸¹ The global civil society that is emerging is an important development, but is it adequate to legitimate a world government? Can it constitute a global political community? Habermas argues that the emerging global civil society has not created a sufficient shared political identity or an integrated public sphere; rather, it is too scattered.¹⁸² While a thin cosmopolitan community based on a sense of shared fate seems to be developing (for

¹⁷⁸ The recent European Parliament election in June 2009 illustrates this problem. Voter participation was lower than previous elections. In addition, it appears that many voted based on domestic policies held by the different parties and in negative reaction to their current domestic governments rather than based on the political issues that are relevant to the European Union. Various reforms have been proposed to increase democratic participation. For example, see James Tully, “A New Kind of Europe? Democratic Integration in the European Union” in Public Philosophy in a New Key Volume 2: Imperialism and Civic Freedom (Cambridge: Cambridge University Press, 2008).


¹⁸⁰ Jürgen Habermas, “Kant’s Idea of Perpetual Peace, with the Benefit of Two Hundred Years’ Hindsight,” in Perpetual Peace: Essays on Kant’s Cosmopolitan Ideal [citation]


example, in response to global environmental problems and terrorism), this sense of community is limited because it takes a negative form and has a reactive character. Even if an elected, representative world parliament is created, Habermas argues that it would not able to generate the kind of normative cohesion, social solidarity and political identity that is required for a political community. As a result, Habermas argues that we should develop the global rule of law and democratic legitimacy through other national, international, transnational and global political processes without a world government. For Habermas, the UN should play an important role in instituting the global rule of law, but it can only be a global organization effective in restricted areas of competence without leading towards a world government.

One might respond to Habermas’ concerns by arguing that a political community could develop once we are under shared global political institutions and laws (after the fact). After all, this is precisely what occurred with modern nation-building: rather than building institutions based on a pre-existing political community with a shared political identity and social solidarity, the latter arose later on, and was often deliberately constructed and nurtured. However, such nation-building was often accomplished in unjust and illegitimate ways and it would be difficult to justify this while valuing democratic legitimacy. In a more recent paper, Habermas recognizes the socializing processes that occur when supranational legal norms are imposed. The problem with this position is that the rule of law and the imposition of legal norms seems to precede the

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183 “Postnational Constellation” at 107-8.
development of democratic legitimacy. There is another possibility. In an important sense, political community is formed in the very act of debating and creating political institutions. According to this view, community formation develops simultaneously with institution-building, rather than simply following from it after the fact.

I will return to the issue of democratic legitimacy and the relationship between democratic legitimacy and the development of the global rule of law through political and legal global institutions in Chapter Five. The purpose of this section with respect to my overall argument is to demonstrate that there are important normative and practical concerns with establishing even a minimal federal world government. Even if one views these as merely current practical obstacles that can one day be overcome, it is still important to consider whether a law-governed condition can be developed in the meantime, in the absence of a world government. In Chapter Five, I will consider to what extent these normative challenges also present problems for the development of international law and the global rule of law without a world government.

2. THE ARGUMENT FOR CENTRALIZED LEGISLATIVE, ADJUDICATIVE AND ENFORCEMENT FUNCTIONS

186 James Tully and Neil Walker present this objection to Habermas’ proposal that we develop the global rule of law, including human rights law, without a world government. In Between Facts and Norms, Habermas argues that the rule of law and democratic legitimacy (popular sovereignty) are equiprimordial: Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (Cambridge: Polity Press, 1996).

Habermas is criticized for giving priority to the rule of law in the international case. My view is vulnerable to the same objection. I will respond to this in the final chapter.

187 Craig Calhoun criticizes Habermas’ conception of social solidarity. He argues that a global public sphere could anchor a social solidarity in which a life together is chosen as it is constructed. “Constitutional Patriotism and the Public Sphere: Interests, Identity, and Solidarity in the Integration of Europe” in Pablo DeGreiff and Ciaran Cronin (eds), Global Justice and Transnational Politics: Essays on the Moral and Political Challenges of Globalization (Cambridge, MA: MIT Press, 2002).
In the previous two chapters I examined Kant’s argument that a central, supreme sovereign is required for a lawful condition, and I also briefly considered similar arguments for this view as presented by Hobbes and other modern writers. In this section I will consider more precisely why the three traditional functions of government – law-making, adjudication and enforcement – must be centralized under a sovereign authority in modern social contract theory and whether certain functions are considered more important than others. If one’s main concern is that individuals may genuinely disagree about what their rights are (for example, where one’s property ends and a neighbour’s property begins, or what a contract requires of the parties), or that individuals will naturally be biased in determining such matters, then the most important requirement is an impartial body to determine what people’s rights are and how these rights should be applied to particular cases, and to provide a fair way to settle conflicts. The judicial function addresses this concern. As I will argue below, this is the feature that I take to be the most important at the global level. If one’s main concern is that laws be enforced by a central coercive power, then the most important requirement for law at the global level is the development of a coercive global system of enforcement.

2.1. The Argument for Centralized Legislative, Adjudicative and Enforcement Functions in Modern Social Contract Theories

Hobbes’ main concern is the need for a coercive power than can impose sanctions. For Hobbes, “there can be no covenants without the sword”; there can be no contractual or legal rights and duties without an independent sovereign power with the capacity and authority to enforce contracts between individuals. The external threat of force and the
fear of punishment is required to ensure that everyone has a reason to comply with one’s contractual obligations and respect the rights of others. Without the threat of punishment, individuals will have good reason to violate their agreements and the rights of others when it is in their own interest to do so and when they can get away with it (such as when there is no reason to fear that the other party will be able to retaliate or punish you). According to Hobbes’ theory, we cannot be obligated to do something that is contrary to our interests. Consequently, we are not under an obligation without a central coercive power that can enforce law through sanctions. The threat of sanction gives me assurance that the other party will comply and it gives the other party the same assurance that I will comply.188 I will analyze Hobbes’ argument for sanctions further in Chapter Four.

Centralized enforcement is not the only requirement for Hobbes. Since individuals may still disagree in their interpretation and application of the terms of a contract, a supreme judge is required to resolve this indeterminacy and settle conflicts. For Hobbes, the sovereign is the supreme judge. The sovereign is also the supreme law-maker: the sovereign determines people’s general legal rights and duties. For Hobbes, all three functions must be centralized under the sovereign in order to have order and a stable civil condition and the rights and powers of sovereignty must be indivisible.189 In

188 Hobbes writes: “For he that performs first has no assurance the other will perform after; because the bonds of words are too weak to bridle men’s ambition, avarice, anger, and other Passions, without the fear of some coercive Power. … But in a civil estate, where there is a Power set up to constrain those that would otherwise violate their faith, that fear is no more reasonable; and for that cause, he which by the Covenant is to perform first, is obliged so to do” (Ch.14). Leviathan, C.B. Macpherson (ed.), (New York: Penguin Classics, 1982) at 196.
189 Ch.18, pp. 236-237. As we saw in Chapter Two, Hobbes argues that mixed government and dividing sovereignty weakens the commonwealth (Ch. 29). While other philosophers attribute these three functions to different branches of government that can provide a system of checks and balances (most notably, Montesquieu), for Hobbes these three functions must be united within the sovereign authority or head of state: the sovereign is the supreme law-maker, the supreme judge, and the supreme enforcer of law. Howard Williams argues that there is greater differentiation
this way, what people’s rights are can always be conclusively determined: it is whatever the supreme, sovereign authority determines.

An independent judiciary seems to be the most important feature that is needed for a civil condition in Locke’s theory. For Locke, the state of nature is governed by a law of nature that obliges everyone: no one ought to harm another in his life, health, liberty, or possessions. These laws can be known by all through reason. Unlike Hobbes, individuals are obligated to follow these laws even in the absence of a civil government that can enforce them. Instead, each individual has a right to punish transgressors of the law of nature to such a degree as may hinder its violation (punishment must be proportionate to the violation). The problem with relying on self-enforcement of one’s own rights or the rights of one’s friends is that individuals tend to be biased in such cases. Human passion and revenge may lead people to take punishment too far. A civil government is needed to remedy this problem. Most importantly, an impartial, independent judge is needed to settle conflicts between individuals and to administer proportionate punishment. Hence, the reasons for a centralized coercive

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191 Locke writes: “For the law of nature would, as all other laws that concern men in this world, be in vain, if there were no body that in the state of nature had a power to execute that law, and thereby preserve the innocent and restrain offenders. And if any one in the state of nature may punish another for any evil he has done, every one may do so: for in that state of perfect equality, where naturally there is no superiority or jurisdiction of one over another, what any may do in prosecution of that law, every one must have a right to do.” Book II, Chapter II, Section 7.
192 Section 13. Locke also differs from Hobbes by raising the concern that if government is to be the remedy of this problem, then it cannot allow one man who commands all others to be judge in his own case and to do whatever he pleases without having anyone else to question or control how he executes his power. He must be answerable to the rest of humankind. Section 13. For Hobbes, in order to have stability, order, and determinacy, the sovereign is above the law and there can be no other authority that may question or control how it executes its power. For Locke, there are constraints on the governing authority. See Section 131.
power to enforce the law for Locke are quite different from those of Hobbes given their different conceptions of the state of nature. For Locke, individuals in the state of nature already have obligations; they are bound by property rights, contractual duties, and the duty not to harm others. The judicial and executive features of civil government are not needed to create contractual or other legal obligations; rather they are intended to address problems with the partial enforcement of these obligations against transgressors.

For Kant, rights and obligations exist in the state of nature but they are only provisional and not conclusive. In order for contract and property rights to be conclusive, all three functions of government are needed for different reasons. Arthur Ripstein explains that first, a centralized law-making body that represents the united will of all is required to set down what is right. Since there will be genuine disagreement about what is right in the state of nature, a legislative power is needed to resolve this indeterminacy. Second, an impartial arbiter is required to resolve residual indeterminacy in cases of conflict. The justification for the judicial branch is similar to the reasons given for this by Hobbes and Locke: it resolves the problem of indeterminacy in the application of general laws to particular cases, and it provides an impartial arbiter to settle conflicts. Third, enforcement (the executive function) is needed to ensure that rights are reciprocal and apply equally to all, regardless of the respective strength of the parties.\footnote{Arthur Ripstein, “Authority and Coercion,” \textit{Philosophy and Public Affairs} 32 (2004) 2-34 at 32.}

There are important differences between Kant and Hobbes regarding the legislative function of government. While both are concerned with having a supreme
law-making authority that can conclusively determine the laws for all.\textsuperscript{194} Kant provides further reasons why this authority should be centralized and independent from the members of a civil society. As I discussed in the previous two chapters, in order to be consistent with the freedom of each individual, the legislative authority must be thought of as representing the united will of all. If the most powerful individual in a pre-legal or pre-civil society simply declared himself king and enacted laws for all, then he would be imposing his unilateral will on all others. If all individuals in a pre-civil society decided to vote on different policies, then some (the majority) would be imposing their multilateral will on others. In order to make the exercise of sovereign legislative and executive power consistent with the inherent freedom of each and every individual, Kant argues that a central, supreme, independent authority that is regarded as representing the united will of all is required. This conception of the united will regards individuals as both authors and subjects of the law at the same time. This argument for a centralized and independent legislative authority suggests that Kant’s theory cannot be used to support a decentralized or horizontal model of international law. However, the application of Kant’s argument for a central legislative authority within states to the international case is limited since there are important differences between the domestic and international cases, as I argued in Chapter One.\textsuperscript{195}

\textsuperscript{194} As demonstrated in their rejection of a right to rebel, they both also argue that the sovereign authority should be supreme and unquestionable precisely so that its determination of what is right is conclusive.

\textsuperscript{195} Kant’s justification for a civil domestic society is based on the inherent right to freedom of persons. A supreme, sovereign authority and common public law is required to secure the right to freedom of individuals. However, as Ripstein argues, states do not similarly have a right to freedom that is analogous to the right to freedom of individuals: Arthur Ripstein, \textit{Force and Freedom: Kant’s Legal and Political Philosophy} (Cambridge Mass: Harvard University Press, 2009). The primary duty of the state is to secure the right to freedom of its citizens. This is why
External enforcement is also required for Kant, but for very different reasons than for Hobbes. For Kant, enforcement is needed to ensure that rights are reciprocal and that they apply universally and equally to all, regardless of the respective strength of the parties. External enforcement provides assurance that each party’s rights will be secured. This may sound like Hobbes, but the role of external enforcement for Kant is not to guarantee actual compliance through the fear of punishment, but to ensure that when one party violates another’s rights, the aggrieved party will be compensated in some way by the violator – it sets things right.  

Although all three functions of government are necessary for a lawful, civil condition for all three philosophers, there are some important differences. All three philosophers recognize the importance of an impartial adjudicator to settle conflicts and address the problem of indeterminacy in the application of law to particular cases, but this has the most important role in Locke’s theory. Hobbes emphasizes the importance of a coercive power to enforce the law since this is required in order to have an obligation to comply with law in the first place, whereas Kant argues that it is necessary to ensure that rights are reciprocal and universal. For all three philosophers, a central law-maker is needed to determine conclusively what the law is, but for Kant a central, independent, legislative power that represents the united will of all is also needed to make the exercise

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Kant does not recognize a right to use coercion against other states in forming a global civil society while he does recognize the right to coerce individuals into a civil society.  

196 Ripstein argues that the point of coercive enforcement for Kant is not to provide disincentives for wrongdoers (which seems to be the case for Hobbes), but to set things right. Ripstein notes that Kant’s paradigmatic example of coercion is the right of a creditor to demand payment from a debtor – the right to compel payment rather than a right to punish nonpayment. Consequently, even though external enforcement cannot guarantee that the other party will meet her obligations under a contract, it sets things right by compensating the aggrieved party. “Authority and Coercion,” 32.
of political authority and coercion consistent with the freedom of all individuals by viewing them at the same time as authors of these laws.

In my analysis of whether a decentralized, horizontal model of international law is able to create a law-governed condition between states, I will try to respond to these arguments and contemporary versions of these arguments. Are these three centralized functions necessary features for a law-governed condition? Are these three centralized features required for law and the rule of law at the global level? In Chapter Four I will focus on the Hobbes’ argument for enforcement through punitive sanctions. In Chapter Five I will address Kant’s argument for a centralized legislative authority. In this Chapter and in the next two chapters I will support the importance for the judicial function as found in all three theories, especially Locke.

2.2. CONTEMPORARY CONCEPTIONS OF WHAT IS REQUIRED FOR LAW

The arguments provided by Hobbes, Locke and Kant are relevant to addressing contemporary challenges to international law and the global rule of law since it is still commonly assumed that a central legislative body, judiciary and system of enforcement is required for law. While examining Kant, Hobbes and Locke is helpful in understanding the reasons why the centralized model continues to be the dominant view in political thought, their theories go beyond the issue of what constitutes law and what is required for the rule of law. These writers are also concerned with establishing a just and rightful condition: a condition in which the natural, inherent rights of individuals are secure. Consequently, a decentralized model of international law may be able to qualify as law and it may be able to satisfy a minimal conception of the rule of law without satisfying
Kant’s conception of what is required for a lawful, just and rightful condition. Since I have taken Kant to be an important starting point in my analysis, I will nonetheless consider to what extent international law without a world government can address Kant’s arguments, and to what extent it cannot.

Let us begin with the first issue: what is required for law? Is international law able to qualify as law without a world government? Is it able to create distinctively legal rules and obligations? The traditional view is that to have a legal system, there must be a legislative body that makes law, adjudicative bodies that interpret and apply the law, and a system of coercive enforcement that can enforce the law through sanctions. This conception of law is reinforced by the fact that our domestic legal system appears to be based on this model. However, we saw in Chapter Two that the relation between the different branches and the claim of supreme and final authority is complicated, particularly in the case of federal governments such as Canada. Based on this

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197 In Canada, the federal government seems to have supreme legislative authority, but provincial governments have supreme jurisdiction over certain matters as outlined in the BNA Act of 1892. While there is a centralized, hierarchical court system under the Supreme Court of Canada (the final court of appeal), and the Canadian government has a monopoly on the use of force, the relation between these branches is complicated. The use of coercion to enforce the law must be authorized by positive law and it is subject to court review. Hence, the judicial branch seems to have ultimate authority regarding enforcement. Other actions and policies of provincial and federal governments are also subject to court review in cases in which jurisdiction is contested by another government, or the act or policy is challenged for violating individual rights under the Charter of Rights and Freedoms. This suggests that we have judicial supremacy rather than parliamentary supremacy. However, there are situations in which the federal and provincial governments can act contrary to judicial findings (for example, a government can invoke the notwithstanding clause), and there are cases in which the courts have decided to leave the matter to political negotiation.

Despite this complex relationship between the different branches of government, we can say that there is “law” and that there is a legal system in Canada since there are legislative bodies with the recognized authority to make law, there are courts with the authority to interpret and apply the laws that are made by the legislature to particular cases and to assess the constitutionality of these laws, and there is a police force and prison system to enforce the court’s judgments. Rather than having an obvious case of Parliamentary supremacy or judicial supremacy, what seems to have supremacy is the rule of law. The boundaries between the
traditional conception, it is argued that what is currently called “international law” does not qualify as law (that it is not true law or real law) and it is not capable of creating legal obligations because it lacks these centralized features. Allen Buchanan refers to this view as the “Legal Nihilist” objection since it argues that what is called international law is not law – it is something else.\textsuperscript{198}

One response to the Legal Nihilist View is to show that these three features can in fact exist without a world government. This response also involves arguing that these three features need not be centralized under a sovereign authority in order to have law. A second response is to challenge the claim that all three of these functions are necessary features for law to exist. Coercive enforcement through sanctions is commonly thought to be a necessary feature for law, if not the most important feature. It is commonly believed that “international law is not law because it is not enforced.”

I will challenge the coercion-based view of law and the view of law that focuses on the imposition of rules from above. Instead, I will support a conception of law that focuses on obligation, the acceptance of law’s normative authority, and the recognized authority of certain legal processes and institutions in the creation, interpretation and application of law. This perspective is becoming more dominant in recent international legal scholarship where there is a greater emphasis on the idea of compliance rather than

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\textsuperscript{198} Allen Buchanan argues that there are two ways of viewing the Legal Nihilist argument: (1) as a claim about the features of a system of rules must have if it is to be a legal system, paired with the assertion that what we call international law lacks some of these features; and (2) as a claim that a system of rules is not a legal system unless its rules effectively determine the behaviour of those to whom the rules are directed, along with the observation that states are not effectively bound by what we call international law. \textit{Justice, Legitimacy and Self-Determination: The Morality of International Law} (Oxford University Press, 2005) at 46. I am referring to the former sense here.
coercive enforcement or sanctions. Of the three functions outlined above, I will argue that the adjudicative function is the most important feature for law in the international case since it provides an independent, impartial and authoritative determination of legal validity (whether a treaty article or other process gives rise to a binding legal rule) and what particular laws require: the interpretation and application of law to particular cases. This need not be limited to the traditional institution of judges and courts. Other administrative and monitoring bodies can fulfill this function as well.

3. The Decentralized or Horizontal Model of Law-Making in International Law

It is important to first understand how the current system of international law functions. International law has developed in decentralized ways, largely through the consent and actions of states, without a centralized law-making body with supreme authority to make binding laws. The closest thing to a centralized law-making body that currently exists is the United Nations. While the U.N. General Assembly is more representative than the Security Council since it includes all states, its Resolutions and Declarations are considered to be “soft law” (quasi-legal) rather than fully binding “hard law.” The term “soft law” in international law is used to refer to international rules that are more flexible, general, or vague. These rules may not stipulate any concrete legal obligations or rights for the relevant parties and they may be vague about what state parties are required to

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Examples of “hard law” include ratified treaties between states, Security Council Resolutions, and international customary laws that specify more precise and concrete legal rights and obligations. Soft law has a very important role in the international legal system since it allows states to accept and recognize more general, flexible principles and obligations until they can reach agreement on more specific, concrete legal rights and obligations. Given the scope of many global problems and significant differences between states in terms of their interests and political cultures, reaching agreement on specific, concrete rights and obligations is very challenging. Through soft law, states can begin with agreements on general principles and commitments through declarations and other soft law instruments and can progress towards developing concrete, legally binding rights and obligations.

Since the Security Council’s Resolutions are considered to be binding “hard law,” the Security Council seems closer to a legislative-executive power than the General Assembly. The Security Council can also authorize states to impose economic and military sanctions to enforce its resolutions or to use military force to stop states that continue to violate international law. Its main role, however, is to deal with urgent matters regarding peace and security rather than to enforce international law more generally. More importantly, this institution is not sufficiently representative or

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200 Dixon, 47-8.
201 For example, the UN Declaration on Human Rights is considered “soft law” since it is not a ratified treaty and does not specify how the obligations set out in the treaty are to be implemented. Its provisions have acquired the status of “hard law” through the ratification of the International Covenant on Civil and Political Rights and the International Covenant on Social, Economic and Cultural Rights (these are considered to be legally binding treaties in international law). The UN Declaration on Human Rights is nevertheless an important document that has significant normative force. In signing a declaration, a state affirms its assent to certain international norms. This can then lead to the creation of a binding treaty or it may be used to support the acceptance of these norms as part of international customary law.
accountable to provide an acceptable model of a global legislative-executive body. From the perspective of political legitimacy and the rule of law, many have rightly argued that in addition to becoming more representative and accountable, the current veto power of the five permanent members should be removed.  

Currently, states largely create legally binding obligations in international law by consenting to multi-lateral treaties. Treaty obligations are legally binding only between states that consent to them. However, states are also bound by international customary law. In the case of customary law, binding obligations are grounded on a state’s implied consent. If it appears that a state has agreed to a particular rule or practice through their actions over a significant amount of time (their *opinio juris*), then this may give rise to a customary legal rule and the state will be legally obligated to comply with this rule. Customary law often becomes codified in treaties over time. An example of a developed area of international customary law is the law of the sea. For example, the International Court of Justice has identified and applied customary law regarding the nature and extent of continental shelf rights. Many of these customary legal principles were later codified in the 1982 *Law of the Sea Convention*. The law of the sea is also an example of an area of international law in which there is a large degree of agreement about the legal

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202 For example: Daniele Archibugi, “From the United Nations to Cosmopolitan Democracy.” I will return to this issue in Chapter 5.

203 The International Court of Justice has determined what kind of actions and statements (*opinio juris*) are sufficient to establish a rule of customary law in the *Lotus Case* (1927) PCIJ Ser. No.10, the *North Sea Continental Shelf Cases* 1969 ICJ Rep 3, the *Advisory Opinion on the Legality of the Threat of or Use of Nuclear Weapons* 1996 ICJ Rep 66, and other cases. In general, state practice must be accompanied by the belief that the practice is obligatory; habitual practice is not enough. Dixon, 32.

204 For example, in the *North Sea Continental Shelf Cases*. 
framework that regulates state action. It is one of the most comprehensive and complex multilateral treaties ever concluded.\textsuperscript{205}

There are also international legal rules that are binding on all states, even without evidence of their explicit or implied consent. For example, the prohibition of aggressive war, genocide, crimes against humanity, slavery and piracy are considered to be \textit{jus cogens} or peremptory norms.\textsuperscript{206} A \textit{jus cogens} obligation is an obligation that is accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted.\textsuperscript{207} According to some sources, the prohibition of torture has also received sufficient recognition as a \textit{jus cogens} obligation.\textsuperscript{208} Precisely how and when international norms acquire the status of \textit{jus cogens} obligations is somewhat unclear. The International Court of Justice has determined the existence of \textit{jus cogens} obligations based on the widespread acceptance of these obligations by states, and the recognition of international jurists and international legal experts. Hence, while treaties are supposed to only bind member states, certain treaty obligations may attain the status

\textsuperscript{205} Dixon at 196.
\textsuperscript{206} These are the least controversial examples of \textit{jus cogens} norms. Ian Brownlie, \textit{The Principles of International Law} (Oxford, Clarendon Press, 1979) at 513.
\textsuperscript{207} The definition of a peremptory norm is stated in Article 53 of the \textit{Vienna Convention on the Law of Treaties}, (1969) 1155 UNTS 331.
\textsuperscript{208} In a General Comment, the UN Human Rights Committee recognized the prohibition against torture as an international customary law and referred to it as an peremptory norm, stating that states may not reserve the right to engage in torture. General Comment No.24 (52), U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994). American courts have stated that the prohibition of torture constitutes an international customary norm. For example, the Court stated this in \textit{Filartiga}, a case brought under the United State’s \textit{Alien Tort Act} 28 U.S.C. §1350: \textit{Filartiga v. Peña-Irala}, 630 F.2d 876 (CA, 2n Cir. 1980) at 890. Unfortunately, despite the near universal recognition of a prohibition against torture, the use of torture is still widespread. Despite the fact that American Courts have held that the prohibition of torture constitutes an international customary norm, in the last decade, the U.S. Government has permitted and even authorized the increased use of torture by its officials. The Canadian Government has also been complicit in the use of torture by the U.S. in Guantanamo Bay (particularly in the Omar Khadr case) and with the use of torture by others in Afghanistan.
of *jus cogens* obligations over time, particularly if there is widespread ratification of these treaties.

Global institutions provide a third source of international law. The U.N. Security Council, the World Trade Organization, the International Monetary Fund, the World Health Organization, the International Labour Organization, the World Intellectual Property Office, and other institutions and agencies have the authority to create, interpret, develop and adjudicate rules in a circumscribed area. In the case of global institutions that are created by treaties, their authority to create, interpret, apply, and develop rules is directly grounded on the consent of states and circumscribed by the treaty.

International law is commonly thought to be consent-based, particularly since so much of it is developed from treaties. Based on this, a voluntarist account of international law and international society may seem appropriate. The voluntarist view holds that all international obligations are self-imposed. This view provides a way to reconcile the assumed absolute sovereignty of states with binding rules of international law since no rule of international law is binding on a state without its prior consent, either express or tacit.

As I argued in Chapter Two, this voluntarist view does not provide an accurate or consistent account of international law. It does not provide an accurate account since international law is not wholly consent-based, as illustrated by the example of *jus cogens* norms.\(^{209}\) It is also not an accurate view because existing international customary law binds new states even though they never had a chance to consent to any customary legal

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\(^{209}\) Fernando R. Tesón argues that state consent cannot be the basis of obligation if one accepts that governments may consent to immoral things, and if one accepts the concept of *jus cogens*. *A Philosophy of International Law* (Colorado: Westview Press, 1998) at 74.
rules. Secondly, the voluntarist account does not provide a consistent account of international law since it holds that states are only bound by obligations that they impose on themselves by treaty or agreement. This assumes a background, higher-level obligation that states are bound by the obligations they impose on themselves. If so, this is an example of a fundamental obligation that binds all states that does not depend on their consent.

The above examples illustrate some of the decentralized ways in which international law is currently created in the absence of a centralized global legislative body. A large body of legal rules and a number of legal processes have developed over a wide range of matters: shared waters and the sea, trade, banking, health, human rights, international criminal law (including war crimes, genocide, crimes against humanity), the environment, labour regulations, refugees, intellectual property, weapons of mass destruction, postal services, communications, outer space and more. This shows that decentralized law-making is possible. The above examples also show that rules and regulations of international law appear to be quite law-like.

Of course there are many significant weaknesses with the current decentralized model of creating international law. First, it is very difficult and takes a lot of time to

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210 For example, a newly formed state will be subject to the international customary laws of the sea even though it has never been able to show tacit consent to these norms through its actions. An existing state that undergoes some change may similarly be bound by international customary obligations that apply to its changed circumstances even though it never had a chance to approve or disapprove of those norms. For example, if an existing state acquires new territory that includes territorial waters, it is bound by existing customary laws regarding territorial waters. See H.L.A. Hart, The Concept of Law (Oxford: Clarendon Press, 1994) at 226.

211 Hart argues: “For, in order that words, spoken or written, should in certain circumstances function as a promise, agreement, or treaty, and so give rise to obligations and confer rights which others may claim, rules must already exist providing that a state is bound to do whatever it undertakes by appropriate words to do. Such rules presupposed in the very notion of a self-imposed obligation obviously cannot derive their obligatory status from a self-imposed obligation to obey them (225).”

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reach consensus on the language of treaties and treaty obligations are often weakened through compromise in order to get more states on board. However, given the scope of many international issues and the difficulty of reaching majority agreement between representatives from different states, these are problems that would still plague a world parliament. In the case of a world parliament that represents individuals directly, reaching agreement would still also be very challenging.

Second, there is a significant power imbalance in the creation of international law. More powerful states seem to have a greater say in the formation and development of international law. Unfortunately I do not think this could be simply addressed by a world legislature in which each state gets an equal vote or with some other arrangement that reflects population or the regional groupings of states. More powerful states would still be able to influence weaker, dependent states. The power imbalance and economic inequality between states would have to be addressed. A good feature of the decentralized model of law-making is that states can develop international law through treaties even when the world’s most powerful states are against the treaty or are not willing to commit themselves to the treaty. For example, the United States is not a party to the treaty that created the International Criminal Court of Justice or to the Kyoto Protocol to the UN Framework Convention on Climate Change; in fact, under the Bush Government, the United States has opposed these treaties. The United States along with Canada and Australia also did not sign The UN Declaration on the Rights of Indigenous Peoples. It seems unfair that states can simply refuse to be part of these

\[212\] The United States has not ratified the International Convention on the Rights of the Child or the International Convention on the Elimination of Discrimination Against Women. It has signed these treaties and it has expressed an intention to ratify them once its domestic laws are changed to be more in line with the provisions of these treaties.
important instruments and their monitoring or compliance mechanisms. As most clearly seen with environmental treaties, this may create free rider problems. However, trying to get the agreement of powerful states or all states would significantly slow down and weaken the commitments made by such treaties. Of course the hope is that eventually more and more states will agree to such important treaties and instruments.

The main question I would like to consider is whether this kind of decentralized or horizontal model of law can sufficiently address the concerns that modern social contract theorists raised against the state of nature – concerns that they believed can only be resolved by a supreme sovereign ruler or government with centralized legislative, judicial and enforcement functions. In Chapter Five, I will consider the extent to which the decentralized model of law-making sketched above can address the arguments that are given in favour of a centralized legislature. In addition to considering the Kantian argument for a centralized legislature, I will also consider contemporary theories of democratic legitimacy.

4. The Judicial Function and the Problem of Indeterminacy: Decentralized Adjudication by International Bodies & Domestic Courts

In this section and in the next two chapters I will argue that the adjudicative function is the most important feature for a decentralized or horizontal model of law at the global level. The impartial and authoritative determination and application of international law is important for addressing the problem of indeterminacy and bias that modern social contract theories attribute to the state of nature.
Some political and legal philosophers have argued that the most important feature that is required for the rule of law at the global level is an impartial judiciary with the authority to settle conflicts because even if law can be developed without a centralized legislature, there will always be indeterminacy in the application of law. For example, Jeremy Bentham and Hans Kelsen argued that an independent international court is the central feature that is required for the rule of law to exist internationally.\(^\text{213}\) I agree that the judicial function is the central feature that is required for a law-governed condition at the global level.

But could the adjudication of conflicts also be decentralized? Under a decentralized system, international courts, domestic courts, and specialized adjudicative or administrative treaty bodies determine what international law requires and apply international law to settle particular conflicts. Currently, domestic courts apply international law to some extent. However, this is something that could and should be developed further. In addition, various adjudicative and administrative bodies have been developed to interpret and apply various treaties. For example, the Human Rights Committee monitors the compliance of member states with the *International Covenant on Civil and Political Rights* and it can adjudicate claims brought by an individual against his or her state.\(^\text{214}\) These adjudicative treaty-based institutions are specialized bodies.


with limited jurisdiction over matters that fall within the scope of the treaty. As we shall see, even the International Court of Justice has limited jurisdiction.

In this section, I will provide a brief overview of how international law is currently adjudicated and I will discuss some of the limitations with this system.

4.1. **THE INTERNATIONAL COURT OF JUSTICE**

The existing International Court of Justice is an international court that adjudicates conflicts between states, and only between states. Individuals and non-state groups are not recognized as parties before the court. This is a significant limitation since individuals cannot bring claims against their states or other states before the ICJ for such things as human rights violations. Peoples or sub-state nations within states are also not able to bring claims against states before the ICJ. Since international law has shifted away from traditional state-based international law to recognizing individuals and other agents as both actors and subjects in international law, it is important to have an international court with higher authority that can provide authoritative determination of fundamental issues in international law that concern individuals and other non-state actors.

A second limitation of the International Court of Justice is that it does not have compulsory jurisdiction. States must agree to have a particular conflict adjudicated by this court. The ability of this Court to settle disputes between states is obviously limited by this factor since all affected state parties must agree. If a state party has reason to think that the International Court will rule against it, it can simply refuse to bring the dispute before the Court. The ability of this court to develop the authoritative
determination of fundamental issues in international law is limited by this factor. An important reform for the global legal system is to give the International Court of Justice compulsory jurisdiction over all states. If State A brings a case against State B, the Court could then still adjudicate the case if State B refuses to participate in the proceedings, and the judgment would be legally binding on State B. If State B believes that State A does not have sufficient grounds for the case, then this is something State B would have to argue before the court.

A third limitation of this Court is that there are no direct enforcement procedures for the Court’s rulings. A state may willingly comply with the Court’s ruling because it recognizes the Court’s authority and legitimacy or it may choose to disregard the court’s judgment and continue with its illegal act or fail to compensate the wronged state party. However, the wronged state, other states, global institutions, and citizen groups may try to pressure compliance with the judgment of the Court through various means and they may justify this action by appealing to the Court’s authority to apply international law. This third limitation concerns the issue of enforcement more generally and so it will be addressed in Chapter Four. I will argue that even if the Court’s judgment can not be effectively enforced against states, the judgment that a state has violated international law has significant normative weight, or at least it ought to.

4.2. Treaty-Based Adjudicative or Administrative Bodies

There are many other adjudicative bodies in international law, but they similarly suffer from the second and third limitations. Some of these adjudicative institutions do not suffer from the first limitation. Some important adjudicative bodies such as the

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215 Daniele Archibugi, Jeremy Bentham, and Hans Kelsen argue for this.
International Criminal Court and the Human Rights Committee recognize individuals as subjects and parties in international law. The former can try individuals for violations of international criminal law as set out by the treaty for the International Criminal Court. The Human Rights Committee can adjudicate claims brought by individuals against their own states for the violation of the International Convention on Civil and Political Rights if the state is a party to the Convention and if it has signed the Optional Protocol concerning individual complaints.

While most international adjudicative bodies are limited by the second factor since states have to be a party to any treaty that establishes these adjudicative bodies or enforcement mechanisms, the International Criminal Court is an exception to some degree. The Security Council can refer a claim against an individual to the ICC Prosecutor and the ICC Prosecutor can issue arrest warrants even in cases in which the individual’s state of nationality is not a party to the ICC Treaty.216

4.3. Domestic Courts

Domestic courts can also adjudicate and enforce international law. The first limitation does not apply since individuals can bring cases against foreign nationals or their own state, and individuals can be sued or prosecuted for the violation of international law in domestic courts. Instead, the ability of domestic courts to apply international law is limited to the extent that they are not able to adjudicate cases between states. In terms of the third limitation, the enforcement mechanisms of the court’s state can be used to enforce judicial judgments where this is possible. For example, an individual can be

216 For example, the ICC Prosecutor requested an arrest warrant for the President of Sudan (President Omar Hassan al-Bahsir) in July 2008 even though Sudan is not a party to the ICC Treaty.
imprisoned in a domestic jail for the violation of international criminal law if he or she is
on the state’s territory, and an individual can be required to pay a financial judgment if he
or she has money or property that the state can seize. The second limitation, claiming
jurisdiction, will depend on the kind of case.

There are three main types of cases in which domestic courts can adjudicate and
enforce international law. The first type involves a claim made by an individual against a
state, before that state’s own domestic court. For example, an individual can claim that
certain rights protected by international human rights treaties or refugee law were
violated by her own state.

A second type of case involves the application of international public law against
an individual. In some cases, a domestic court’s authority to apply and enforce
international law is authorized by a treaty. However, certain norms give rise to universal
jurisdiction. These are regarded as crimes against the whole global community, and all
states have the authority to adjudicate and punish those that have violated such laws.
These obligations are owed by all states, to all states; all states have an interest, and
perhaps even an obligation, in enforcing and promoting obligations *erga omnes*.\(^{217}\)
Consequently, a foreign individual can be prosecuted before a domestic court for
committing these crimes in another country against the citizens of other states. In Canada,
the prosecution of Irme Finta for war crimes and crimes against humanity committed

\(^{217}\) In *Concerning Barcelona Traction, Light & Power Co, Ltd. (Belgium v. Spain)* [1970] ICJ
Rep.3 at 32, the ICJ stated that obligations *erga omnes* “are the concern of all States. In view of
the importance of the rights involved, all States can be held to have a legal interest in their
protection.” The Court stated that existing *erga omnes* obligations were derived from the
outlawing of acts of aggression, and of genocide, as well as “from the principles and rules
concerning the basic rights of the human person, including slavery and racial discrimination.” In
a 1987 report, the U.N. Special Rapporteur on Torture, P. Kooijmans, suggested that the
against Jews in Hungary during WWII is an example of this type of case \( (R. v. Finta) \).\(^{218}\)

A more recent example is the Quebec Superior Court’s 2009 judgment that convicted Désiré Munyaneza for acts of genocide, war crimes, and crimes against humanity committed in Rwanda in 1994 \( (R. v. Munyaneza) \).\(^{219}\)

A third kind of case involves the adjudication of private international law or transnational civil law. For example, an individual can sue a foreign individual in a

\(^{218}\) In is \( R. v. Finta \), [1994] 1 S.C.R. 701, Imre Finta was prosecuted under the war crimes and crimes against humanity provisions of the \textit{Canadian Criminal Code} Section 7(3.71) - (3.76) for crimes committed against Jews in Hungary during World War II. The Supreme Court of Canada based its claim to jurisdiction on the principles of international law. Justice Cory (writing for the majority) explains: “Since war crimes and crimes against humanity are crimes against international prescriptions and, indeed, go to the very structure of the international legal order, they are not under international law subject to the general legal prescription (reflected in s. 6(2) of our Code) that crimes must ordinarily be prosecuted and punished in the state where they are committed; see \textit{Attorney-General of the Government of Israel v. Eichmann} (1961), 36 I.L.R. 5. Indeed the international community has encouraged member states to prosecute war crimes and crimes against humanity wherever they have been committed.” Justice Cory notes that claiming jurisdiction for this case is not only permitted by international law, it is also encouraged by the international community. Justice Cory also refers to the main sources of international law in understanding the requirements for these crimes: “…international conventions and the practices adopted and approved as law by authoritative decision makers in the world community, along with the general principles of law recognized by civilized countries are what constitute the principal sources of international law. The pronouncements of learned writers on international law are extremely useful in setting forth what these practices and principles are, but the personal views of learned writers in the field, though useful in developing consensus, are of a subsidiary character in determining what constitutes international law. This approach, which is universally accepted by the international community, is authoritatively set down in Art. 38(1) of the \textit{Statute of the International Court of Justice}…”

“Again one must return to the international system perspective to understand this requirement [the requirement that to constitute a crime against humanity the impugned act have been directed at "any civilian population or any identifiable group"]]. As mentioned earlier, this is the specific factor that gives the crime the requisite international dimension and that permits extraterritorial prosecution, thus distinguishing it from an "ordinary crime" that the state is expected to prosecute. Unlike ordinary crimes, it is of direct concern to the international community and may be prosecuted wherever the alleged offender may be found. As earlier mentioned, this exception to the ordinary principle that criminal law is territorially limited is made necessary by a number of considerations. As mentioned, where the crime is especially widespread in that it is directed against an entire population (whether of a town, or region, or even nationally) or an identifiable group within the population, foreign enforcement is especially important because there is often the possibility that the government in the state where the crime occurs may not be willing to prosecute; indeed it may be the source of the crimes. For this reason, international law permits other states to exercise jurisdiction to try such crimes.”

\(^{219}\) \( R. v. Munyaneza \), [2009] Q.C.C.S., 2201. This case was the first case prosecuted under Canada’s \textit{Crimes Against Humanity and War Crimes Act} (2000, c. 24). This Act incorporated the obligations of the \textit{Rome Statute of the International Criminal Court} into Canada’s domestic laws.
domestic court, for an act committed in a foreign country. This occurs quite frequently in private law cases involving commercial transaction. Many trace this back to the much older development of mercantile law (*lex mercantile*). In standard tort cases that involve individuals of different countries or that occur in a foreign country, the first legal issue that must be determined is which court should have jurisdiction: the court of the state in which the wrongful act occurred, the court of the plaintiff’s state, or the court of the defendant’s state.\(^{220}\)

A more novel kind of international private law case is the use of civil litigation to enforce public international law, such as international human rights violations and violations of international criminal law and humanitarian law. For example, American domestic courts have adjudicated tort claims for torture committed by foreign individuals, in foreign countries, even when the claimants are not American citizens.\(^{221}\) Enforcement of these judgments is often difficult, unless the defendant owns property within the state in which the case is tried. However, most plaintiffs who bring such cases are primarily concerned with getting a judgment that their international human rights were violated rather than financial compensation.\(^{222}\)

\(^{220}\) Domestic courts have developed rules for determining this issue. For example, in *Tolofson v. Jensen*, the Supreme Court of Canada developed the general rule that the *lex loci delicti* (the place where the tort was committed) should be the governing law. It also affirmed the Court’s discretion to apply Canadian law when a rigid rule on the international level could give rise to injustice (*Tolofson v. Jensen; Lucas v. Gagnon*, [1994] 3 SCR 1022). Despite the development of determinate rules for settling these questions, however, the courts of different countries may have different rules for determining jurisdiction.

\(^{221}\) This is made possible through to the U.S. *Alien Tort Act*.

\(^{222}\) Harold Hongju Koh argues that plaintiffs who sue the government or government officials in domestic courts for international wrongs not only seek compensation, but also norm-enunciation and judicial declarations that the state has transgressed universally recognized norms of international law. While their announced aim has is retrospective redress, he argues that the underlying focus of their actions is prospective: to provoke a judicial declaration that the conduct of government officials violates a norm of international law. Harold Hongju Koh, "Transnational Public Law Litigation", (1991) 100 *Yale LJ* 2372, at 2368-9.
These examples show that domestic courts have significant authority and capacity to apply and enforce international law. While domestic courts have no problem dealing with transnational private law issues between private actors (for example, in settling disputes concerning private contracts or defective products), there seems to be some resistance to applying public international law except in grave cases such as genocide and crimes against humanity. This problem is more significant in the Canadian case since international treaties must be first incorporated through domestic legislation in order for it to be regarded as part of Canadian law. In the United States, once the Government ratifies a treaty, it is considered part of U.S. law and courts can apply it as such. However, even then, many judges seem reluctant to apply international law directly.

According to Phillip Jessup, the difficulty in creating and applying international or transnational law in domestic courts is a problem that "lies in the minds of men" - something which can be improved by creating an understanding amongst students, scholars, lawyers and judges. He argues that the application of international law by a domestic court is not as indeterminate or biased as some worry because it is significantly

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223 This requirement of incorporation in Canadian law also creates limitations for the previous two kinds of cases in Canada. Instead of applying international law directly against the Canadian state or against an individual, Canadians courts must apply domestic legislation that incorporates the relevant provisions in international law. For example, in the Finta case, the Supreme Court of Canada did not apply international law directly. Instead, it applied the provisions of the Criminal Code that incorporated international rules and obligations regarding crimes against humanity and war crimes into Canadian law. Similarly, in the Munyaneza case, the Quebec Superior Court case did not directly apply the Rome Statute of the International Criminal Court but rather a Canadian statute that incorporated rules and obligations from that treaty into Canadian domestic law (The Crimes Against Humanity and War Crimes Act).

circumscribed by the sources that specify transnational law: domestic statutes, treaties, U.N. General Assembly Resolutions, as well as domestic courts themselves.\textsuperscript{225}

5. **CONCLUSION**

In the remaining two Chapters, I will argue that the central, most important feature for law at the global level is not a centralized world parliament to make law or a centralized coercive system of sanctions to enforce law; rather the central feature is the existence of impartial bodies that have the authority to determine and interpret international law and to apply international law to settle conflicts. This feature addresses the problem of indeterminacy that Hobbes, Locke and Kant attributed to the state of nature and it addresses the Locken concern with bias.

While a decentralized system of international courts, domestic courts, treaty-based adjudicative and administrative bodies can address the problems of indeterminacy and impartiality by determining what a particular area of international law requires and by applying this to settle cases, there are good reasons to have a central international court with compulsory jurisdiction to address foundational legal issues in international law. Such a court could provide greater determinacy and consistency on foundational issues such as the creation and force of treaties and the recognition of new rules of international customary law. It could also address any gaps that exist in international law and settle issues that are not covered by treaty-based bodies. As discussed in Chapter Two, as sovereignty becomes more dispersed, boundary disputes will arise. An

international court could settle conflicting claims to jurisdiction between different levels of government (for example, when both a state and a supranational institution claim jurisdiction over a particular matter). In addition, as I will discuss in Chapter Five, an international court can develop and apply fundamental principles of the rule of law or administrative law to constrain the exercise of power by international institutions.

In Chapter Five, I will consider the objection that this view privileges the rule of law over democratic legitimacy and leads to the judicialization of politics and judicial imperialism: that it gives too much power to adjudicative and administrative bodies. I will consider both Kant’s argument and contemporary objections based on democratic legitimacy.
CHAPTER 4

A DECENTRALIZED MODEL OF INTERNATIONAL LAW:
THE PROBLEM OF ENFORCEMENT

In this chapter I will focus on the issue of coercive enforcement and the skeptical argument that since international law is not effectively enforced against states by a centralized, supranational system of coercive enforcement, it is not really law. This objection appears to be the most common and serious challenge that is presented against a decentralized model of international law. To the extent that such supranational coercive enforcement is either not possible or undesirable, this is regarded as an argument against the possibility of law and the rule of law at the international or global level. This objection is important from the perspective of legal theory since a distinctive feature of domestic legal rules seems to be the fact that they are enforced coercively, as well as the idea that they can be so enforced. This is often thought to be what distinguishes legal rules and obligations from non-legal moral rules and obligations: we think external enforcement is justified for the former but not the latter. However, does focusing on coercion provide an adequate account of legal obligations? What important features of law do we neglect by focusing on coercion? Is coercive enforcement through sanctions a necessary feature of law?

There are different versions of this objection against the possibility of developing law and the rule of law at the global level without a supranational system of coercive enforcement. First, there is the view that a centralized system of coercive sanctions is a
necessary feature for law. This is a conceptual argument about the nature of law. 

According to this view, since international law lacks a supranational coercive system of sanctions, it is not really law; it is something else. This objection begins with a particular conception about what features are required for law and when it finds that some of these features are absent in the international case, it concludes that international rules are simply not law, as if by definition. As I discussed in the previous chapter, Allen Buchanan refers to this view as the “Legal Nihilist” objection.\(^{226}\)

Second, enforcement-based objections can also take the form of a practical or instrumental argument. This kind of objection puts aside the conceptual issue of whether coercive sanctions are conceptually necessary for law, and it argues that, in practice, coercive sanctions are required for law to be effective and to achieve the goals that law ought to achieve. Without sanctions, legal rules and duties are useless and meaningless.

If one believes that international law without a supranational system of coercive enforcement is not true law, that it cannot create distinctively legal rules and obligations or fulfill what one considers to be the central distinctive function of law, then the next issue is: what do we have instead? There are two main views that follow from his objection. First, there is the Realist view of international relations. This view regards the relation between states as a Hobbesian state of nature in which states act solely based on their own national interests. Under the Realist view, while states may agree to be bound by certain treaties and rules of international law, they comply with these rules and treaties only when it suits their interests, and not because they are under any obligation to do so.

What we have instead is mere power politics, rather than action that is guided or constrained by normative rules and obligations.

Second, there is what I call the Morality But Not Law view. In contrast to the Realist position, this view accepts that normative rights and obligations can exist between states without a world government with centralized coercive enforcement, but it regards the obligations between states as merely voluntary or self-binding moral obligations rather than externally binding legal obligations. Jürgen Habermas presents this argument against Kant’s proposal for a voluntary non-coercive federation of states.227

There are two main responses to the conceptual objection: first, one can reject the assumption that coercive enforcement is required for law (this is a conceptual issue), and second, one can try to show that international law can be sufficiently enforced without a coercive world government to meet this conceptual requirement.228 In this chapter, I will focus on the first response by considering broader conceptual issues regarding the connection between law and coercive enforcement.

In the first section of this chapter, I will provide an argument in favour of the first response. I will reject the assumption that coercive enforcement is required for law, or that it is a necessary or even central feature of law. I will argue that this is not a good account of law and that it does not probably understand the nature of legal obligations. For the latter argument, I will appeal to H.L.A. Hart’s persuasive rejection of John Austin’s command theory of law. Despite the existing close relationship between law

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228 One could also argue that decentralized enforcement is in fact preferable to concentrating coercive power under a global authority and giving this authority a monopoly on the use of force.
and coercive sanctions, Hart argues that it is a mistake to conceive of law in terms of commands by a sovereign backed by threat; law is not a gunman situation writ large. The coercion-based theory of law neglects law’s normativity and does not provide a good account of legal obligation. I will go further than Hart by arguing that coercive sanctions are not conceptually necessary for law. Since all existing domestic legal systems seem to depend on coercive sanctions, this conceptual claim about law may seem quite controversial.

In the second section I will consider the practical or instrumental objection. Is centralized coercive enforcement, while not an inherent feature of law, nonetheless required in practice for law to be effective and to achieve what are considered to be the central goals of law and the rule of law (for example, to enable social coordination and provide stability)? While centralized coercive enforcement can in practice increase law’s effectiveness, I will argue that it is best to keep these more practical considerations distinct from the conceptual question of what is required for law and legal obligation. Second, I will argue that there are significant differences between the use of coercive sanctions in the domestic case and the international case that make relying on coercive sanctions to strengthen compliance with international law less effective and more problematic than is often assumed.

Instead, I propose the following important elements for the global rule of law. First, states, individuals, other transnational agents, international/global institutions and officials that administer and apply international law must generally accept that international law is authoritative and binding on them. This is based on Hart’s conception of law. Second, legal rules must be impartially and authoritatively
determined, interpreted and applied to cases by impartial adjudicative and administrative
bodies with the recognized authority to do so, including domestic courts. While
enforcement is important to the extent that it can increase the effectiveness of law, the
authoritative and impartial interpretation and application of law as is provided by the
judicial function has greater importance since it is needed to properly determine when
and how enforcement may be used. My argument is based on a minimal conception of
the rule of law in the international case that can allow states, individuals and other
transnational agents to coordinate their actions and settle conflicts in an impartial,
legitimate, and authoritative way. In the last section I will briefly address normative
objections against the current decentralized ways in which international law is enforced

1. IS COERCIVE ENFORCEMENT A CONCEPTUALLY NECESSARY FEATURE OF LAW? IS LAW
INHERENTLY COERCIVE?

1.1 COERCION-BASED VIEWS OF LAW: THOMAS HOBBES AND JOHN AUSTIN

The view that centralized enforcement through coercive sanctions is a necessary
requirement for law is most clearly defended by Thomas Hobbes and John Austin.
H.L.A Hart refers to their conception of law as the command theory of law. According to
Hobbes, law is not counsel but commands of a supreme sovereign backed by force. For
Hobbes, the purpose of law is to provide order, stability and certainty. There is the
constant threat of war between individuals in the state of nature because as each pursues
his or her interests, conflicts between them are inevitable. When there is a conflict, each
person will have his or her own conception of what is right. Hobbes argues that in order
to leave this state of insecurity “where the life of man is solitary, poor, nasty, brutish, and
short”, a supreme sovereign is needed first, to conclusively determine what the law is, second, to apply the law to particular cases and settle conflicts, and third, to enforce the law through the threat of force. As I argued in Chapter Three, the first two requirements address problems of indeterminacy in the state of nature. The legislative function determines what people’s rights are in general, and the judicial function settles particular conflicts by determining how these general laws apply to particular cases. Why are coercive sanctions required?

In an important passage, Hobbes argues that there can be no covenants, no contractual rights and duties, without the sword—without the threat of force. I briefly discussed this passage in Chapter Three, but I would like to now take a closer look at Hobbes’ argument. Without the threat of punishment, it is rational for individuals to violate their agreements and the rights of others when it is in their interest to do so, and when they can get away with it without suffering negative consequences. Consequently, if I perform my end of the agreement first, once the other party has already benefited from this, he may have no other reason to perform his end of the agreement; it may be in his interest to defect. As Hobbes explains, “he that performs first has no assurance the other will perform after; because the bonds of words are too weak to bridle men's ambition, avarice, anger, and other Passions, without the fear of some coercive Power…”229 The threat of punishment gives everyone a reason to comply and consequently, it gives each individual effective assurance that others will also comply. If I make a contract without such effective assurance that you will respect our agreement, it is not rational for me to fulfill my contractual promises first. According to Hobbes’ prudential account of obligation, we cannot be obligated to do something that is contrary

229 Ch.14, at 196.
to our interests. Consequently, we are not under an obligation in such cases. This means that individuals are not obligated to follow the law without an independent sovereign power with the capacity and authority to enforce the law between individuals.

John Austin also defends a “command theory of law” that views law as a system of commands backed by threats. Similar to Hobbes, Austin also conceives of the sovereign as an “uncommanded commander.” He argues that without sanctions, the law would only be able to make requests on us rather than commands. Austin’s positivist account of what it means to have a legal obligation and how such obligations differ from moral obligations is based on the idea that we are obligated to obey the law, regardless of other reasons and desires we may have to act contrary to a particular law, simply because the law threatens us with sanctions if we do not obey. According to Austin, a law that is not binding in the sense of being externally enforced through sanctions is not “law.” Based on this conception of law, Austin concludes that international law is not law but “positive morality” because it lacks coercive sanctions.

Hart’s persuasive rejection of Austin’s sanction-based theory of law has been very influential in legal theory. I will use Hart’s arguments against Austin to challenge the view that a central coercive power to enforce the law is a necessary and central feature of

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232 Austin, 134-52. Although Habermas’ theory of law differs from Austin’s command theory, Habermas also argues that legal obligations must be externally binding. I will consider Habermas’ arguments below.

233 Hart’s objections against Austin’s command theory of law are widely accepted within contemporary legal philosophy. However, some writers still defend Austin’s idea that coercion is a necessary, inherent feature of law while recognizing that this is not all there is to law. I will address this defence of Austin below.
law and legal obligations. This view seems to be assumed by the objection that international law is not really law because it is not enforced. Hart argues that while Austin’s view of law as commands backed by threats has some affinities and connections with law, there is a danger of exaggerating this connection and obscuring the special features that distinguish law from other means of social control. According to Hart, this theory views law as similar to the situation of a gunman saying to his victim, “give me your money or your life,” except that in this case, the gunman says it to a large number of people who are used to this and habitually surrender their money to such threats. Hart argues that that there is much more to law than obeying commands out of fear of punishment.

First, this is not an accurate account of law. While the criminal law consists largely of rules that are like commands that are obeyed or disobeyed, rules that enable individuals to make contracts, wills and trusts are not designed to obstruct antisocial behaviour. Rather than saying: “do this regardless of whether you want to or not” they say “if you wish to do this, this is the way to do it.” Constitutional legal rules that constrain government action also do not fit this model. For example, when a government’s legislation violates a constitutional law, a court can nullify that legislation, but it does not have its own independent coercive mechanism to force the government to do this.

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234 Buchanan also argues that to deny international law the title of “law” because it lacks a Hobbesian enforcement agent is to assume a now discredited Austinian conception of law and to ignore the realities of systems that certainly deserve the title of legal system (47).
237 Hart, *The Concept of Law*
Second, and more importantly, the command theory of law distorts the role that the idea of obligation and duty play in legal discourse. Hart argues that it identifies the normative idea of “having an obligation” or “being bound” with the observation that “one is likely to suffer the sanction or punishment threatened for disobedience.” The command theory of law neglects law’s internal normativity.

While the command theory of law emphasizes obedience towards law based on the fear of sanctions, Hart emphasizes the normative aspect of law from the internal perspective: the idea that individuals are bound by legal rules because they accept these rules as valid legal rules and hence, as binding. They take themselves to be under an obligation to obey laws that are created in the manner that is recognized to be authoritative. This more accurately reflects why most people obey the law. This is true even in cases in which people disagree with a particular law or believe it to be morally wrong; one may obey a law while opposing it publicly in the hopes of changing the law. More importantly, it provides a better account of legal obligations because it is the acceptance of valid legal rules as binding that justifies the enforcement of law, and not...

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238 Even though domestic law contains effective organized sanctions, Hart argues that we have to distinguish the variety of reasons given for the obligations created by law. He argues that once we reject the conception of law as essentially an order backed by threat (“the gunman situation writ large”), there seems no good reason for limiting the normative idea of obligation to rules supported by organized coercive sanctions (218).

Hart does not think that a theory of law must answer the question of why people ought to obey the law in a foundational way. The motives for voluntarily supporting the rules of a legal system may be extremely diverse. While a legal order may be at its healthiest when there is a generally diffused sense that it is morally obligatory to conform to it, nonetheless, adherence to law may not be motivated by it, but by calculations of long-term interest, or by a desire to continue a tradition, or by disinterested concern for others. Hart argues that there is no good reason for identifying any of these as a necessary condition of the existence of law among individuals or states. Hart, 231-232.
the other way around.\textsuperscript{239} Sanctions reinforce legal duties; they not to constitute them. As Leslie Green argues:

“…the normal function of sanctions in the law is to reinforce duties, not to constitute them. It is true that one reason people are interested in knowing their legal duties is to avoid sanctions, but this is not the only reason nor is it, contrary to what Oliver Wendell Holmes supposed, a theoretically primary one. Subjects also want to be guided by their duties — whether in order to fulfil them or deliberately to infringe them — and officials invoke them as reasons for, and not merely consequences of, their decisions.”\textsuperscript{240}

Therefore, even if the fact that domestic laws are enforced provides a reason why some (or even most) individuals obey the law when they are not sufficiently motivated by their legal obligations, that they are enforced is not what makes them law, and it is not the reason they are binding. When someone violates an obligation, this does not mean that he does not accept that obligation as binding on him; rather, he can recognize it as binding and yet he can choose to deliberately violate it.

According to Hart’s conception of law, the idea that a law is binding on us means that the legal rule is valid and that we can be said to have some obligation or duty under it. Hart suggests that an important feature of a legal system is that its subjects and administrators regard legal rules as binding on them, even though their reasons and motives for this may differ. He states, “the proof that ‘binding’ rules in any society exist, is simply that they are thought of, spoken of, and function as such.”\textsuperscript{241}

\textsuperscript{239} According to Hobbes’ prudential account of obligation, we are only under an obligation to obey laws when they are externally enforced against all because we are not obligated to act contrary to our own interests.
\textsuperscript{240} Leslie Green, “Legal Obligation.” \textit{The Stanford Encyclopedia of Philosophy}.
\textsuperscript{241} Hart, 211
The issue for international law then is whether its rules can meaningfully be said to give rise to obligations. What matters is that states, individuals, other agents, officials of global institutions, and judges regard the rules of international law as binding on them, even though their reasons and motives for this may differ. It is the fact that rules of international law come into being in the manner accepted and recognized as authoritative that makes them “law.” Proof that they are binding is simply that they are thought of, spoken of and function as such.

Hart points to various elements in the relations of states that support the statement that there are rules among states that impose obligations upon them. In the practice of states, certain rules are regularly respected at the cost of certain sacrifices; claims are formulated by reference to them; breaches of the rules expose the offender to serious criticism and are held to justify claims for compensation or retaliation. Hart admits that rules could not exist or function in the relations between states unless a significant majority of states accepted the rules and voluntarily co-operated in maintaining them. He also admits that the pressure exercised on those who break or threaten to break the rules is often relatively weak, and has usually been decentralized and unorganized. However, as in the case of individuals who voluntarily accept the far more coercive system of domestic law, the motives for voluntarily supporting such a system may be extremely diverse. Adherence to a particular law may be motivated by a general moral obligation to act in accordance with the law, by calculations of long-term interest, or by the desire to

242 Hart observes that questions about the binding character of international law express a doubt about the general legal status of international law, not its applicability. He argues that a better way to formulate the question is “can such rules as these be meaningfully and truthfully said ever to give rise to obligations?” Hart, 216.
244 Hart, 211.
continue a tradition or by concern for others, and some may be motivated by the fear of
punishment.\textsuperscript{245}

Many theorists of international law similarly argue that what makes international
law “law” is not whether or not it is analogous to domestic law, and not whether or not it
uses sanctions to enforce international legal rules, but whether states themselves accept
international law as binding on them.\textsuperscript{246} The view of international lawyers is that most
states do accept international law as generally binding on them. For example, Louis
Henkin is often quoted for his statement that "almost all nations observe almost all
principles of international law and almost all of their obligations almost all of the
time."\textsuperscript{247} When we see states violating fundamental rules of international law we may be
tempted to doubt that such recognition exists. However, even when states violate
international law, they may try to hide this or defend their action by appealing to
international law. For example, a state that violates international law by trying to develop
weapons of mass destruction or by violating the rights of its citizens may claim that it has
a right to do this based on its right to state sovereignty in international law, and it may
claim that other states do not have a right to intervene. In doing so, the state appeals to
basic principles and rules in international law. When states take aggressive action against
other states, they often try to justify their actions as in accordance with international
principles, such as the right to self-defence or collective state-defence. Sometimes these
claims are genuine, but sometimes a state may intentionally violate international law and

\textsuperscript{245} Hart argues that there is no good reason for identifying any of these as a necessary condition
of the existence of law among individuals or states. Hart, 231.
\textsuperscript{246} For example, Martin Dixon and Malcolm N. Shaw. Malcolm N. Shaw, \textit{International Law}
\textsuperscript{247} Louis Henkin, \textit{How Nations Behave: Law and Foreign Policy} (Columbia University Press,
1979), 47. This sentence is cited “almost all the time” by “almost all” international legal scholars
yet try to characterize its action as one that accords with international law in order to avoid reproach and other negative consequences.\textsuperscript{248} As in the domestic case, the fact that laws are generally recognized as binding does not guarantee that actors will always comply with all particular laws. In addition, the fact that some agents violate laws does not prove that they are not generally recognized as binding.

Based on Hart’s account, there is a second factor that makes the rules of international law legally binding: if they come into being in the manner that is accepted and recognized as authoritative.\textsuperscript{249}

1.2 Hart’s Theory of Secondary Rules and International Law

Since I am drawing on Hart’s rejection of the command theory of law and coercion-based conceptions of law, I will consider further Hart’s own theory of law and how it applies to the international case. What does it mean for a rule to be valid? For Hart, the special features of law that distinguish it from other means of social control are best understood through the idea of the union of primary and secondary rules.\textsuperscript{250} Primary rules are rules

\textsuperscript{248} For example, rather than simply argue that international law does not bind the United States, the U.S. Government tried to justify its military intervention in Iraq by arguing that it was an extension of the right to self-defence – the right to preemptive self-defence. The U.S. Government also tried to justify the intervention as authorized by international law by appealing to U.N. Security Council Resolutions that threatened sanctions against Iraq if it not comply with inspections. Most of the international community and most international lawyers do not consider there to be sufficient grounds to justify the war in international law. If this issue was brought before the International Court of Justice, the Court would most likely conclude that the action was illegal and not justified by the existing right to self-defence. However, as in domestic law, existing laws can be altered and extended by a court of law. It is in principle possible that the Court could extend the right to self-defence in international law to include a preemptive right to self-defence.

\textsuperscript{249} Dixon, 6.

\textsuperscript{250} In his analysis of law, Hart contrasts a developed legal system with the union of primary and secondary rules against a more primitive society of individuals that only has primary rules of obligations. He treats the existence of this characteristic union of rules as a sufficient condition for the application of the expression “legal system,” but he does not claim that the word “law”
of conduct that confer obligations on individuals (for example, the rules of criminal law). Secondary rules are power-conferring rules that are addressed to officials. They set out rules for the creation, recognition, change, and adjudication of primary rules. The most important kind of secondary rule is the rule of recognition: the most fundamental, basic rule of a legal system that is accepted at least by the officials who administer the legal system as specifying the sources of law and the criteria for determining whether a rule has legal validity.

Hart’s theory is an important contribution to legal and political philosophy because it challenges the modern idea of the supreme sovereign that is outside the law and Hobbes’ and Austin’s idea of the “uncommanded commander.” Against the modern idea of the supreme, unlimited sovereign that continued to be accepted by Austin, Hart proposes the idea of a foundational rule of legal validity.²⁵¹ In order to create law, legislators must comply with foundational legal rules that specify law-making procedures. As David Dyzenhaus argues, this distinguishes legitimate legal authority from arbitrary political power, and it places restrictions on law-makers and legal administrators concerning their creation and application of the law.²⁵² The ultimate source of law then is not the sovereign’s will but foundational legal principles. Rather than the rule of man, or the rule of a sovereign that is above the law, we have the rule of law as the ultimate source of political authority. Hart would probably take issue with this

must be defined in these terms. Hart explains that his aim is to offer an elucidation of the concept of law, rather than a definition of “law” which could provide rules for the use of this term. Hart, 213.

²⁵¹ Hans Kelsen introduced a similar idea before Hart. He argued that the legal order was based on a Grundnorm or basic norm.

since he argues that his conception of law is merely descriptive and has no such
normative implications. However, regardless if Hart recognizes it or not, I think that
his conception of law does have these important normative implications.

One of the reasons why Hobbes and Kant argue for a supreme sovereign that is
not subject to any other authority is to determine the rights, duties and rules for a society
in a conclusive way. For Hobbes and Kant, the sovereign’s authority must be supreme
because if another body could question the sovereign’s actions, then the problem of
indeterminacy arises again. This is part of their reason for rejecting the right to rebel:
we need a sovereign authority that will have the final say. For Hart, the source of law is
not the sovereign’s will but the secondary rules, and if a government violates these in its
actions, then these actions do not have the normative force of law; they are brute force.

This idea is particularly useful in the international case. Instead of resting the
ultimate source of law with a sovereign global legislative and executive body, the
legitimacy and authority of international law can rest on its own foundational principles.
The role of these foundational secondary rules also addresses the problem of uncertainty
that Hobbes, Locke and Kant identify in the state of nature because they provide a
determinate and authoritative way by which international legal rules are created.

One of the problems with using Hart’s theory to make the case that international
law is indeed real law is that Hart believed that international law lacked secondary rules
of change and adjudication which provide for legislature and courts in international law,
as well as a unifying rule of recognition which specifies the sources of law and provides

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253 I am grateful to Lars Vinx for raising this point.
254 See Chapter Two.
general criteria for the identification of its rules. Based on Hart’s conception of a domestic legal system as a union of primary and secondary rules, this seems to lead to the conclusion that based on Hart’s own conception of law, international law is not a legal system since it lacks secondary rules. Instead, it is a simple, primitive form of social structure that consists only of primary rules of obligation.

Hart does not himself conclude this. Instead, he argues that even though international law lacks secondary rules, this does not lead to the conclusion that it is not true law or it does not constitute a legal system. Since Hart criticizes other philosophers who take their conception of domestic law to be paradigmatic of all law and then evaluate international law through an adverse comparison with domestic law, he tries to avoid making this mistake himself. Consequently, since he develops his conception of a legal system by analyzing domestic legal systems, he thinks it is problematic to apply his conception of domestic law as the union of primary and secondary rules to decide the issue of whether international law is really law.

1.3. Objections to Hart’s View of International Law

I disagree with Hart on this issue. I think the development and clarification of such foundational rules of legal validity are particularly important for a more decentralized model of international law. If we had a world parliament, then the test of validity for international laws could simply be whatever the world legislature passes according to recognized procedures (this would be a simple secondary rule). But if the creation of legal rules is more decentralized, then it is all the more important to develop clear

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255 Hart, 214.
256 Hart, 216. His discussion of the second objection is relevant to Chapter 2, so I will consider it there.
principles and rules regarding the sources and validity of international legal rules and obligations.

I think that significant secondary rules of change and adjudication already exist in international law. For example, the *Vienna Convention on Treaties* codifies pre-existing international customary norms that govern the formation and effect of treaties.\(^\text{257}\) This provides secondary rules regarding the creation and alteration of primary rules since it defines what is required to make a treaty valid. Article 39 of the treaty that created the International Court of Justice provides secondary rules of adjudication and also lists various sources of law.\(^\text{258}\) Article 39 states that in settling disputes between states, the Court should apply international conventions, international customary law, the general principles of law recognized by states, and juristic writings. Such secondary rules need to be developed further but what exists so far is sufficient for a workable system of law.

This issue points to a limitation with applying Hart’s theory to defend a more decentralized model of international law. I think that Hart doubts that secondary rules exist in international law because his conception of secondary rules seems to be too centralized and too hierarchical, particularly his suggestion that there is an ultimate rule of recognition that unifies a legal system. Even in domestic legal systems, it is difficult to determine a single ultimate rule of recognition. Instead, there are various interrelated practices, institutions, rules and agreements regarding the creation and application of law that emerge over time and become generally accepted and recognized by officials, and to a lesser extent, citizens. It is tempting to believe that a legal system’s ultimate rule of

\(^{257}\) Signed in 1969  
\(^{258}\) Established in 1946.
recognition is its constitution or founding document, but what determines the legal validity of the constitution?

Because Hart bases his theory of law on secondary rules and the role of government officials, he has been criticized for still viewing law as a one-way projection of authority; instead of grounding law on a supreme sovereign authority (as Hobbes and Austin do), law is grounded on a hierarchy of rules. Against the conception of law as an imposition of authority from above, Lon Fuller provides a less hierarchical and a more interactive or reciprocal conception of law. Law depends neither on force, nor the exercise of authority, nor a hierarchy of rules. Instead, law depends on the effective cooperation between citizens, and lawmaking and law-applying officials. This corresponds to the requirement of congruence in Fuller’s conception of the rule of law or “the internal morality of law”: the congruence between declared legal rules and the actions of officials operating under the law. I will discuss Fuller’s conception of the rule of law further in the next chapter.

This interactive conception of law appears to be present in Hart’s theory of law to some extent. We see this feature in his consideration of what makes international legal rules binding. An important factor for him is that the subjects of international law (states, individuals, and other agents) recognize international law as binding on them. However, those who support more interactive and constructivist theories of law criticize Hart’s

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focus on rules (instead of recognizing the important role of legal process and dialogue) and his focus on the perspective of officials rather than law’s subjects. According to this view, the focus should be on the recognition and acceptance of law by its subjects rather than on whether there is an ultimate rule of recognition that can provide an ultimate ground for law’s validity.

I have argued that it is important to develop authoritative adjudicative institutions in order for international law to provide determinacy so that it can guide and coordinate the actions and interactions of various agents in ways that are less susceptible to problems of bias and power politics. However, ultimately the parties and subjects of international law (states, individuals, corporations, global and transnational organizations) must recognize international law as binding and must accept the authority of judicial and administrative institutions in determining what international law requires.

1.4. Going Further Than Hart: Is Coercive Enforcement a Necessary Feature of Law?

There is an important response that can be raised against my use of Hart to address the enforcement-based objection against international law. One can argue that while Hart was correct to criticize Austin’s and Hobbes’ reductive view of law as commands by an “uncommanded commander” backed by the threat of sanctions, this does not support the conclusion that sanctions are not conceptually necessary for law; it only proves that they are not sufficient and that other features are required as well. One may agree with Hart that a system of commands backed by threat alone does not constitute a legal system and that Austin’s focus on sanctions leads to an inadequate understanding of legal
obligations. However, one can argue that the claim that coercive sanctions are not conceptually necessary for law goes too far. One can agree that there is more to law than Austin’s “commands backed by sanctions” but still hold that coercive sanctions are required for law and for legally binding obligations; law may still be inherently coercive.  

This response seems quite persuasive since we tend to think of legal rules as rules that are enforced through public coercion, and that can be so enforced. This is a significant feature that distinguishes legal rules from other moral and social norms. Also, all legal systems seem to depend on the widespread use of sanctions. However, while the use of coercive sanctions to enforce law is common to all modern legal systems, is it conceptually necessary for law? Is it possible to have law or a legal system without coercive sanctions? Can one imagine a legal system without coercion? If so, what would be the purpose of law in such a system?

1.3.1. RESPONSE: THE COMMUNITY OF SAINTS THOUGHT EXPERIMENT

In addressing this issue, Joseph Raz imagines a society of saints in which all members of that society act according to what they think is right. They pursue their self-interests when they think it right to do so (they are not self-denying), but they may be wrong about what is right. We see this idea in the discussion of the state of nature in Hobbes, Kant and Locke: no matter how morally good and honourable individuals may be, there will still be disagreement about what is right. Even if all members of a society are morally

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good, even if they all want to honour their agreements and respect the rights of others, they may nonetheless unintentionally harm others or violate the rights of others by accident or due to ignorance. Conflicts will still arise and there may be more than one way to settle certain conflicts. Law is required then to set down general rules for all, to determine people’s remedial rights and duties, and to settle conflicts by applying these general rules to particular cases. This highlights the central role of adjudication for law. There needs to be some authority to create, interpret and apply general laws.

If all members of this ideal society are motivated by these general rules and the authority of certain institutions to adjudicate particular conflicts, if these are regarded as normative obligations that bind them, then punitive, coercive sanctions are not necessary. When members of this society harm others by mistake, they will still have to pay compensation to set things right, but this differs from punitive sanctions that are intended to deter law-breakers. Punitive sanctions are only needed when individuals refuse to comply with what the law requires or what a judge determines in a particular case. In such circumstances, the threat of coercion both motivates compliance and provides assurance to all that others will also comply. In the case of human beings (who are not saints), being arrested, imprisoned, and compelled to pay fines works quite well to fulfill this purpose (even though these are not effective enough to achieve full compliance or full compensation).

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264 As I discussed in Chapter Three, Kant’s argument for coercive enforcement is directed at the ability to compel compliance and ensure that those whose rights are violated are compensated (see Ripstein, “Authority and Coercion”).

265 Raz, 160.
Based on this hypothetical example, Raz concludes that a sanctionless legal system is logically possible but humanly impossible. 266 While it may seem strange to address this issue by appealing to the legal system of an imaginary society of saints since this will not work for a real society of human beings, this example suggests that some other explanation of the normativity of laws is needed. As Raz argues, the sanction-based attempt to explain the normativity of the law leads to a dead end; it explains one way in which laws provide reasons for action, but it fails to explain in what way they are norms. 267

If law is not necessarily or inherently coercive even though coercive public sanctions are needed as a practical matter to deal with the problem of non-compliance (as this example illustrates), this alters the way we think of law and legal obligations. In Section 3 of this chapter, I will consider to what extent coercive sanctions are necessary in practice for the effectiveness of international law: to increase compliance, to guide action, to provide stability and certainty, and to achieve other goals. It is important, however, to keep these practical and instrumental issues distinct from the conceptual question of what is law and what is required for a legal obligation. The mistake made by some enforcement-based objections against international law is to argue that without centralized coercive sanctions that are analogous to the way sanctions are used within domestic legal systems, international law is not “law,” and international law cannot create legal obligations. Instead, skeptics argue that international law is not able to create obligations between states (the Realist view), or at best, it can only create moral obligations but not legal obligations (the Morality But Not Law view).

266 Raz, 158.
267 Raz, 162.
The Morality But Not Law View may seem appealing since coercive enforcement is generally thought to be what distinguishes legal obligations from moral obligations: the former can be enforced through public coercion provided that it meets certain kinds of justification, while the latter cannot. In the next section, I will consider Habermas as an example of this view before considering other ways to distinguish law from morality, and legal obligations from moral obligations, and why this distinction matters.

1.3.2. Habermas and The Morality But Not Law Objection

Habermas is an example of a philosopher who argues that external coercive sanctions are required for law while moving beyond Austin and Hobbes by recognizing the importance of law’s normativity and legitimacy. Habermas argues that law has the dual character of facticity and validity. The coercive force of law secures norm compliance while the legitimacy of the rule itself (when the addressees can see themselves as the authors of the law) makes it possible to follow the norm out of respect for the law.\textsuperscript{268} Habermas’ conception of law is based on the social integrative function of modern law. Modern law compensates for the problems of social coordination in states where social pluralization and societal complexity have reduced the shared background assumptions needed for reaching an understanding through communicative action. As it becomes more difficult to achieve social coordination through shared understanding and communicative action, the spheres of strategic action increase and greater regulation of strategic action is needed for social coordination. In such societies, coercive sanctions are required to compel compliance by strategic actors. Hence, Habermas’ conception of law and its purpose is

\textsuperscript{268} Habermas goes beyond Hart here. Mere legal validity (that laws are made in the right way) is not sufficient; democratic processes of lawmaking are required for law’s legitimacy. I will address the relationship between democratic legitimacy and the rule of law in the final chapter.
based on the role of law in modern states that lack a sufficient shared normative background to reach agreements based on communicative action.

In order for coercive regulation to be consistent with individual freedom, actors must be allowed to come to an agreement about the normative regulation of strategic interactions. Habermas argues that "the coercive law tailored for the self-interested use of individual rights can preserve its socially integrating force only insofar as the addressees of legal norms may at the same time understand themselves, taken as a whole, as the rational authors of those norms." In order for legal norms to provide socially integrating constraints on strategic interactions, they must simultaneously present *de facto* restrictions that will compel compliance by strategic actors, and develop a socially integrating force that will obligate addressees on the basis of intersubjectively recognized normative validity claims.

Habermas provides a more sophisticated account of law than Hobbes or Austin. While he still views coercive sanctions as necessary for law, law cannot be reduced to the commands of an uncommanded commander backed up by the threat of sanctions. More is required for law to be valid, binding, and legitimate. I will focus on the coercive character of law here.

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270 *Between Facts and Norms* at 33. This can be seen as a development from Kant’s idea of the internal connection between legal coercion and freedom. Kant defines "right" as the conditions within which the freedom of each individual's will can co-exist with the freedom of everyone else. Coercion is justified when it is used to prevent an action that hinders freedom. Habermas identifies an internal tension between facticity and validity within Kant's concept of legal validity; the facticity of the enforcement of law is intertwined with the legitimacy of a genesis of law that claims to be rational because it guarantees liberty. Whereas Kant grounds the legitimacy of law on universalizable moral right, Habermas' discourse-theoretic approach legitimates law through democratic processes and a set of discourses (moral, ethical and pragmatic discourses) that justify legal norms. *Between Facts & Norms*, 28-29

271 *Between Facts and Norms* at 27
Why precisely are coercive sanctions necessary for Habermas? The state's guarantee to enforce the law through sanctions is important because it stabilizes behavioural expectations while leaving the motives for rule compliance open for action oriented by self-interest and action oriented toward reaching an understanding (for example, based on the acceptance of the reasons for a particular law). While many individuals in a society will be motivated by the common goals of a society and by the acceptance of rules that are necessary for social coordination, coercive enforcement is needed in areas in which there is less agreement about these common goals. It is also necessary to ensure compliance by self-interested, strategic actors who would otherwise benefit from not complying while everyone else does (the free-rider problem). It provides protection to law-abiders from law-breakers.

Habermas’ conception of law’s dual character is originally developed as an account of modern law in large, socially plural states. Does it apply to other contexts? Would coercive sanctions be required for more socially integrated communities given that there will still be some non-compliance by some individuals? Is it required in order to have law between states and between other actors at the global level? Is coercive enforcement an inherent feature of law such that it is not possible to have law without it? Habermas’ argument that coercive enforcement is required to provide assurance is developed from Kant. However, as we saw in Chapter One, Kant recognized that there are significant limitations with applying his argument for coercive enforcement in the case of individuals within a state to the international case. This explains Kant’s proposal for a voluntary federation without coercive public law. Habermas criticizes Kant for
proposing this. Habermas argues that without supranational coercive sanctions, there cannot be “law” at the international or cosmopolitan level.

In his article on Kant’s *Perpetual Peace*, Habermas views international law as a decentralized legal system in which states voluntarily bind themselves and impose sanctions on each other. With respect to the first feature of law, the facticity of law, Habermas argues that an international organization with coercive authority needs to be established to secure norm compliance. The reliance on certain member states for the coercive enforcement of international law also weakens the legitimacy and validity of international law (the second feature of law) since a state’s use of force may appear to be motivated by bias and national interest rather than the goal of enforcing international law.\(^{272}\) Coercive enforcement by a common global authority is necessary for the *de facto* validity of international law.

Habermas argues that Kant’s proposal for a voluntary federation without coercive public law cannot stabilize behaviour if it is voluntary. He also argues that Kant could not have any legal obligation in mind with his proposal for a voluntary federation because it is not organized around the organs of a common government that could acquire coercive authority; without this, Kant is forced to rely exclusively on each government’s

\(^{272}\) In *The Past as Future*, he argues that the Gulf War illustrates the ineffectiveness of the Security Council to consistently enforce or stabilize legal norms or expectations since similar actions were not taken against the invasion and annexation of East Timor or Tibet. This undermines the legitimacy of international law. The fact that this military action was led by the United States rather than the U.N. also undermines its legitimacy since it raises the suspicion that the action was motivated by U.S. interests rather than the goal of enforcing of international law. I will discuss this problem with decentralized enforcement below. *The Past as Future: Interviews with Michael Haller*. Max Pensky (ed. and trans.), (Lincoln: University of Nebraska Press, 1994).
own moral self-bindingness. Habermas argues that such trust is hardly compatible with Kant’s own soberly realistic descriptions of the politics of his time. In order for a federation between states to be a legal arrangement, rather than merely a moral one, Habermas argues that it would need all the qualities Kant outlines for a constitutional state. Rather than relying on the “good moral culture” of its members, it must be able to make and enforce its own binding demands.

Habermas seems to reject the possibility of a decentralized legal order in which international courts or UN bodies can make judgments that are then enforced by other states who are in a position to impose sanctions. In contrast to a decentralized legal order that could combine elements of state sovereignty with centralized legal institutions, Habermas argues:

For actionable rights to issue from the United Nations Declaration of Human Rights, it is not enough simply to have international courts; such courts will first be able to function adequately only when the age of individual sovereign states has come to an end through a United Nations that can not only pass but also act on and enforce its resolutions [emphasis added].

The enforcement of international law by coercive international institutions rather than states is required in order for international law to be functionally effective in stabilizing transnational action.

Habermas also provides a structural argument based on what is necessary to secure the rights of world citizens and to move towards a global civil condition. He

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274 “Kant's Idea of Perpetual Peace" at 118.
275 “Kant's Idea of Perpetual Peace" at 118.
276 Between Facts and Norms at 456. Similarly Habermas suggests: "we have to contribute to the creation of an effective world institution with the aim of making the UN capable of enforcing its own resolutions, on its own if necessary, with units under its own command." The Past as Future, at 153.
argues that the threat of sanctions must be institutionalized in such a way that it actually binds state governments and stabilizes state actions. He writes:

The rights of the world citizen must be institutionalized in such a way that it actually binds individual governments. The community of peoples must at least be able to hold its members to legally appropriate behaviour through the threat of sanctions. Only then will the unstable system of states asserting their sovereignty through mutual threat be transformed into a federation whose common institutions take over state functions: it will legally regulate the relations among its members and monitor their compliance with its rules. The external relationship of contractually regulated international relations among states ... then becomes the internally structured relationship among the members of a common organization based on a charter or a constitution [emphasis added].

In this article on Kant’s Perpetual Peace, Habermas argues that a constitutionally organized common government is necessary as a sanctioning and executive power, not only to stabilize state relations, but also to transform the external relationship of contractually regulated relations among state actors into an internally structured relationship, much in the same way that a state is needed in the domestic case for securing rights in Habermas’ domestic theory of rights and law. As I discussed in Chapter Three, in his later writings Habermas is more skeptical about the creation of such a world government because the global public sphere is not sufficiently developed to legitimate it.

Habermas’ arguments against a decentralized model of international law go beyond criticizing Kant’s voluntary federation for not being able to stabilize behaviour and for not being able to deal with the problem of assurance given the lack of trust that exists between states. Habermas also suggests that without a common government with

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277 “Kant’s Idea of Perpetual Peace” at 127.
278 Between Facts and Norms at 134.
coercive authority, there can be no “law” between states. Any obligations that exist are merely moral self-binding obligations rather than truly binding legal obligations. Habermas may be right that enforcing international law through coercive international institutions would be more effective at stabilizing behaviour, providing assurance against free-riders, and enabling social coordination. He may also be right that existing decentralized forms of enforcement are both ineffective at stabilizing transnational action and problematic from the perspective of law’s legitimacy since there may be the perception of bias and self-interest when states claim to be enforcing international law against other states. Structurally, having a common coercive world government may be the only way to have a just civil condition that secures the individual rights of world citizens. Supranational coercive sanctions by a world government may be required in order for international law to fulfill these goals.

The problem I have with Habermas’ argument is that he concludes that a decentralized model of international law is not “law” and cannot create legal obligations based on the fact that it is less effective at achieving these goals; instead it can only create voluntary or self-binding moral obligations. This is why I have discussed his theory of law as an example of the “Morality But Not Law” view. It is my argument that it is best to keep these more instrumental arguments regarding what is practically required for law to fulfill certain functions in certain kinds of society distinct from the conceptual issue of what can be called law or what is required for a legal obligation. Habermas’ account sets up an either/or scenario: we either have coercively enforced legal obligations or we have voluntary moral obligations. What gets lost in this is the possibility that legal obligations

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280 For Habermas, the central importance of positive law is that it allows more complex forms of cooperation to emerge.
can still exist in the absence of a central authority to coercively enforce these obligations, and that such obligations differ in significant ways from moral obligations. We can develop a better account of legal obligation and the normativity of law if we do not assume that because coercive sanctions increase law’s effectiveness at guiding behaviour, stabilizing interactions, and dealing with problems that are created by non-compliance, that we can only speak of law and legal obligations if we have centralized coercive sanctions.

2. The Distinction Between International Legal Obligations and Moral Obligations

If we reject the claim that all legal obligations must be externally binding by being enforced by an external power for the reasons discussed above, then what is left to distinguish law from morality and legal obligations from moral obligations? To the extent that states take themselves to be obligated to comply with their treaty agreements, why is this not simply a case of the moral duty of promise-keeping? Why does the distinction between law and morality matter?

In the case of domestic law, we can distinguish between our moral obligation to keep promises and our legal obligation to comply with the terms of the legal contracts we make. In many cases, both will apply. If I promise to pay my neighbour if he shovels the snow from my walkway, and he agrees and does it, I am under a moral obligation to keep my promise and pay my neighbour, but I am also under a legal obligation. Now if I

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281 One may also ask what distinguishes law and legal rules from the rules of etiquette and other arbitrary social norms. Since Austin and Habermas both argued that international law is not law but morality, I will focus on the distinction between law and morality, between legal rules and obligations and moral rules and obligations. In addition, this distinction is a central issue in legal theory.
promise a dear friend that I will call her back later, I may be under a moral obligation to
call her back, but I am not under a legal obligation.

What is the basis for the legal obligation in the first case? Is it that this is a matter
that falls under the laws of my legal system? Is it that my neighbour can sue me in a
court of law? Is it that I may be ordered by law to pay him? Is it that I fear that the state
will punish me? The threat of punishment or coercive sanctions such as imprisonment
seems to be a less important factor in non-criminal law contexts. However, it may lead
to this. If I am sued in a court of law and the court orders me to compensate my friend, it
can compel me to do this. If I refuse, then I will incur a putative penalty but this will be
for violating a court order. The most important factor that distinguishes the two cases is
whether or not there is a valid law that recognizes my promise as a valid legal contract.
The rest follows from this.

As a matter of fact, there are important differences between the obligations
created by international law and moral obligations that correspond to the distinction
between law and morality in domestic law. When states reproach each other for immoral
conduct or praise themselves or others for living up to the standard of international
morality, this moral appraisal is recognizably different from the formulation of claims,
demands and the acknowledgements of rights and obligations under the rules of
international law. What is predominate in the arguments states address to each other

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282 As Hart argues against the coercion-based conception of law, it does not provide an adequate
account for even domestic legal systems. It seems to be most applicable in the criminal law
context: “if you do x, you will be charged and sentenced to a fine or imprisonment.” But what
about laws concerning will and estates? There are certain legal rules one must follow in order to
make a valid will (such as having a witness). If you do not comply with these rules, then there
will be negative consequences (your will will not be honoured), but you and the intended heirs
cannot be said to suffer coercive sanctions.

283 Hart, 228.
over disputed matters of international law are references to treaties, court judgments, and juristic writings. They are often very technical, and often, there is no mention of moral right or wrong, good or bad. For example, we can distinguish between whether NATO’s intervention in Kosovo was the morally right thing to do, and whether it nonetheless violated existing rules of international law. We may think that the rules, procedures and institutions of international law should be changed to better address such situations of humanitarian intervention. Despite the dominance of politics, power and national interest in international law, the use of legal arguments, a court’s rules of procedure, and the interpretation of treaties define the bounds within which parties can deal with the law strategically.

A further distinction is the fact that the rules of international law, like the rules of domestic law, are often morally indifferent. Some rules exist because it is convenient or necessary to have some clear rules on a subject, and no moral importance is attached to these rules. Such a rule may be one of a large number of possible rules, any one of which would do equally well. For example: what side of the road should we drive on? Such

284 For example, Martti Koskenniemi, the former Legal Advisor to Finland's Permanent Mission to the United Nations from 1989 to 1990, recounts that in deciding what actions should be taken against Iraq for its invasion of Kuwait, diplomats at the UN invoked legal norms and argued as if whatever action the UN or its member states could take was dependent on rules of law. A central topic of debate was the interpretation of various Articles of the UN Charter, suggesting that the UN and its member states were bound to act according to the terms of the Charter. Despite the dominant presence of political interests or moral concerns in such matters, Koskenniemi argues that the point of law is to provide a certain kind of impartial justification or legitimation. Law's contribution to security is not in the substantive responses it gives, but in the process of justification that it imports into institutional policy and in its assumption of responsibility for the policies chosen. Entering the legal culture compels a move away from one's idiosyncratic interests and preferences by insisting on their justification in terms of the historical practices and proclaimed standards of the community. Martti Koskenniemi "The Place of Law in Collective Security" The Michigan Journal International Law 17 (1996), 455.

285 Habermas recognizes this point in his discussion of adjudicative legal discourse and its distinction with moral discourse in Between Facts and Norms, p.237.

286 Hart, 229. The same could be said of the rules of etiquette.
rules are needed for social coordination; it does not matter what the rule is as long as there is a determinate, authoritative rule. In addition, legal rules, both domestic and international, commonly contain highly specific detail and arbitrary distinctions and conditions that would be unintelligible as elements in moral rules or principles. In support of this distinction, Hart argues that a morality cannot logically contain rules which are generally held by those who subscribe to them to be in no way preferable to alternatives and of no intrinsic importance; although law contains much that is of moral importance, it can and does contain such rules.\textsuperscript{287} Arbitrary distinctions and highly special detail are comprehensible features of law because the typical functions of law, unlike morality, are to use such rules to maximize certainty and predictability and to facilitate the proof or assessment of claims.\textsuperscript{288} For example, we can expect a domestic legal system, but not morality, to tell us how many witnesses are required for a validly executed will; we can expect international law, but not morality to tell us such things as the width of territorial waters and the methods to be used in their measurement.\textsuperscript{289} Such things are necessary and desirable provisions for legal rules to make. Hart argues that in so far as such rules may take many possible forms, they remain distinct from rules that are characteristic of morality.\textsuperscript{290}

Why does the distinction between law and morality matter? There are different views regarding the purpose and function of law. In the Introduction and the previous chapter, I have supported a minimal account of the purpose of law in the international case. I will defend this further in the next chapter. Law allows us to settle conflicts in a

\textsuperscript{287} Hart, 229.  
\textsuperscript{288} Hart, 229.  
\textsuperscript{289} Hart, 229-30.  
\textsuperscript{290} Hart, 230.
determinate, authoritative and legitimate way. Law provides certainty, predictability, order and allows individuals in a society to coordinate their behaviour. Even if individuals or states always acted in accordance with their moral obligations, including keeping their promises, the formulation of general laws and its application to particular cases would still be needed in cases of conflicts. These goals are important in the international case. Rather than settling conflicts by force or the threat of force, states can settle their disputes according to accepted legal rules and even in a court of law or other impartial and authoritative administrative or monitoring body. This is a development of Kant’s goal in his argument for a cosmopolitan juridical condition: so that states could settle their disputes as if by a court of law rather than through force.291

Rather than focusing on the coercive function, my conception of the purpose of law focuses on the ability of law to guide action and settle disputes; it focuses on the adjudicative function. What is central to law is the ability to have authoritative interpretations of what legal rules require, to be able to give impartial justifications of one’s actions based on these rules, and to be able to settle conflicts through impartial and authoritative mechanisms. Morality does not aim to do this, nor do the rules of etiquette. One would need institutions with the authority to determine what the rules of morality and etiquette require and authoritative bodies to settle moral disputes or disputes over whether a rule of etiquette has been violated.

291 While Kant recognized certain problems with applying his conception of what is required for a lawful and rightful condition within states (a coercive sovereign authority with legislative, adjudicative and enforcement powers) to the cosmopolitan level, this is still what is required for a lawful condition with conclusive public right. In its absence, he suggests that a voluntary federation is able to ensure peace and provide a means of settling disputes without resorting to force, but it is still largely characterized as a situation of private, provisional right rather than public right. See Chapters One and Two for further explanation of this. I have moved away from Kant’s theory in suggesting that a decentralized model of law can secure legal rights and obligations based on a more minimal conception of law and the rule of law.
Connected to this idea, a pragmatic reason why it matters that we call international law “law” is that by recognizing that international treaties and customary international law are just as much law as domestic law, these can then be applied by domestic courts in the same way that domestic law is applied. As we saw in the previous chapter this already occurs, and as I argued there, this should be developed further.

The distinction between law and morality, between one’s legal and moral obligations, is particularly important to the extent that there is moral disagreement between individuals and between societies with different moral and political cultures. The problem of moral disagreement is more significant in the international case. There are significant differences between states regarding their legal cultures, political systems, political cultures, social organization, economic systems, and institutional development, in addition to differences in their moral beliefs, religious beliefs, and cultural practices. As I will argue in the next chapter, this is why a minimal conception of law is more appropriate for the global rule of law. The distinction between law and morality allows us to agree that an individual’s or agent’s action was illegal, even when we disagree about whether it was morally wrong or not. The institutions, rules and procedures of domestic law and international law give us impartial rules and procedures for determining whether an individual’s or a state’s action was illegal – whether it was authorized by law.

3. IS COERCIVE ENFORCEMENT NECESSARY FOR INSTRUMENTAL REASONS? IS IT NECESSARY FOR THE EFFECTIVENESS OF LAW IN PRACTICE?

So far I have addressed the conceptual issue of whether coercion is an inherent feature of law: whether coercive sanctions are conceptually necessary for law or whether they are
necessary for a rule or obligation to be a legal rule or a legal obligation. I will now briefly consider the issue from a practical perspective: are coercive sanctions or a centralized system of coercive enforcement required in practice for law’s effectiveness? Are they required for law to effectively achieve the goals that we think law ought to achieve, such as guiding behaviour and coordinating action? While I have argued that the threat of sanctions is not conceptually necessary for the idea of a legal obligation, sanctions may be needed as a practical matter in the non-ideal world in which agents accept that law is generally binding on them but nonetheless intentionally violate their legal obligations. Sanctions may increase compliance in such cases by giving individuals and states additional incentives to obey legal rules that have independent normative force. The problem with the enforcement-based objections against international law that I have discussed above is that they merge these two issues and they tie the idea of law and the notion of having a legal obligation too closely with coercive sanctions. As Martin Dixon argues, that the weaker, decentralized model of international law may encourage states to flout the law more frequently than the individual does in national legal systems is a question about motives for compliance with law, not about its quality as “law.”

3.1. Practical Reasons for Coercive Legal Enforcement

Even if the best conception of law and legal obligation is one that focuses on law’s normativity, validity and authority rather than coercion, and even if most individuals or states comply with the law because they accept law’s normativity and authority, what about those actors who are not moved by this and intentionally break the law? The threat of coercive sanctions creates additional incentives to obey the law by imposing

292 Dixon, 6.
negative consequences. Consequently, they increase compliance for those who are not moved by the normative force of law. In doing so, they make laws more effective in practice.

Second, coercive enforcement protects law-abiders from those that would otherwise violate the law. As such, it provides assurance that if one follows the law, this does not make one vulnerable to law-breakers. It shields cooperators from free riders. We saw this argument in Hobbes, Kant and Habermas. For Hobbes, coercive sanctions deter others from breaking the law. Without this assurance that others will comply, it would not be prudent for me to comply first. For Kant, it protects law-abiders from law-breakers by setting things right when others break the law. Coercive enforcement does not guarantee that other individuals will not break the law, but it guarantees that if this happens, I have some means of redress and can compel compensation or performance. For Kant, the purpose of law and coercive enforcement is broader than the more minimal view of the function of law I have presented here. Kant is concerned with what conditions are needed to make rights conclusive, reciprocal and universal. It is a fuller conception of what is needed for justice.

Third, I have argued that a central function of law is social coordination. A certain level of stability, certainty, and predictability is required for agents to be able to pursue their own goals and coordinate their actions with others. To the extent that coercive sanctions are effective in increasing compliance with the law, this stabilizes behaviour and expectations, and it increases the capacity for social coordination. According to Habermas, coercive sanctions are required for law to fulfill this function.

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293 I will argue for this further in the next chapter.
Fourth, sanctions can strengthen compliance and enable cooperation in another respect, connected with the free-rider problem. The absence of punishment for non-compliance can have a corrosive effect on cooperation. If individuals who would otherwise comply with legal rules because they accept their authority and legitimacy continually see others violating the law with impunity, this may weaken the force of these other reasons for compliance. Individuals and states may feel a sense of unfairness as they comply with the law, even when it is contrary to their other interests, while others continually get away with violating the law and benefit from it.294

There are other goals that are specific to international law that seem to require the use of strong coercive measures. For example, a central goal of international law is to protect and maintain international peace and security. In order to stop violent conflicts, both within states and between states, a global peace-keeping force is needed. This would be more effective than decentralized enforcement since the latter relies on certain states having the military strength and political will to take military action against other states.

3.2. RESPONSE: HOW EFFECTIVE MUST LAW BE?

I have focused on the conceptual response to the enforcement-based objection by arguing that it is a mistake to regard coercive sanctions as a necessary feature of all law. However, a second standard response to the enforcement-based objection is to point out that international law is in fact enforced through various means.

First, international criminal tribunals and domestic courts have been able to try and punish individuals for violations of international criminal law. An important

294 I am grateful to Joseph Heath for suggesting this argument.
development for the enforcement of international criminal law is the creation of the International Criminal Court. Second, some treaty-based organizations, such as the World Trade Organization, can impose penalties on states that violate treaties. Third, international law authorizes states to take the following non-forcible countermeasures in response to states that breach their treaty obligations: trade embargoes, the freezing of assets, and non-performance of treaty obligations.\textsuperscript{295} Fourth, political pressure and the force of public opinion can also be used to compel states and other institutions or actors to fulfill their obligations under international law.\textsuperscript{296} Such political pressure may come from other states, from global civil society, from a state’s own citizens, or from international institutions.

Fifth, there are also more coercive or forcible means of enforcement against states. Under the \textit{UN Charter}, the UN Security Council can authorize states to take military and economic sanctions to maintain or restore peace and security.\textsuperscript{297} Brownlie argues that if one wants to compare the international system to the domestic legal system, then this is an important similarity: just as states have a monopoly on the use of force with the exception of self-defence, the Security Council alone can authorize the use of

\textsuperscript{295} Non-forcible countermeasures to a state’s breach of its treaty obligations are part of customary international law and they have been recognized as such by the International Court of Justice. There are four recognized conditions on the use of non-forcible countermeasures: (1) they must be intended to obtain redress for the wrong committed; (2) prior notification of the countermeasures and their purposes must be given; (3) they must be proportionate to the violations complained of; and (4) countermeasures which affect individuals are subject to certain limits deriving from human rights standards which form part of general international law. Ian Brownlie, \textit{The Rule of Law in International Affairs} (M. Nijhoff Publishers, 1998) at 135.

\textsuperscript{296} For example, Richard Falk argues that the civil society can provide “normative restraint” and force states to comply with their international obligations. \textit{Re revitalizing International Law} (Iowa State University Press, 1989), at 100.

\textsuperscript{297} Under Article 39 and Chapter VII of the \textit{UN Charter}, the Security Council may authorize: military action (Korea in 1950, Iraq in 1990-91, Indonesia over East Timor); or economic action, such as trading restrictions & embargoes (Iraq, South Africa in 1977, Serbia/Montenegro in 1992); or diplomatic and political measures, such as mandatory severance of air links with Libya (Lockerbie incident in 1992). Dixon, \textit{International Law} at 7.
coercive force under international law with the exception of self-defence or collective self-defence. In practice, however, the power of the Security Council in this respect has been limited since the Council has been deadlocked by the veto power of its five permanent members. If these five members agreed more often in their authorization of the use of force, then the UN Security Council would have considerable executive power.

The existing powers of the Security Council raise important concerns for the rule of law. As I will argue in the next chapter, the central ideal of the rule of law is to protect against the abuse of power by subjecting those with political power to certain constraints so that they are not above the law and cannot act arbitrarily. The existence of the veto power for the five permanent members is clearly contrary to this common conception of the rule of law. Because of this veto power, the Security Council is not able to authorize the use of coercive force against any of these five states. This allows these states to violate international law with impunity. This must be changed. In addition, to achieve the global rule of law, constraints on the Security Council must be developed.

One could argue that even though these forms of decentralized enforcement against states are weaker than the kind of centralized enforcement that exists within states, international law is sufficiently effective to be regarded as a viable system of law that can guide and constrain behaviour. Many international legal scholars argue that international rules are effective enough by pointing to the fact that most states do comply

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298 The UN Charter prohibits the use of force by states except for self-defence and collective self-defence against attacks subject to the authority of the Security Council to take action to maintain or restore peace and security (Article 51). Brownlie, The Rule of Law, 63.
299 Many international legal scholars have argued for this, including Brownlie (Chapter 15 of The Rule of Law).
with most of their international obligations most of the time.**300 Unfortunately, we get quite a different impression when we see cases where states violate fundamental rules of international law (such as aggressive action against other states, torture, and genocide). However, a large, complex body of international rules and regulations functions in the background of this even though this rarely makes the news. There are rules and regulations concerning communication, postal services, banking, the sea, outer space, air transportation, trade, intellectual property, and so on. Of course, this does not mean that cases of serious violations against human rights and humanitarian law can be simply dismissed as exceptional cases since they are indeed fundamental violations of international law.

The skeptic could object that this decentralized system of enforcement is too weak and insufficiently effective, particularly since the stronger means of enforcement (military and economic sanctions) depend on the ability and willingness of individual states to take action to enforce international law against other states. A problem with the objection that international law is not “effective enough” to count as law is that it is not clear what would count as sufficient effectiveness. It cannot be complete effectiveness or complete compliance since many people continue to break the law in the United States and Canada, and many escape legal punishment, and yet we consider these two states to have strong systems of law. Much of domestic law is not coercively enforced in practice. In addition, there are areas of domestic law that do not include the use of coercive sanctions; the use of coercive sanctions may not even make sense in some areas of law. As I noted above, if you fail to follow the required rules and procedures for a valid will, it will not have any legal effect but coercive sanctions will not be imposed on you or your

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intended heirs. In the case of constitutional law, when a court finds that a particular law by the Federal Government violates the constitution, that law is rendered null and void. In the case of the violation of an individual’s constitutional rights, the Government may be ordered to compensate the individual, but Courts do not impose punitive sanctions against the Government.

3.3 Different Factual Backgrounds

It is easier to see why physical sanctions are possible and necessary in the case of individuals who are approximately equal in physical strength and vulnerability. As we see in Hobbes’ theory, physical sanctions ensure that those who voluntarily submit to the restraints of law do not become victims of those who would, in the absence of sanctions, take advantage of others’ respect for the law while not respecting it themselves. Among individuals living in close proximity to each other, the opportunities for injuring others are great, as are the chances of escape, and consequently, natural deterrents and other reasons would not be adequate to restrain people from disobeying the law.301

However, there are important factual differences in the international case. First, the use of force against states is more complicated, less efficacious, and comes at a very high cost, especially with respect to human lives. Second, there appear to be stronger natural deterrents in the international case, so the need for problematic coercive sanctions may not be as important as in the case of individuals. The second claim is more controversial and may initially seem difficult to believe.

First, would a supranational coercive body be able to enforce law in a safe and effective way? In the domestic case, the police can use force to arrest an individual with

301 Hart, 218-9.
little risk of harm to others. By contrast when the violator of international law is a state, it is very difficult to direct sanctions solely against those who are responsible for violating international law. While this is most clear with the use of military action, economic sanctions can also cause serious harm against the more vulnerable citizens within a state, including citizens who may not even support the government’s violation of international law. The use of force against states is always public in nature. As Hart argues, since the organization and use of sanctions internationally involves great risks (particularly in the case of military action) and has these grave negative consequences, the threat of them adds little to other deterrents and reasons for compliance.\footnote{Hart, 219.} Military action and economic sanctions that harm the population of a state may only be justified as a last resort in the most serious cases. A global, independent military force (such as a U.N. military force) would also be significantly limited by these factors.

What about cases in which individuals have been prosecuted for the violation of international criminal law? Here, coercive sanctions are directed specifically at an individual rather than a government or state. Being able to physically apprehend international criminals, however, is challenging, particularly when they are active government officials. In some cases, individuals have been arrested in another country, years after the violent conflict has ended (for example, Finta and Eichmann were prosecuted years later for crimes during World War II). In the case of international criminal tribunals such as in the Former Yugoslavia and in Rwanda, these occur only after military intervention has been successful or the violent conflict has ended, and apprehending defendants has been difficult. Saddam Hussein was tried after the U.S. went to war in Iraq, a war that has involved great risks and losses in terms of the lives of
its soldiers and financial cost, and that has resulted in grave negative consequences for the people of Iraq. The International Criminal Court will be better able to prosecute individuals if their state is a party to the ICC Treaty or if the arrest is initiated by the Security Council or the Chief Prosecutor. However, if the arrest warrant is for the political leader or important government or military official of a state while he still active in his position, he may well use all the military force at his disposal to prevent arrest.

It is important to note that the criminal prosecution of individuals in international law is limited to war crimes and crimes against humanity. Individual prosecution does not apply when the government of a state violates other international treaties and other rules of international law. In addition, state immunity is an important limitation for directing sanctions at individual government officials. If, given the great risks and negative consequences of military action, as well as the serious harm that many economic and trade sanctions can cause to a population, it is recognized that these should only be used as a last resort in serious cases, then, due to this restriction, these threats will add little to other deterrents and reasons for compliance.

Second, there seem to be stronger natural deterrents and other more effective reasons for compliance in the international case. In the case of states, there are a limited number of actors and their actions are public in nature. To the extent that they must interact with each other in our globalized world and are dependent on future good relations with other states, this provides strong reasons to comply with their international legal obligations, particularly their treaty obligations. This is a significant difference between the case of states and the case of individuals. For example, if I perform my obligations under a contract and the other party then decides to defect, I can refuse to
ever deal with that person again. However, this may not mean much to the other party. There are plenty of other people she can enter into cooperative agreements with in the future. If word gets out that she is untrustworthy, she can move to another community or change her identity. While the natural incentive of being able to enter into cooperative arrangements in the future is very weak in the case of individuals, it is much stronger in the case of states since there are a limited number of states. To the extent that a state will need the cooperation of other states in the future, this creates a natural deterrent against breaching treaty obligations. In addition, given the public nature of state actions, the condemnation of the violation of international law by international institutions, non-governmental organizations, other states, and individual citizens has a stronger role in guiding behaviour than in the case of individuals in large societies where shame and social condemnation may have little effect. The termination of diplomatic relations, the cancellation of other agreements, suspension from inter-governmental organization, and the loss of legal rights and privileges can have a greater practical effect on a delinquent state than overt displays of force, especially in today’s highly interdependent international community.

What about independent, economically self-sufficient states that do not need the cooperation of other states and are not greatly affected by economic or trade sanctions? What if they are not moved by such incentives or by the normative force of international law? In such cases, the threat of force seems to be the only means that might compel compliance. While this may seem like the best option, given the serious negative costs of

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303 Unfortunately such reasons may be less compelling for very powerful states and states that are less interdependent and are less concerned with being part of an international community of states.

military action, relying on the threat of force may be not be as effective as one might think; it will not be as effective as it is in the case of individuals within states. There are good reasons why military action by an independent military body should be used when necessary to protect a state that is being illegally attacked by an aggressive state (collective self-defence) or to protect a people from genocide (humanitarian intervention). However, these are extreme cases in which peace and security are at stake and the aggressive state’s actions weaken its own claim to the right of non-intervention. This goes beyond the use of coercive sanctions for the general enforcement of international law.

Against this different factual background, international law has developed in a form different from that of domestic law. As Hart points out, given the large populations of modern states, if there were no organized repression and punishment of crime, violence and theft would be frequent occurrences. However, for states, long years of peace have intervened between disastrous wars. This is to be expected given the risks and stakes of war and the mutual needs of states.  

Even in the absence of a central enforcement body above states, what the rules of international law require is still thought and spoken of as “obligatory”: there is a general pressure for conformity to the rules, claims are based on them, and their breach is held to justify not only demands for compensation, but reprisals and counter-measures. When international rules are disregarded, it is usually not on the ground that international law is

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305 Hart, 220.
306 Hart argues that the fact that so much may be secured shows that no simple deduction can be made from the necessity of organized sanctions to domestic law (given its background physical and psychological facts), to the conclusion that without them international law (in its very different setting) imposes no obligations, is not “binding,” and consequently, is not worthy of the title of “law.” Hart, 220.
generally not “binding.” Instead, efforts are often made to conceal the facts that these rules were broken, or efforts are made to justify the action in accordance with international law.\(^{307}\)

In the international case, states may comply with the decisions or directives of the Security Council and other international adjudicative and administrative bodies for a variety of reasons. First, states may be rationally persuaded by the correctness of the body’s decision. Second, states may comply to avoid adverse consequences by the actions of other states as authorized by these bodies. For example, in a WTO dispute, a state may disagree with the correctness of the Appellate Body’s decision and yet it may comply to avoid the imposition of trade sanctions. Even in the absence of a centralized system of coercive sanctions, the enforcement mechanisms that do exist in a decentralized way still create significant incentives to comply. A third reason for compliance is legitimacy: the acceptance of the legitimate authority of a rule or institution of international law. An individual or state can comply with a decision not because it is persuaded that the decision is correct or because it fears sanctions, reprisals or other negative consequences but because it accepts the decision-making process as legitimate.\(^1\) The third feature is the most important one for the normativity of law and the rule of law. The second feature, avoiding adverse consequences, may provide a reason for action. By contrast, the idea that if an institution has the right to rule then individuals and states should defer with its decisions does not merely provide a reason for action; it

\(^{307}\) For example, the United States tried to defend itself against the charge that the war on Iraq is a violation of international law by arguing that the right to self-defence in international law should be extended to include preemptive self-defence.
has a normative quality that provides a justification for action. While I think that this is the most important factor for legal obligation, the second reason (to avoid adverse consequences) is needed in a non-ideal world in which agents are not sufficiently moved by the normative force of law.

4. Normative Problems With Decentralized Enforcement

Regardless of whether or not coercive enforcement is a necessary feature for law, either conceptually or for its effectiveness in practice, coercive sanctions are currently used to enforce international law in decentralized ways, without a central system of enforcement. Although the UN Security Council can authorize military and economic sanctions, the UN does not have an independent military to enforce these sanctions; these sanctions are enforced through the actions of individual states. In addition, states can take non-forcible countermeasures for the breach of treaties, and some treaty-based organizations, such as the WTO, can impose penalties on states that violate treaties. The current decentralized ways in which international law is enforced by individual states and various global institutions may be able to increase the effectiveness of international legal rules in practice by giving states additional incentives to comply and means to redress in the case of non-compliance, but it raises serious concerns.

First, whether or not a state attempts to enforce international legal rules against another state may be based on a state’s own interests. Here we have the Lockean problem of bias. Secondly, the effectiveness of decentralized enforcement is limited by

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the respective power of the states and institutions involved. If State A is powerful and
State B is not, then A can enforce international law against B, but B will not be able to
enforce it against A. These factors undermine important norms that are associated with
the rule of law, such as impartiality and universality. International legal rules do not
seem to apply to all states equally if some states are more powerful and can enforce these
rules on less powerful states, while other states are powerless to enforce these rules
against these more powerful states. This is an important concern for Kant in his
argument for a coercive sovereign authority within states: it ensures universality,
reciprocity and omnilateralism.

These are important concerns that need to be addressed. I think they present the
strongest argument in favour of centralized coercive enforcement and reveal the most
important weakness of a decentralized model of enforcement. However, they are not
sufficient reasons for denying that international law is “law” or denying that the rule of
law can exist internationally in the absence of a supranational coercive body. Instead, in
the absence of a world government, these problems can and should be addressed within
the framework of existing international law. In the domestic case, the state has a
monopoly on the use of force with the exception that individuals can use force for self-
defence. It is hard to imagine states conceding significant military power to an
independent international military force. The more pressing issue then for the rule of law
is how international law can address the above problems with decentralized enforcement.

How can these problems be addressed through a decentralized model of
international law? In order to have the rule of law, enforcement ought only to be used in
accordance with international legal rules. For example, the *UN Charter* defines when
states can use force, such as in cases of self-defence, and international customary law sets out and limits the use of nonforcible countermeasures for the breach of treaties. The International Court of Justice has adjudicated both kinds of cases. This illustrates why impartial adjudication and other such authoritative application of international law is important, and should be prior to, enforcement: they are needed to authorize, justify and constrain coercive enforcement. In the absence of a strong, effective supranational coercive authority, adjudication becomes all the more important so that it can evaluate the legality of a state’s use of force or economic sanctions against another state. The fact that formal institutions determine when sanctions are legally authorized and what kind of sanctions are appropriate according to the formal rules of international law distinguishes this decentralized use of sanctions from those which are used for moral norms.  

This gives us reason to strengthen the authority and jurisdiction of international courts, domestic courts and other administrative bodies to adjudicate these matters. Currently, states must agree to have their conflicts submitted to the International Court of Justice and they must accept its jurisdiction. In a decentralized model of law, an international court with compulsory jurisdiction is of central importance for the development of the global rule of law since it provides determinacy regarding the rules of international law, how they apply to particular cases, and what kinds of counter-measures or sanctions are justified. Increasing the authority and jurisdiction of politically independent adjudicate bodies is needed to address Locke’s concern with bias in

309 Even though Hans Kelsen views law essentially as a coercive order, he also concludes that international law is still true law because, broadly speaking, it provides sanctions (reprisals, use of force, war) and makes the employment of these sanctions lawful as a counter-measure against a legal wrong, but unlawful in other cases. Principles of International Law, (Clark, New Jersey: Lawbook Exchange, 2003).
310 This is a common proposal for reforming international law. It has been argued for by Kelsen, Bentham, and contemporary writers on global justice, such as Daniele Archibugi.
determining when one’s rights have been violated and in then using force to punish or seek compensation. As discussed in Chapter Three, a politically independent and impartial judiciary is a central feature for the conception of the rule of law.

Some may think that focusing on adjudicative and administrative institutions without backing their judgements with their own independent means of coercive enforcement is meaningless. So what if the International Court of Justice declared that the United States violated international law in the Nicaragua case if its judgement does not have the effect of preventing the United States from continuing in this violation of international law or compelling compensation? In this chapter, I have focused on the more conceptual issue of what is required for law and what is required for laws to be thought of as binding legal obligations. Some may think that this is merely a terminological issue.

However, in practice, when there is an impartial, authoritative and legitimate declaration that international law has been broken and what kind of reparations or consequences follow from that according to recognized law, this can have a significant effect on the behaviour of states; it does so in many cases, and more importantly, it ought to matter. Individuals, states and other actors do generally regard international law as binding. Being able to characterize the rules and practices of international law as “law” can itself have the practical effect of guiding behaviour and increasing compliance. Of course, we should resist the temptation to simply reconceptualize the concept of law and legal obligation so that it easily includes international law as it currently functions. My analysis of the connection between law and coercion has broader implications for our understanding of law in general and for our understanding of the nature of law and legal
obligation within domestic legal systems as well. In addition, in trying to defend a decentralized model of international law, I do not mean to suggest that it is just fine the way it is. In order to develop the global rule of law, I have suggested certain reforms (for example, reforms for the Security Council and the International Court of Justice).

5. CONCLUSION

In this chapter, I have tried to respond to the skeptical argument that without a centralized, supranational system of coercive enforcement, we cannot have law or legal obligations at the international or global level; at best, we can only have voluntary, self-binding moral obligations. In my response, I first challenged the view that sanctions are a central and necessary feature of law by drawing on Hart’s and Raz’s criticism of the command theory of law. Secondly, I tried to show that there are limitations with trying to replicate the domestic model of legal enforcement at the global level given important factual differences between the two cases.

Whereas others emphasize the importance of coercive enforcement for the development of a law-governed condition at the international and global level, I think the most important elements for the global rule of law are: first, that states, individuals, other transnational actors, and officials within international institutions regard international legal rules as binding on them; second, the impartial determination and application of the rules of international law by adjudicative bodies and other institutions with the accepted authority to do so (such as the International Court of Justice, the International Criminal Court, the monitoring bodies of particular treaties, as well as domestic courts), and third, the further development of principles that specify criteria for the creation, adjudication
and application of international legal rules. The latter two elements are particularly important under a minimal conception of law that regards law’s primary purpose as providing a legitimate and authoritative way to settle conflicts.

My account of law and the rule of law in the international case will not satisfy Kant’s argument for a lawful, rightful condition; it is more minimal. In order to provide real assurance that states, individuals, and other transnational actors will be compensated for non-performance of treaty obligations or the violation of other rights under international law (in order to set things right), stronger, more effective coercive enforcement seems to be required. In order for the rights of states and other actors to be universal and reciprocal, an independent supranational coercive authority is required so that the enforcement of rights is not contingent on the respective power and will of particular states to enforce international law.

However, as we saw in Chapter One, Kant himself doubted the prospects of this in the international case, not merely due to practical considerations concerning whether it was possible, but due to more principled reasons. States are not analogous to individuals. They do not have the freedom to pursue their own ends as individuals do and the justification of legal coercion to protect the rights and freedom of states differs from the case of individuals. Rather, the sovereign authority and rights of states are ultimately based on their protection of the rights and individual freedom of its citizens. The decentralized, minimal model of law and the rule of law I have proposed is motivated by the goal of achieving something in between a lawless state of nature and a coercive world government.
In this chapter, I will consider objections against my proposal for a polycentric model of international law that arise from a concern for democratic legitimacy. First, without an elected global parliament comprised of state representatives or representatives of world citizens, how can the creation and application of international legal rules be democratically legitimate? To say that an institution is legitimate in the normative sense is to assert that it has the *right to rule*, where ruling includes promulgating rules and attempting to secure compliance with them by attaching costs to non-compliance. Can the exercise of political power and legal authority be justified by a different conception of legitimacy than the idea of democratic legitimacy that is based on the domestic model of a democratically elected and representative law-making body? Second, I will consider related objections against the central role that I assign to judicial and administrative bodies for the impartial and authoritative interpretation and application of international legal rules. One may object that this places significant power in the hands of judges, lawyers and administrators, leading to the charge of judicial imperialism and legal imperialism; it supports “the rule by judges and lawyers” rather than the democratic ideal of “the rule by and for the people.”

In this dissertation, I have focused on law and the rule of law rather than democratic legitimacy: whether a decentralized model of international law can create legal obligations and satisfy a minimal conception of the rule of law. However, I recognize that this is only one component within a wider theory of justice. My account leaves open the issue of what else is required for international laws and institutions to be just, politically legitimate, and morally justified. These are important questions that I will not be able to fully address here since doing so requires a substantial analysis of the relationship between democracy and the rule of law within a broader conception of justice, as well as a substantial analysis of conceptions of political legitimacy, legal legitimacy and democratic legitimacy. However, I will show why these questions are important and I will suggest different ways that these concerns can be addressed.

The rule of law is an important component for global justice. I argue that law enables social coordination and stability, and that it addresses the problems of partiality and inconsistency of rules that we see in the pre-legal societies imagined by modern social contract theory. The rule of law also contributes to global justice because a central feature of the rule of law is to constrain the exercise of arbitrary power. However, laws and the rule of law are not sufficient for global justice. While establishing a lawful condition through international law has been the focus of this dissertation, democratic legitimacy, the protection of human rights, equality, and economic justice are also important components of global justice.

Although my focus has been on law, there are problems with treating the rule of law and democratic legitimacy or popular sovereignty as independent features of global justice. In theories of domestic law, the use of force needs to be justified in order for it to
be consistent with individual freedom and this is best achieved through democratic legitimacy. We saw how Kant addresses this with his argument that the legislative authority must be independent and representative of the united will of all. In this way, the subjects of law are also regarded as its co-authors. We also see this concern in Rousseau and in contemporary theories of democracy and human rights.

To the extent that international law is less coercive, what is required to justify the exercise of power through international law may be weaker. However, the legitimacy of international legal rules (what justifies their claim to authority) becomes all the more important in the absence of strong, effective, supranational coercive enforcement because without this, the effectiveness of international law will depend more on the internal strength of legal obligations and their perceived legitimacy. Hence, democratic legitimacy is not simply an independent feature that is important for global justice in addition to the rule of law; there are important connections between the two. Without the rule of law, a democracy could devolve into an arbitrary tyranny of the majority. Conversely, if a system of law is not able to claim legitimacy over those who are subject to it, then it could devolve into legal or judicial imperialism: the rule by judges rather than the rule by the people.

In the first section of this chapter, I begin by considering objections against a decentralized model of international law that are based on Kant’s arguments for a centralized legislative and executive authority, as well as objections that are based on theories of democratic legitimacy. Against the view that a democratically elected and representative world parliament is required, I will argue that other standards of political legitimacy are more appropriate for international law, legal processes, and institutions.
Instead of a general theory of international legitimacy, I will argue for a differentiated and contextual account of legitimacy that considers the kind of authority that is exercised by a given institution or system, the kind of coercion it can exercise, and the degree to which it constrains states and impacts people’s lives. The greater these are, the higher the standard of legitimacy will be. Consequently, to the extent that international law is less coercive and less constraining than domestic law, weaker standards of political legitimacy may be appropriate.

In the second section of this chapter, I will consider to what extent the idea of the rule of law itself can address issues of legitimacy. While legal legitimacy based on the ideals that are internal to the idea of the rule of law is not equivalent to political legitimacy or democratic legitimacy, there are important overlaps and the former can help address concerns of the latter. In the absence of a world government with a globally representative democratic parliament, power is exercised by states, institutions of global governance, and other transnational actors in a non-democratic and unaccountable manner. This is problematic from the perspective of democracy since these undemocratic institutions can constrain the ability of democratic states to implement policies that are internally democratically justified. Consequently, the more effective institutions of global governance and international law are, the more urgent and important the question of their legitimacy becomes. The application and development of global administrative law by adjudicative bodies can at least limit the arbitrariness of this exercise of power and make it more accountable by subjecting it to rule of law principles.

312 Buchanan & Keohane, at 407.
and transparency are important features of democracy that can be protected by rule of law principles as found in administrative law.

As I will discuss in the second and third sections of this chapter, this is far from satisfactory. This solution is still open to the charge of judicial and legal imperialism since the accountability of international law and institutions of global governance will then depend on judicial and administrative authorities. While the development of the rule of law through a decentralized model of international law is needed for global justice, and while standards of legal legitimacy can increase accountability, this must be supplemented by the development of global democratization and political legitimacy. In addition, concerns with legal imperialism and the restriction of democracy and other important values by international law provide reasons to favour a weaker, more flexible model of international law. This provides an additional response to the objection concerning enforcement addressed in Chapter Four. The fact that international law lacks strong, effective coercive enforcement may be a good thing.

I will only be able to briefly raise and partially address these issues in this chapter. This final chapter opens the door to much needed further research and analysis on the following matters: the relationship between the rule of law and democratic legitimacy or popular sovereignty, including whether decentralized and polycentric forms of democratization can be sufficient to legitimate the exercise of authority through international law; whether international law must meet other conditions of justice, such as the protection of human rights and the development of greater global equality; and the strengths and limitations of developing global administrative law to make global
institutions more accountable and to ensure the legitimacy of these institutions and their
decisions.

1. Can the Authority of International Law be Justified in the Absence of a
Democratic Legislative Body that Represents All States?

Kant’s argument for a centralized legislative power that represents the united will of all is
based on his concern with individual freedom. In order for coercive laws to be consistent
with the freedom of each individual, laws should not be imposed unilaterally or
multilaterally (i.e. when more than one person imposes his or her will on others). An
independent law-making body that is omnilateral and represents the united will of all is
required in the domestic case for Kant in order to secure the inherent right to personal
freedom of moral persons. This allows individuals to be conceived as both subjects and
co-authors of the laws that bind them. However, since states are not persons with a
similar inherent right to personal freedom, this argument cannot be directly extended to
the international case. Rather, the right and autonomy of states is based on their duty to
secure the freedom of their citizens through a civil constitution, and it is limited by this
duty. 314

As noted in Chapter One, some scholars disagree with this interpretation of Kant
and support Kant’s arguments for a universal federal state in his earlier political writings,

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314 My explanation of Kant’s argument for a sovereign, independent, centralized law-making
body that represents the united will of all is influenced by Arthur Ripstein’s analysis of Kant. In
his recent book, Ripstein himself does not think that Kant’s argument for a centralized legislative
body applies in the international case, nor does Kant’s argument for centralized, coercive
enforcement for these reasons. Instead, Ripstein argues that only Kant’s argument for a judiciary
applies in the international case because it is required to solve the indeterminacy problem.
while others think that regardless of what the most accurate interpretation of Kant is, this is the correct view. Even if one does not think Kant’s argument for an independent, omnilateral, sovereign authority in the domestic case can be extended to the international case, Kant’s concern with using law to impose one’s unilateral will on others and the ideal of omnilateralism is nonetheless important in the international case. States with greater political, economic and military power have stronger bargaining power in the creation of international law. Historically, international law has been created by western states. Consequently, international law suffers from the problem that some states are able to impose their unilateral or multilateral will on other states. The charge of legal imperialism is a serious one since international law has historically been developed by Western states and it has been used to further their own interests, including in support of colonization, imperialism, and to support their own economic interests through trade regulations.  

How can these concerns be addressed in the absence of a world government that has authority over all states and that can be thought of as representing all states equally or all individuals directly as global citizens?

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315 For example, the Doctrine of Discovery and the *terra nullus* principle were developed in international law to legitimate European colonization of Africa and the Americas. This Doctrine was applied by domestic courts to affirm the state’s ultimate title to the lands. For example, in *Johnson v. M’Intosh*, the U.S. Supreme Court affirmed that the United States government held ultimate title to Native American lands: *Johnson v. M’Intosh*, 21 U.S. 543 (1823). According to this doctrine, a state can acquire title to land through occupation if that land is not already governed by another state. The application of this doctrine to occupied lands in Africa and the Americas was based on the premise that the inhabitants did not have sufficient political organization.

While the right to self-determination of all peoples that is recognized in the *UN Charter* and Article 1 of the *International Covenant of Civil and Political Rights* was eventually applied to the decolonization in Africa, there has been resistance to extending this right to Indigenous Peoples. Many states with indigenous populations opposed the inclusion of the right of self-determination in the *United Nations Declaration of the Rights of Indigenous Peoples*. The Declaration was adopted on September 13, 2007 despite receiving negative votes from Canada, Australia, New Zealand, and the United States.
1.1. Demokratically Elected, Representative World Parliament

One view is that in the absence of a democratically elected, representative world parliament that can legitimate the rules and institutions of international law, the rules and institutions of international law should not be binding on states, individuals and other actors, and that they should not be enforced against these agents, even through non-forcible sanctions. According to this view, the exercise of political power and the force of law must be legitimated through democratic processes in order to be justified. In contrast to the objection that international law requires stronger enforcement, this view supports weakening the enforcement of international law by states and international institutions unless the rules enforced are legitimated through democratic processes and the actors and institutions charged with their enforcement can be made accountable to democratic processes. If one believes that the only way to do this is through a democratically elected world parliament (either one that represents states equally, or one that represents world citizens directly, or a combination of the two), then to the extent that this is not a viable option in the near future, this provides a reason to weaken the ability of international law to constrain the actions of states, individuals and other actors.

In Chapter Three, I discussed Habermas’ doubts that a world parliament would be able to sufficiently legitimate its policies in a global polis. Despite this, Habermas defends the development of a global rule of law and global constitutionalism based on the human rights regime and the institutional structure of the U.N. without a world
He has been criticized for privileging the rule of law and constitutionalism over popular sovereignty and democracy, contrary to his own view that these ought to be equiprimordial in the domestic case – equally basic conditions of legitimacy. In order for the exercise of political power to be legitimate, the principle of the rule of law (or constitutionalism) requires that political power be exercised in accordance with a foundational system of principles, rules and procedures regarding the creation, amendment and application of law (for example, Hart’s secondary rules). The principle of democracy (or popular sovereignty) requires that those who are subject to law or a constitutional system must have a say over these principles, rules and procedures through various democratic practices of deliberation. In this way, individuals are free since they can be regarded as imposing laws on themselves. As Tully explains, if the rule of law gains priority over the principle of democracy, so that the constitution is not itself subject to democratic deliberation, then the political system is illegitimate; politics is said to be reduced to ‘juridification’ and to suffer a ‘democratic deficit’.

Conversely, if the democratic principle gains priority, then the association is said to be illegitimate because it is ‘a tyranny of the majority’, without rules and procedures.

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318 Tully, “The Unfreedom of the Moderns” at 207.

319 Tully, “The Unfreedom of the Moderns” at 207.

320 Tully, “The Unfreedom of the Moderns” at 207.
My defence of a decentralized model of international law is vulnerable to the same objection: it leads to the juridification of politics and suffers from a democratic deficit. This is particularly a problem since I assign an important role to the impartial, authoritative determination and application of international law by judicial and administrative bodies in order to address the problems of partiality, inconsistency and indeterminacy. Since states and other transnational actors interact globally, I have argued that there are good reasons to develop international law and the global rule of law under a polycentric model. Rather than allowing transnational actors and institutions to arbitrarily exercise power in ways that significantly affect people's lives, we can subject these to international legal rules and monitoring institutions to provide greater stability, consistency, transparency and to make the exercise of power less arbitrary. The development of international law and the rule of law globally may actually help lead to the development of a global political and legal culture that could support a global democratic parliament and provide a necessary legal institutional framework for it.

The critics are right to be concerned about the legitimacy of international legal rules and institutions, particularly the justification of any form of coercion that is used to enforce these rules, including economic and trade sanctions and incentives. However, this need not lead to skepticism about the development of international law and the global rule of law in the absence of a democratic world parliament, or to a rejection of the application of international law by legal and adjudicative institutions. Instead, we can ask how a decentralized model of international law can ensure greater legitimacy of its rules, processes, and institutions. There may be ways to address the legitimacy of international law other than through a global parliament. In fact, given the continuing
problem of a democratic deficit within the European Union, there is good reason to think that a supranational, representative parliament alone will not be sufficient to address these concerns.

1.2. Other Forms of Global Democratization and Political Legitimacy

I think there are other viable ways in which international law can be more democratically legitimate, less imperialistic, and more omnilateral in the absence of a representative world parliament. The democratic principle that agents should have a say in the rules that govern them can be realized through transnational networks and non-government organizations that are able to participate in the creation and application of international law. Some refer to this as “globalization from below” and “international law from below.” Given the significant differences between the decentralized model of international law that currently exists and the domestic model of constitutional democracies, it is reasonable to think that the conditions needed to justify the exercise of political power and legal authority through international law will be different.

On the one hand, these alternatives may be viewed as second-best solutions given the serious difficulties with creating a legitimate, democratically elected world parliament. However, in the international case and in the case of large supranational political institutions such as the European Union, these more diffused, polycentric forms of democratization may in fact be more effective in increasing participation than traditional forms of democratic government within democratic states.

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For example, Allen Buchanan argues against assessing the legitimacy of international law based on the domestic model of majoritarian democracy.\(^{322}\) He rejects the consent-based account of international law: the view that it is the consent of states that confers legitimacy on the international legal system.\(^{323}\) Instead, he defends a justice-based account of legitimacy grounded in the ideal of protecting the basic human rights of all persons. He argues that in order for any system that exercises political power to be morally justified in the sense of having the right to rule (including the international legal system), it must achieve a minimal standard of basic human rights protection.\(^{324}\) For Buchanan, this is a necessary and sufficient condition for legitimacy. This is what justifies the international legal system’s authority and what obligates agents to comply with it. While Buchanan’s conception of system legitimacy is justice-based, it does not require full compliance with principles of justice. Theories of legitimacy articulate a minimal moral standard for the purpose of justifying the right to exercise political power. The international legal system as a whole may be legitimate (its authority may be morally justified), and yet particular laws, procedures and institutions may fail to meet higher standards of justice and can be judged legitimate, but unjust and in need of reform.

Although Buchanan recognizes that democracy may be the best way to ensure the protection of human rights and to justify the exercise of political power, he argues that it


\(^{323}\) He argues that on the one hand, much of the existing international legal system is not consensual. As discussed in Chapter Three, states are obligated to obey various rules without their consent. This includes peace treaties that are signed under duress. To the extent that consent-based theories do not exclude these rules as illegitimate, the concept of consent is watered down to the point that it is rendered useless. Second, he criticizes different normative arguments that are given to justify the view that consent is either a sufficient or necessary condition of legitimacy. For his full argument, see 301-314.

\(^{324}\) Buchanan, *Justice, Legitimacy*, 299.
is a mistake to equate democratic legitimacy with state majoritarianism. The most serious democratic deficit is due to the fact that a technocratic elite lacking democratic accountability is playing an increasingly powerful role in a system of regional and global governance. The most important task then is to develop and implement a more genuine, democratic form of global governance in which those who make, apply and enforce international law are accountable to individuals and nonstate groups, not only, or primarily, to states.\textsuperscript{325} This requires widespread democratization. Buchanan recognizes that what is required for legitimacy is not an absolute standard. It is a matter of degree and it will vary depending on what is feasible and on a comparative assessment of available options. While the democratization of international institutions is an urgent task to work towards, he argues that the current failure to achieve more democratic institutions does not entail that the international legal system is illegitimate.\textsuperscript{326} He argues that democracy is only a necessary condition for legitimacy where it is feasible, and currently there are many institutional obstacles to global democratization.

While I think there are some problems with Buchanan’s own account, I think he is correct to criticize the assumption that the legitimacy of international law requires a democratic political system based on state majoritarianism. There are problems with simply dragging in the old model of democratic representation from presumptively unified and centralized nation-states into the international realm, particularly since the older model no longer fits well with more complex states today (as discussed in Chapter Two).

\textsuperscript{325} Buchanan, \textit{Justice, Legitimacy}, 289-90.
\textsuperscript{326} Buchanan, \textit{Justice, Legitimacy}, 324.
Buchanan is also right to emphasize the importance of addressing the democratic deficit of global governance institutions. Although there is no global government, there are many international regimes that enact binding regulations on particular matters, such as the WTO, the IMF, the Intellectual Property Organization, the International Labour Organization, the WHO’s system for containing global epidemics, and the Basel II regime in banking. Unlike the public services within nation states, these are not accountable to any democratically elected body. Hence, we have the rule of technocrats rather than the rule of the people. This raises the important issue of how to make these institutions and processes more accountable and transparent, and how to increase the participation of those affected by their decisions (decisions that can have an important impact on people’s lives). There is much work being done on subjecting these institutions to standards of justice, fairness and political legitimacy.  

For example, Buchanan & Keohane propose a global public standard for the normative legitimacy of global governance institutions that can provide the basis for principled criticisms of global governance institutions and can guide reform efforts in circumstances in which people disagree deeply about the demands of global justice and the role that global governance institutions should play in meeting them. They develop a middle ground conception of legitimacy between the increasingly discredited conception of legitimacy based on state consent, on the one hand, and the unrealistic view that legitimacy for these institutions requires the same democratic standards that are

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328 Buchanan & Keohane at 405.
applied within liberal democratic states, on the other. Global governance institutions such as the UN Security Council, the International Criminal Court, the World Trade Organization, the International Monetary Fund, and various environmental institutions such as the climate change regime built around the Kyoto Protocol are like governments in that they issue rules and publicly attach significant consequences to non-compliance, and claim authority to do so. Nonetheless, they do not attempt to perform anything that approaches general governmental functions and they do not seek to monopolize the legitimate use of violence within a given territory. In addition, their design and major actions require the consent of states. Consequently, Buchanan and Keohane argue that a weaker standard of legitimacy than the democratic standards that are found within states is appropriate.

Their approach takes into account the fact that global governance institutions are novel, still evolving, and characterized by reasonable disagreement about what their proper goals are and what standards of justice they should meet. Rather than trying to provide universal and necessary conditions for legitimacy, they try to provide a principled proposal for how to best assess the legitimacy of these institutions for the time being. This is an important issue given the power that these institutions currently exercise. Whether or not an institution is legitimate and has the right to rule determines the claims it can make on us: whether we have a normative obligation to comply with it and whether we should support it and refrain from interfering in it, or whether we should limit its power or try to reform the institution.

I believe that the best approach is to develop standards of legitimacy in a much

329 Buchanan & Keohane at 406.
330 Buchanan & Keohane at 406.
331 Buchanan & Keohane at 406.
more differentiated, contextual way rather than trying to elaborate a general theory of legitimacy. Daniel Bodansky also defends a more differentiated approach.\(^{332}\) He argues that what is required in order to legitimize an institution may vary depending on how much authority it is exercising, the kind of authority it is exercising, and the kinds of issues it is exercising authority over. For example, the greater the authority an institution exercises, the greater the demands for its legitimacy will be. Bodansky proposes that we consider the following factors. First, how binding are an institution’s decisions? An institution that can make binding rules obviously poses a greater issue of legitimacy than those that can only adopt resolutions or make recommendations. Here, the distinction between legally binding “hard law” and “soft law” declarations and resolutions is particularly relevant.\(^{333}\) Second, how broad is its decision-making authority? Institutions with broad areas of control raise greater issues of legitimacy than those with narrowly specified areas of power. Finally, how removed is the decision-maker from those subject to its authority? The greater the distance between ruler and governed, the greater are the legitimacy concerns.\(^{334}\)

Bodansky argues for a more differentiated approach to legitimacy because different agents will have different views about legitimacy. From a sociological perspective, the perception of legitimacy is important for the effectiveness of law since it will increase compliance. Bodansky argues that while governmental actors may put a much greater premium on sovereignty and consent, organizations within civil society


\(^{333}\) See Chapter Three for a discussion of the distinction between hard and soft law.

\(^{334}\) Bodansky, 8.
may place greater emphasis on participation and transparency. Bodansky also suggests that attitudes about legitimacy may differ along cultural grounds, such that there may be different attitudes about legitimacy between people and government officials in developing and developed countries. Hence, rather than trying to develop a single standard of legitimacy for international law and international legal institutions, it may be more fruitful to develop different accounts of legitimacy based on these different factors.

2. LEGAL LEGITIMACY: INCREASING ACCOUNTABILITY, PARTICIPATION AND TRANSPARENCY THROUGH GLOBAL ADMINISTRATIVE LAW

The issue of legitimacy can also be addressed from the perspective of the rule of law. The principles that underlie the idea of the rule of law can be used to address Kant’s concern with omnilateralism, Locke’s concern with impartiality, and the democratic concern with increasing transparency, accountability and participation. For example, Benedict Kingsbury, an influential legal scholar on global administrative law, defends the ability of global administrative law to provide a form of omnilateralism.

First, global administrative law can help police the boundaries of international institutions so they do not overstep their authority. Second, just as national administrative law provides procedural guarantees that can at least partially restrict political authorities from exercising power in arbitrary ways, global administrative law can similarly apply procedural guarantees to prevent international institutions from exercising their power in arbitrary ways. The values of transparency and accountability that are supported by theories of democratic legitimacy are also supported by theories of

335 Bodansky, 6.
336 Benedict Kingsbury, “Omnilateralism and Partial International Communities.”
337 Kingsbury, 99.
legal legitimacy and the rule of law. For example, global administrative law can require that those affected by decisions or actions of international institutions be notified and given an opportunity to respond, or that institutions must give reasons to justify their decisions. While some transnational institutions have already created such rules to provide greater transparency and accountability, global administrative law can extend standards of accountability, transparency and participation to institutions that have not chosen to do this themselves.338

The use of global administrative law to address accountability, transparency and participation can be defended in two ways: in terms of the principle of democracy, as well as through the principle of the rule of law itself. On the one hand, we can develop an instrumental justification for developing global administrative law to increase democratic accountability and to help address the current democratic deficit of transnational institutions. However, independent of this instrumental justification, accountability and transparency are also required by the conception of the rule of law itself.339 As David Dyzenhaus argues, the rule of law has its own legitimacy and accountability.340 Let us first consider the idea of the rule of law before examining further how global administrative law can ensure legitimacy and accountability.

338 For example, ECOSOC Resolution 1996/31 on “The Consultative Relationship between the United Nations and Non-Governmental Organizations “ affirmed and strengthened the rights of accredited NGOs to participate in UN meetings. Unfortunately, many NGOs have found that this has not been sufficiently effective in practice. The 1999 Conference of NGOs (CO-NGO) called for more consolidation.
2.1. The Idea of the Rule of Law

The idea of the rule of law can be distinguished from the concept of law. On some accounts of these two concepts, it is possible that a society can have a legal system with legal rules and legal institutions (courts, police, prison system) without having the rule of law. On other accounts, these two concepts are more closely connected: a legal system that does not meet the requirements of the rule of law is a deficient legal system and should not be considered law proper.

The central meaning of the term “the rule of law” that almost all theories of the rule of the law hold in common is that law ought to constrain the arbitrary use of power. The rule of law is commonly distinguished from “the rule of man” or “the rule of kings.” For example, a ruler or government can rule by law without the rule of law: a ruler or government can use legal statutes and institutions (courts, police, prison system) to enforce its will, but the sovereign authority itself may be above the law and not subject to any legal or constitutional constraints. If we take John Austin’s conception of law as commands of a sovereign backed by force, then a society that has a sovereign authority that issues commands and has the power to back up these commands with force has law. This is the command theory of law. The sovereign is not itself bound by law; instead, the sovereign is the “uncommanded commander.” This is the conception of law that is supported by Hobbes and Bodin. It is connected to the modern idea of absolute, supreme sovereignty.

In contrast to the modern idea of absolute sovereignty that regards the sovereign as above the law (“the uncommanded commander”), the ideal of the rule of law views law as the source of ultimate authority, not the sovereign: no one is above the law,
including heads of states, lawmakers, courts and government officials.\textsuperscript{341} In order to have the authority to make and enforce law, government officials are subject to legal or constitutional constraints. When a government governs in arbitrary, corrupt ways, without following proper norms and procedures in the enactment and enforcement of law, when it violates its own constitution, when government officials interfere with court judgments for political reasons, when people are detained without due process, these are commonly regarded as abuses of the rule of law.\textsuperscript{342} Based on this distinction, a society in which the ruler or government uses legal rules and legal institutions to simply enforce its arbitrary will, without itself being constrained by those rules or more foundational or constitutional legal rules, may have law, but it lacks the rule of law.

The contrast between the rule of law and the rule of man is found as far back as Plato and Aristotle. Plato wrote that “[w]here the law is subject to some other authority and has none of its own, the collapse of the state, in my view, is not far off; but if law is the master of the government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state.”\textsuperscript{343} Aristotle similarly argued that “it is more proper that law should govern than any one of the citizens: upon the same principle, if it is advantageous to place the supreme power in some particular persons, they should be appointed to be only guardians, and the servants

\textsuperscript{341} In his pamphlet on common sense, Thomas Paine wrote: “as in absolute governments the king is law, so in free countries the law ought to be king; and there ought to be no other.” Thomas Paine, \textit{Rights of Man, Common Sense, and Other Writing} (Oxford: Oxford University Press, 1995).


of the laws."\textsuperscript{344} Both these statements support the supremacy of law and the idea that the power and authority of government officials should be constrained by law. In modern political philosophy, this idea is also found in Locke. Unlike Hobbes, Locke placed certain constraints on government. Locke argues that those who have legislative or sovereign power in a commonwealth should be bound to govern according to established laws that are made public to the people, that courts must settle conflicts by applying those laws impartially, and that coercion can only be used against citizens in the execution of those laws.\textsuperscript{345}

Some conceptions of law and a legal system may be more closely related to the idea of the rule of law.\textsuperscript{346} Some might argue that in the above case of an unlimited sovereign we do not really have law proper or a true legal system but a deficient one. For example, under John Austin’s conception of law as commands of a sovereign backed by force, law exists in this case. However, as we saw in Chapter Four, under H.L.A. Hart’s conception of a legal system, secondary or foundational rules that authorize and constrain


\textsuperscript{345} Locke writes: “...the power of the society, or legislative constituted by them, can never be supposed to extend farther, than the common good; but is obliged to secure every one's property, by providing against those three defects above mentioned, that made the state of nature so unsafe and uneasy. And so whoever has the legislative or supreme power of any common-wealth, is bound to govern by established standing laws, promulged and known to the people, and not by extemporary decrees; by indifferent and upright judges, who are to decide controversies by those laws; and to employ the force of the community at home, only in the execution of such laws, or abroad to prevent or redress foreign injuries, and secure the community from inroads and invasion. And all this to be directed to no other end, but the peace, safety, and public good of the people.” In \textit{Second Treatise}, C.B. Macpherson (ed.), (Indianapolis, Indiana: Hackett Publishing Company, 1980): Section 131

\textsuperscript{346} Jeremy Waldron argues that our understanding of the rule of law and our understanding of the concept of law ought to be much more closely connected than they are in modern jurisprudence. “The Concept and the Rule of Law” at 4.
government officials in making and applying law are needed for a legal system.³⁴⁷ Lon Fuller includes further features in his conception of law and legality.³⁴⁸ Despite the fact that there are significantly different conceptions of the rule of law, some more formal and procedural, while other conceptions are more substantive, the central meaning of this term that all these theories hold in common is that the rule of law constrains the arbitrary use of power.

This central idea points to other features that are often considered to be part of the rule of law. Formal or thin conceptions of the rule of law generally include the following procedural requirements: (1) Laws must be open, clear, and they should be made public. (2) Laws should be relatively stable and consistent. (3) Laws must be prospective and set forth in advance rather than applied retroactively. (4) There should be an independent judiciary that can apply the law impartially. All these features should be included in a minimal, formal conception of the rule of law since they are necessary for what I take to be the central, distinctive purpose of law: to allow actors to coordinate their actions and pursue their sometimes conflicting ends. To enable actors to pursue their conflicting goals and coordinate their actions, all actors need to be guided by the same rules to avoid conflict and resolve conflicts. They need to know what these rules are ahead of time in order to then act accordingly. Hence, law must be open, clear, public and prospective. Stability and certainty are also needed to enable actors to pursue their goals in a coordinated way.

³⁴⁷ In Chapter Four, I will use Hart’s argument against Austin to support my argument against the objection that international law is not law because it lacks an effective, centralized system of coercive sanctions.
³⁴⁸ I will discuss Lon Fuller’s requirements for legality or “the internal morality of law” below.
The last feature (an independent judiciary) deals with the problem of bias that we see in the state of nature, particularly in Locke’s conception of the state of nature, as well as the problem of indeterminacy. In order to determine what has the status of law, how that law should be interpreted, and how it should be applied to settle particular cases of conflict, we need judicial institutions with the recognized authority to determine these matters. For Hobbes, this requires an independent, supreme authority to act as judge and address the indeterminacy problem, but this need not be independent from the law-making authority. One of the reasons in favour of Hobbes’ conception of an indivisible, unitary sovereign that is both the supreme law-maker and supreme judge is that we do not have to worry about conflicts between the legislative and adjudicative branches of government. However, as most clearly argued for by Montesquieu, the reason why it is better to separate these two branches and give them independent authority is that they can check and balance each other out, thereby limiting the abuse of power. This is a central goal in most conceptions of the rule of law: the goals of the rule of law are not simply to provide stability and certainty, but to also limit the use of arbitrary power so that government officials are also governed and constrained by law. This suggests two more important features that should be required for the rule of law: (5) any official that administers the law, including courts, must act according to law; (6) the judiciary should have review powers over the administration of law by government officials.

We see most of these requirements and others in Joseph Raz’s conception of the rule of law. Raz bases his conception of the rule of law on the idea that the law should guide action and be such that people will be able to be guided by it. In order for the law to do this, he argues that it must meet the following requirements: (1) all laws should be
prospective, open and clear; (2) laws should be relatively stable; (3) the making of particular laws should be guided by open, stable, clear, and general rules; (4) the independence of the judiciary must be guaranteed; (5) principles of procedural justice (often referred to as the “principles of natural justice”) must be observed; (6) courts should have review powers over the implementation of other principles; (7) the courts should be easily accessible; (8) the discretion of the crime-preventing agencies should not be allowed to pervert the law.\textsuperscript{349}

The sixth feature provides institutional protection for the rule of law by empowering courts to review the implementation of the other principles. For example, if a government enacts laws that violate these requirements, courts should be able to review this and find that such laws are of no force or effect. All administrative action is also subject to judicial review to determine if it conforms to the rule of law. The fifth feature constrains courts to obey principles of procedural justice, such as the right to a fair and open hearing, the absence of bias, and other rights of procedural fairness. The last few principles concerning courts, governmental and administrative action, and the actions of crime-preventing institutions are based on the concern that these institutions should act in strict conformity with the rule of law rather than in arbitrary ways or ways that distort the law. This is required in order for the actors to be guided by their best estimation of what the law requires and what courts, police and administrators will likely do.\textsuperscript{350} This is Raz’s justification for judicial independence as well (the fourth requirement): it is required in order for judges to be free from extraneous pressures and independent of all authority except that of the law. Raz states that this list is incomplete. What other


\textsuperscript{350} Raz, “The Rule of Law,” 217.
principles might be needed and how these principles ought to be elaborated should be grounded on the basic idea that the law should be capable of providing effective guidance.\footnote{Raz, “The Rule of Law,” 218.}

Lon Fuller argues for similar requirements in his conception of legality or what he calls “the internal morality of law”. For Fuller, laws are general rules that guide conduct. They must be relatively stable. They must be promulgated and made accessible to the public, and they must be clear so citizens are able to understand what the law requires. They must not be retroactive. Fuller includes the following additional requirements for legality: laws should not be contradictory; they should be realistic and possible to obey; and finally, there should be congruence between declared legal rules and the actions of officials operating under the law.\footnote{Lon Fuller, \textit{The Morality of Law} (New Haven: Yale University Press, 1969), 204-210.} The former features ensure that law can guide conduct. The last feature requires that government officials and courts do in fact act according to legal norms in practice; it ensures that the law in fact rules or governs the actions of governments. Both Fuller and Raz provide formal and procedural conceptions of the rule of law that are similar to the features of the minimal conception of the rule of law that I have proposed above.

Let us briefly consider how Raz’s conception of the rule of law and Fuller’s conception of legality apply to current international law. International law is generally prospective (Raz’s first requirement), however there is a notable exception: the Nuremberg and Tokyo Tribunals after World War II. The tribunals applied novel international law retroactively. While war crimes were already recognized in criminal law
at that time, crimes of aggression and crimes against humanity were developed at
Nuremberg. Other international criminal tribunals, such as those for Rwanda and the
Former Yugoslavia, were also created after the crimes were committed, but they are less
problematic since they are based on already developed principles of international criminal
law.

International laws are generally public, open and clear, and the creation of
particular laws are generally guided by open, stable, clear, and general rules (Fuller and
Raz #1 and #3). The creation of treaty laws meets these requirements and the Vienna
Convention on the Law of Treaties (1969) codifies important legal principles governing
the creation and application of treaties. The more difficult case is international customary
law. It is not so clear when a practice is widespread enough to be recognized as a rule of
customary international law. This is an issue that should be developed more clearly by
international legal experts, The International Law Commission, and the International
Court of Justice.

International law is also relatively stable (Raz #2 and Fuller). In fact, a criticism
of international law is that it changes too slowly. The creation of a treaty and achieving
agreement on its articles and the language used is subject to much painstaking negotiation
between states. There is also a significant delay for treaties to take effect: a certain
number of state signatories is required. In practice, the stability that is provided by
international law may seem weak since states have disregarded their commitments.353
Increased monitoring and enforcement mechanisms could address this.

353 For example, the current Conservative Government in Canada has ignored Canada’s
commitments under The Kyoto Protocol – a treaty that was signed by the previous Liberal
Government.
In international law, the independence of the judiciary is respected (Raz #4). The International Criminal Court and International Criminal Tribunals are required to observe principles of procedural justice, such as the right to fair trial (Raz #5). Unfortunately the judiciary’s review powers over other bodies is weak (#6). This is precisely where global administrative law needs to be developed. The requirement that courts be easily accessible appears more difficult in the international case (#7). This can be addressed by increasing the application of international law by local domestic courts.

More substantive or thick theories of the rule of law seem to support the central features listed above but they go further in arguing that the very idea of the rule of law includes such things as the protection of human rights, democratic legitimacy, substantive social and economic equality, and other requirements of justice. Based on a conception of the rule of law that includes guiding behaviour as a central goal, these requirements may be regarded as necessary for law to be able to effectively guide behaviour. One could argue that if law is not regarded as democratically legitimate and just, citizens will not recognize the law’s authority and they will not feel bound to obey the law; law will then not be able to guide action except through the threat of force. This demonstrates that there is an important connection between law and justice.

Legal positivists argue that substantive theories of law confuse the idea of the rule of law with democracy, human rights and other ideas of justice. They argue that in order to develop a more accurate, descriptive account of law, there should be a clear distinction between law and morality or law and justice. We can determine that a particular law is a valid law (enacted in the right way) and yet it may be regarded as immoral or unjust. There are also normative reasons that can be given for maintaining a distinction between
law and other conceptions of justice. A more formal conception of law that maintains this distinction is particularly useful in a society in which there is moral pluralism and disagreement about what is morally right and what justice requires. If a law is valid (if it is enacted in the right way according to the conception of the rule of law proposed above), and yet there is disagreement on whether the law is just or unjust, then those who believe it is unjust, can still regard the law as binding on them, as creating a legal obligation on them, even though they may try to change the law. When a society has sufficient political support for human rights and democratic rights, then these values can receive constitutional protection and can become constraints on the enactment and administration of law by public officials. In such a case, we can say that not only do we have the rule of law, but that we have a more just political and legal system. The debate between formal and substantive conceptions of the rule of law is an important and interesting one, but in the international case, I think there are good reasons to begin with a more formal account of the rule of law.

2.2 THE GLOBAL RULE OF LAW

At the global level, given the diversity of legal and political cultures and institutions that exists between states, a stronger argument can be made in favour of a minimal, formal global rule of law. The thin, formal conception also provides a common baseline that all competing conceptions of the rule of law share, even though some theories go beyond this minimum. Keeping this minimal, formal conception of the rule of law distinct

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354 A formal, procedural conception of the rule of law is accepted in the international case by many writers, including by non-positivists. Brian Z. Tamanaha argues that the a formal conception of the rule of law that has no content requirements renders it open to a range of ends and makes it amenable to universal application. *On the Rule of Law* (Cambridge: Cambridge
from the protection of individual human rights and democratic legitimacy allows us to focus on what would be required globally for the more minimal, formal conception. However, whether or not one believes that the very idea of the rule of law ought to include the protection for individual human rights and democratic legitimacy, these ideals are closely related and they are all necessary features for any meaningful conception of global justice, as is global economic justice. I do not wish to argue that the minimal conception is all we can or ought to have at the global level, since I think these three ideals are all necessary for global justice. Rather, I am focusing on the minimal conception of the rule of law as a starting point that is often neglected in the current philosophical literature on global justice that already focuses on human rights, democratic legitimacy, and global distributive justice. The procedural ideals and values associated with this more formal conception of the rule of law may be able to secure and maintain these other more substantive ideals. For example, while the establishment of the formal rule of law is not sufficient for democracy and human rights, the rule of law is thought to be necessary in order to secure and maintain democracy and human rights.355

One problem with applying this conception of the rule of law that has historically been developed in order to constrain the arbitrary power of the sovereign is that there is


355 The Universal Declaration of Human Rights declares that, "it is essential if man is not to have recourse as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the Rule of Law."
no sovereign global legislative and executive authority whose power needs to be constrained. International law has been developed through custom, acceptance by states, and the creation of international tribunals. It is characterized by its lack of legislative and executive agencies and by its primarily consent-based creation of legal rules and tribunals, and voluntary compliance with its legal regimes. While this makes it difficult to see how the rule of law as developed within nation-states to limit sovereign power should be applied at the global level, the modern idea of the rule of law was originally developed in response to the more decentralized system of law and political authority that existed in the medieval period. The concern with increasing certainty, consistency and equality in the application of the law (central features to most conceptions of the rule of law) seems particularly important in the international case to address the piecemeal creation of rules and tribunals which often overlap and the varying national and regional interpretation and application of the rules of international law.

The ideal of constraining the arbitrary use of power through rule of law principles is also important in the international case for different reasons. Even though there is no global legislative and executive government, international institutions and tribunals such as the Security Council and the World Trade Organization have the power to make decisions that constrain states and greatly affect people’s lives. There is a greater danger in the international case that self-interest and power politics rather than fair and impartial rule application will prevail. Rule of law principles as developed by domestic administrative law are concerned with ensuring transparency and accountability of public administrative institutions. Global administrative law can similarly be used to constrain

356 Tamanaha, On the Rule of Law.
357 Tamanaha, On the Rule of Law
358 Tamanaha, On the Rule of Law
the arbitrary use of power by transnational institutions and tribunals and to ensure greater transparency, accountability and participation in their decision-making processes. The development of global administrative law is currently a growing field of research in international legal studies.359

2.3. **GLOBAL ADMINISTRATIVE LAW**

Legal scholars working on global administrative law apply the general rules and principles of domestic administrative law to existing global and transnational governing institutions.360 In the domestic case, administrative law defines and sets limits on the authority and powers of administrative institutions. Domestic administrative law also includes procedural rules and principles governing the way that administrative institutions make their decisions that provide accountability, transparency and procedural justice for those affected by their decisions.361 Global administrative law similarly includes principles, rules and mechanisms that promote the accountability of global administrative bodies, ensure that these institutions meet standards of transparency, participation, reasoned decision, and legality, and provide effective review of the rules and decisions they make.362

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359 Benedict Kingsbury and the Global Administrative Law Project at NYU have been particularly influential in developing this project.
360 Much work is currently being done on this issue through the Global Administrative Law Project at NYU. For example, Kingsbury, Kirsch and Stewart.
361 A more recent development within domestic administrative law is the "duty to consult." This duty holds that administrative law-makers have a duty to consult those affected by their administrative laws during the process of developing these laws. This duty has developed over the last fifteen years within the domestic administrative law of many countries. This duty could similarly be developed in the international case.
Unfortunately, while the principles of the rule of law as found in administrative law can be used to ensure greater accountability, transparency and procedural fairness, they represent a narrow, procedural conception of legitimacy. These principles are concerned with the procedures used to make decisions and do not assess the substantive justice of the outcomes. Since global institutions including adjudicative and administrative bodies increasingly exercise power in ways that affect the lives of individuals and can constrain the ability of states and political communities to promote the interests, well-being and democratic will of their members, the principles of administrative law seem insufficient to justify the authority of these institutions.

Bodansky argues that administrative law principles are intended to protect against decisions being made for the wrong types of reasons; they are intended essentially to protect against illegitimacy. Hence, it is difficult to establish that something is legitimate but much easier to show that it is illegitimate.\textsuperscript{363} Administrative law principles represent necessary rather than sufficient conditions for legitimacy. They are necessary to ensure that a decision is not illegitimate, but they are not sufficient to ensure that it is legitimate; more is needed.\textsuperscript{364}

Other legal scholars have argued for a more substantive requirement based on the ideal of the rule of law. For example, a procedural account could require that the Security Council give reasons for its decision to support or oppose humanitarian intervention in a particular case.\textsuperscript{365} Patrick Macklem goes further than this procedural

\textsuperscript{363} Daniel Bodansky, “The Concept of Legitimacy in International Law,” at 7-8.
\textsuperscript{364} Bodansky, 7-8.
\textsuperscript{365} Aside from Advisory Opinions by the International Court of Justice, judicial review of Security Council decisions is rare. In the \textit{Lockerbie} case, the International Court of Justice deferred to the Security Council’s decision regarding measures against Libya while asserting the Court’s authority to determine the limits of that discretion. \textit{Questions of Interpretation and
requirement of giving reasons and argues that Security Council members should be precluded from supporting or opposing the use of force for illegitimate reasons. What counts as an “illegitimate reason” for Macklem involves a normative assessment of the legitimacy of its reasons. Hence, Macklem promotes a closer relationship between the issue of the legality of the humanitarian intervention and the normative question of its legitimacy. In other words, he appears to promote a closer relationship between legal legitimacy and moral or political conceptions of legitimacy.

To the extent that global administrative law is able to increase accountability, this should be pursued. However, since its ability to address substantive legitimacy is limited by its focus on procedural legitimacy, this solution needs to be supplemented by political processes that can provide a normative assessment of legitimacy, including processes of democratization. Even more substantive theories of legal legitimacy (such as the one proposed by Macklem) are insufficient on their own. For example, in establishing a new international institution or reforming an existing one, it is important to ask: How should institutions be designed in order to enhance their legitimacy? What should be the rules, for example, regarding participation, transparency and so forth? Bodansky argues that these questions cannot be answered in terms of legality because when we are creating a new institution, no legal rules yet exist.

What more is required for the legitimacy of these institutions is an important question that I will not be able to adequately address here. Fortunately much work is

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367 Bodansky, 4.
being done in this area. As I argued in the previous section, since there are significant differences between a decentralized, polycentric model of international law and the traditional sovereign coercive authority of state governments, one cannot assume that the kind of democratic legitimacy that is required to justify a state’s internal authority is what is needed to legitimate the authority of less coercive and more specialized global institutions, some of which entirely depend on voluntary membership. Given that there is such a wide variety of global institutions, some non-voluntary and more coercive (such as the Security Council and the World Trade Organization), and others based on voluntary membership with weak compliance mechanisms, it seems unlikely that one conception of legitimacy could be appropriate for all.

3. THE LEGAL IMPERIALISM OBJECTION: A REASON FOR A MORE FLEXIBLE MODEL OF INTERNATIONAL LAW WITH LESS COERCIVE SANCTIONS

3.1. THE CHARGE OF IMPERIALISM

While many regard international law as too weak, others are concerned with the increasing legalization of international politics. As Anne-Marie Slaughter and others note, “in many issue areas, the world is witnessing a move to law.” As examples, they cite important cases by the World Trade Organization’s Appellate Body, the Law of the Sea Tribunal, the International Criminal Tribunal for the Former Yugoslavia, as well as the development of the Montreal Protocol on Substances Depleting the Ozone Layer (as a legally binding agreement with a system of implementation review involving third

368 Allen Buchanan, Robert Keohane, David Held, Thomas Franck, Daniel Bodansky, Ruth Buchanan.
parties), and the detailed legal conventions involving the proliferation of weapons of mass destruction. 370 While I have argued that regulating the actions of international actors through law and in accordance with rule of law ideals is a good thing and that global administrative law can be used to promote the accountability of global governance institutions, concerns with legal imperialism and judicial imperialism remain.

Although international law and the global rule of law can be viewed with optimism as a way to constrain the arbitrary exercise of power by states and transnational corporations in ways that greatly impact people’s lives, there are also good reasons to be skeptical of its ability to do this and to contribute to global justice. Tully cautions writers who place their hopes for the global rule of law and democracy on the international institutions and laws established after World War II to govern a postcolonial and post-sovereign world. He argues that it is difficult to see how these institutions and emerging international laws of humanitarian and human rights intervention can be seen as an unproblematic basis for reforms that would lead to a non-imperial future. 371 He reminds us that these institutions were created by the former imperial powers and the U.S. at the end of WWII to continue the ‘grand strategy’ and ‘great game’ of opening the resources, labour and markets of the former colonies to free trade in the expanding global market dominated by them and their transnational corporations. He refers to these institutions, especially the World Bank and the IMF, as instruments of contemporary “informal imperialism.” He argues that they should not be the unexamined ground for the criticism of imperialism, but one of the objects of criticism. 372

370 Goldstein, Kahler, Keohane and Slaughter, 385.
372 Tully “On Law, Democracy and Imperialism.”
In her forceful attack of current “rule of law” discourse, Judith Shklar argues:

We ought to expose the shams and inequities which may be concealed beneath the law. But the rule of law itself, the imposing of effective inhibitions upon power and the defense of the citizen from power’s all-intrusive claims, seems to me to be an unqualified human good. It would not be very difficult to show that the phrase ‘the Rule of Law’ has become meaningless thanks to ideological abuse and general over-use. It may well have become just another one of those self-congratulatory rhetorical devices that grace the utterances of Anglo-American politicians. No intellectual effort need therefore be wasted on this bit of ruling-class chatter.\textsuperscript{373}

The term “rule of law” has indeed been used to legitimate practices and institutions that favour some states and global capitalism.\textsuperscript{374} The goal of establishing the rule of law in all states has also been used to justify imperialist and financially motivated interventions in other states, as has the goal of establishing democracy.

In response, rather than dismissing rule of law discourse altogether for this reason, we can aim for a clearer understanding of what this term should mean and judge when it is being misused to promote other suspect political and economic interests. The situation would be much worse without international legal rules and institutions that apply international law and monitor state compliance, and without the ideal of the rule of law to constrain the exercise of arbitrary, brute power. Given global interaction, there is a legitimate need for international law and the rule of law to regulate these interactions, to

\textsuperscript{373} Judith Shklar, “Political Theory and the Rule of Law,” in Allan C. Hutchinson & Patrick Monahan (eds), \textit{The Rule of Law: Ideal or Ideology} (Toronto: Casswell, 1987).

\textsuperscript{374} Ruth Buchanan and Sundhya Pahuja criticize the use of the indeterminate yet presumptively universal concept of the “rule of law” to legitimize interventions by the World Bank and other international economic institutions. They argue that the “rule of law myth” views law as already constituted and determined outside of contingent political processes and the history of nationalism and imperialism. "Legal Imperialism: Empire's Invisible Hand?" in Paul Pasavant and Jodi Dean (eds.), \textit{The Empires New Clothes: Reading Hardt and Negri} (Routledge, 2003) at 74.
provide stability and consistency, to overcome the problem of partiality, and to address free rider problems. Of course it can be misused, but the fact that states feel the need to justify their actions as being in accordance with international law or as promoting the rule of law itself suggests that it is effective as some kind of constraint on state action. The way to resolve this problem is by demonstrating how it is being misused and in altering international rules and institutions to better address such problems.

3.2. THE LACK OF STRONG ENFORCEMENT MAY BE A GOOD THING FOR DEMOCRATIC REASONS

While there are reasons to favour stronger international law in cases where it increases peace, justice, democracy, self-determination, human rights protection, environmental protection, and socio-economic justice and equality, in many cases international law can actually limit a state’s ability to achieve these goods. For instance, WTO trade agreements such as the General Agreement on Trade in Services (GATS) restricts the ability of states to ban imported products for the purpose of protecting the environment, endangered species, or human health, even when there is strong democratic support for these policies. If these bans violate previous trade agreements and harm the economic interests of states that export these products, the WTO Panel can rule that such bans violate international law and it can impose fines.

Peter Singer has criticized GATT rules for eroding the ability of states to legislate to secure environmental and workplace safety goals. Although GATT Article XX allows exceptions to protect animal or plant life or health and to conserve exhaustible

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natural resources, the GATT panel has ruled that states cannot discriminate with respect to production processes: similar products must get equal treatment regardless of dissimilar production processes. Singer refers to the Dolphin-Tuna dispute in 1991 between the United States and Mexico as an example. The U.S. Marine Mammal Protection Act set standards for dolphin protection in the harvesting of tuna and applied these standards to imported tuna. This allowed the U.S. Government to ban fish imports from Mexico since its fishing practices did not meet these standards. Mexico filed a complaint in 1991 according to GATT’s dispute settlement procedures. The Panel found that the U.S. could not embargo tuna from Mexico based on the process through which it came to market. While this is troubling, Moellendorf notes that the WTO has upheld the right of states to legislate in accordance with environmental values in the U.S. Shrimp-Turtle case in 1999, even though it found against the U.S. He suggests that this is an evolving area of WTO jurisprudence and that it is too early to tell how the law will eventually be decided. Moellendorf suggests ways that trade rules could be supplemented to secure other values.  

Gopal Sreenivasan has examined this issue with respect to domestic health care policies. He concludes that the General Agreement on Trade in Services (GATS) unduly restricts the scope for democratic choice. According to Sreenivasan, the signatories to GATS effectively acquire a constitutional obligation to maintain a domestic health sector with a certain minimum degree of privatization. He considers the

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378 "Does the GATS Undermine Democratic Control Over Health?"
obligations imposed by GATS to be similar to constitutional obligations because they greatly restrict the ability of future generations to structure their domestic health sector. He argues that to gain democratic legitimacy, these international agreements must pass a higher standard of democratic scrutiny, such as ratification by a super-majority; ordinary legislative ratification does not suffice. This would greatly limit the ability to reach international agreements.

These cases suggest that a weaker, more flexible decentralized model of international law may in fact be better able to promote democracy and justice than a more centralized model of international law with more coercive means of enforcement. While the main objection addressed in Chapter Four was that international law was not forceful or unified enough, these cases raise the opposite objection: international law should be more flexible, more decentralized, and less constraining. One solution is that international law itself should develop in ways that leave sufficient space for states to protect and promote important values. For example, additional exemptions to trade rules can be added to allow states to legislate to protect the environment, the safety and health of its people, or the human rights and labour rights of foreign workers through fair trade standards. However, Sreenivasan’s broader concern remains. The more difficult international law is to change, the more binding its rules, the more effective its enforcement, then the more it may limit democratic control within states, particularly for future generations.

379 Elsewhere Sreenivasan presents the stronger argument that the effective restrictions that enforceable international trade agreements impose on the ability of later generations to decide domestic legal questions concerning health or education are “substantively unjustified” and that even ratification by a supermajority would not be enough to justify these restrictions. "Does the GATS Undermine Democratic Control Over Health?"

380 Moellendorf proposes this solution.
4. Conclusion

While I have focused on a decentralized model of law and a minimal or formal conception of the rule of law in this dissertation, this is only one component of a broader theory of global justice. It is important to keep in mind the complex, mutually reinforcing relationship between law and popular sovereignty or democracy, between legal legitimacy and political or democratic legitimacy. Law, particularly constitutional law, can protect and ensure democratic rights and processes, while democratic processes can be used to assess the legitimacy of particular laws, legal institutions, and legal processes.

In the domestic case, since coercion is widely used to enforce law, this sets higher standards on the legitimacy of domestic law: the use of force requires strong normative justification. To the extent that the use of coercion in a decentralized model of international law is weaker, this seems to weaken the demands of legitimacy. However, as I argued in Chapter 4, legitimacy is important in a decentralized model of law for additional reasons. Compliance will depend less on the fear of sanctions or negative consequences and more on the perception of legitimacy. If agents recognize that an institution has the right to rule, then agents will defer to its rules and decisions for this reason, even when they disagree with particular rules or outcomes. As I have suggested in Chapter 4, this is a better account of law than the coercion-based model because it is based on law’s normativity rather than law’s force.

In conclusion, global administrative law should be developed to increase accountability, but as discussed in the second section, its ability to ensure meaningful accountability...

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381 Bodansky, 2.
legitimacy is limited by its focus on procedural legal legitimacy. This needs to be supplemented by a broader conception of political legitimacy and by political processes of democratization. Under broader conceptions of global justice, the political legitimacy of international law and its institutions may also require the protection of human rights (as Allen Buchanan argues), and greater global equality as a background condition for the creation and application of international law. These are issues that require further consideration.
CONCLUSION

The decentralized, minimal model of law and the rule of law I have proposed is motivated by the goal of achieving a law-governed condition that falls between a lawless state of nature and a coercive world government. The application of modern social contract theory to the international case leads to two possibilities: either a supreme, sovereign world government with centralized law-making, adjudicative, and enforcement powers must be developed in order to have a law-governed condition at the global level, or, to the extent that this is conceptually or practically impossible, the interaction between states must remain a lawless state of nature. This sets up an all or nothing scenario. One of the reasons why I began this dissertation with Kant is that Kant hoped to create a law-governed condition at the cosmopolitan level but he recognized various problems with the idea of a coercive world government. In proposing a voluntary federation, he seemed to be searching for an alternative solution – a condition between a coercive world government and a lawless state of nature in which states would be able to settle their conflicts as if by a court of law, rather than through force.

Although I began with Kant, the minimal conception of a decentralized model of international law and the global rule of law I have proposed in the second half of this dissertation appears to have some important affinities with Locke’s theory as well. I have argued that law and legal institutions that determine and apply legal rules are required to enable coordination and to address problems of partiality and inconsistency in the formulation, interpretation and application of rules when conflicts arise. This differs from the Hobbesian defence of the rule of law through a sovereign authority that creates,
applies and enforces law. For Hobbes, the purpose of law is to establish stability and order, and to ensure that all will obey legal rules through the threat of sanction. The minimal conception of law that I have proposed in the international case also differs from more comprehensive conceptions that hold that the goal of law is to secure and protect a more substantive conception of justice.

I have focused on a minimal conception of the purpose of law and the idea of the rule of law because of the significant differences that exist between states and political communities in the international case: differences in political and legal cultures and systems, economic systems, and religious and cultural beliefs and practices. Even if these differences lead one to be skeptical about the possibility of reaching agreement on substantive shared goals, law still has an important function; in fact, the role of law becomes more important in the absence of agreement on shared substantive goals. When there is background disagreement, law can provide a legitimate and impartial way to coordinate behaviour, provide consistency and certainty, and settle conflicts. However, if agreement on shared substantive goals is possible, then the role of law can go beyond merely coordinating behaviour and settling conflicts, and it can move towards developing rules and mechanisms to achieve these substantive goals.

Whereas others emphasize the importance of coercive enforcement for the development of a law-governed condition at the international and global level, I have argued that the two most important elements for the global rule of law are: first, that states, individuals, officials and other transnational actors regard international legal rules as binding on them; and second, that the rules of international law can be determined, interpreted and applied in an impartial, legitimate way by adjudicative bodies and other
institutions with the accepted authority to do so (such as the International Court of Justice, the International Criminal Court, the monitoring bodies of particular treaties, as well as domestic courts). In Chapter Four, I proposed a third element based on Hart’s theory: the further development of principles that specify the criteria for the creation, adjudication and application of international legal rules. The first element establishes the normativity of law and the existence of legal obligations, while the latter two elements are required in order for international law to provide a legitimate, impartial and authoritative way to settle conflicts.

As I discussed in Chapter Five, the most important objections against my project are the charges of legal imperialism and judicial imperialism: the objection that my view gives priority to the rule of law over democratic legitimacy and supports the judicialization of politics. While I have focused on a decentralized model of law and a minimal or formal conception of the rule of law in this dissertation, my intention was to address only one component of a broader theory of global justice. It is important to keep in mind the complex, mutually reinforcing relationship between law and popular sovereignty or democracy, between legal legitimacy and political legitimacy.

On the one hand, to the extent that the use of coercion in a decentralized model of international law is weaker, this seems to weaken the demands of legitimacy. However, legitimacy is important in a decentralized model of law for other reasons. I have argued that compliance with international law depends less on the fear of sanctions or negative consequences and more on the recognition that the rules of international law are authoritative and binding. The latter depends significantly on the perception of legitimacy. If agents recognize that an institution has the right to rule, then agents will
comply with its rules and decisions for this reason, even when they disagree with particular rules or outcomes. As I have suggested in Chapter Four, this is a better account of law than the coercion-based model because it is based on law’s normativity rather than law’s *de facto* force.

There is a further objection against my view that I have not considered. The conception of the purpose of law that I have outlined above works well for *inter*-national justice since it explains why law is required between states, and between individuals and other agents from different states. What about cosmopolitan issues of justice that concern the relationship between a state and its own citizens? If the need for an international legal system is to address the problem of partiality, inconsistency, and the lack of coordination that plagues the private interpretation and application of rules, then since states already have legal systems designed to avoid these problems within their own borders, it is unclear how my argument would be able to defend why international law should address human rights protection or how a state treats its own citizens. Why should a global legal system include rules and institutions of cosmopolitan justice that address the internal affairs of states?

One Lockean-based reason that could be given is that in the case of human rights law, since states are likely to be biased when it comes to evaluating their treatment of their own citizens, international legal institutions are needed to ensure the impartial

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application of human rights law within states. Buchanan raises an objection against this argument. He argues that it is not sufficient since it does not seem to apply to states with domestic legal systems that provide better human rights protection than the international human rights regime. The fact that some states cannot be trusted to respect the human rights of their populations does not entail that all states should be subject to international human rights law. According to Buchanan, further arguments are needed.

In response, I think my argument (which includes Lockean-based reasons for international law) also applies to states that have strong human rights protection. Even if a state has a legal system that provides strong human rights protection, bias may still occur. The possibility of appealing to transnational human rights law and institutions can strengthen human rights protection by giving individuals and groups another means of redress if domestic measures fail. For example, in Canada, two significant cases have been brought before the International Human Rights Tribunal after the claimants exhausted appeals to the Canadian government and appeals before the Canadian court system: the Lovelace case and the Lubicon Lake Band case. In both cases, the International Human Rights Tribunal ruled against Canada. The European Court of Human Rights is another example of this. Even though many European countries provide a high level of human rights protection, many individuals still bring cases against their countries before the European Court of Human Rights.

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385 Buchanan, 295.
Hence, the idea that the purpose of law is to provide certainty, impartiality and consistency can be extended to justify international human rights law and its institutions. In addition, while the minimal conception of law that I have adopted does not directly include human rights protection as an internal goal, to the extent that states agree to treaties and institutions that secure human rights (or other matters of justice that concern a state’s internal matters), international law is thereby able to address issues of cosmopolitan justice. However, a more substantive conception of law and global justice that directly includes the protection of human rights would of course be able to provide a stronger justification. While I have focused on defending a minimal conception of the global rule of law, this does not mean that I do not think a more substantive theory can be justified. This is an issue that I am leaving open for further analysis in the future.

Finally, I would like to address again two common worries that arise from a comparison between a decentralized model of international law and traditional domestic legal systems. First, there is the practical worry that a decentralized model of law is weaker and less effective at obtaining compliance than domestic legal systems. In Chapter Four, I addressed this concern by arguing that increasing compliance through stronger, more forceful sanctions is more problematic and thus less effective in the international case than in the domestic case. Military action and economic sanctions have devastating negative consequences on the population of a country, so their use should be limited, and to the extent that it is limited, the threat of forceful sanctions will be less effective than other means of increasing compliance. Also, it is important to recognize that these problems are not unique to a decentralized model; they would also limit a world government with centralized powers to enforce more coercive sanctions. In
addition, as I argue in Chapter Five, from the perspective of democratic legitimacy within states, having less forceful international sanctions may actually be a good thing. The most effective and meaningful level of democratic legitimacy continues to be within states. The use of softer means of enforcing international law and promoting compliance allows international law to be more flexible and it gives states more room to act in accordance with the democratic will of their citizens.

Second, given the significant differences between a domestic legal system and a decentralized model of international law, some may still wonder why I have tried to argue that the latter should be conceived of as law and as giving rise to legal obligations. Why does this matter? Conceptually, I think there are problems with the coercion-based conception of law in the domestic case as well, independent of considerations of the role of coercion in international law. However, this is not simply a terminological matter. My argument is also motivated by pragmatic concerns. Since there is a significant normative weight attached to domestic legal rules and obligations, showing that the rules and obligations of international law should be recognized as *real* law can increase the normative weight attached to these as well. In addition, I have argued that international law should be seen as related to domestic law and domestic legal systems. Domestic courts can and should apply and enforce international law. Therefore, there are both conceptual and pragmatic reasons why international law should be recognized as law.
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