

7-2011

# The Principle of Fairness and States' Duty to Obey International Law

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**This is a pre-publication author manuscript of the final, published article.**

## Recommended Citation

Lefkowitz, David, "The Principle of Fairness and States' Duty to Obey International Law" (2011). *Philosophy Faculty Publications*. 62.  
<http://scholarship.richmond.edu/philosophy-faculty-publications/62>

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## **The Principle of Fairness and States' Duty to Obey International Law**

The charge that particular states are acting, or have acted, illegally is a regular feature of contemporary commentary on international relations. Most of those who make this claim aim not simply to describe a state of affairs but to criticize it; implicit in their observation is the normative claim that the state ought to obey international law. For many commentators the 'ought' here is moral, not prudential; states that violate international law act wrongly, even if not contrary to their national interest. Yet as a conceptual matter, the mere fact that the law as such requires X does not necessarily provide even a moral presumption in favor of doing X.<sup>1</sup> Alas, few commentators distinguish between the descriptive question "is this act contrary to law?" and the normative question "does this actor have a moral obligation to obey the law?" Instead, their criticisms of state conduct often appear to rest on an undefended (if widely shared) assumption that states have a moral obligation to obey international law simply because it is the law.<sup>2</sup>

The attempt to justify a moral obligation to obey the law, sometimes referred to as political obligation, has ancient roots in the Western philosophical tradition. Yet practically all such efforts have focused exclusively on the case of domestic law, and the duty of individuals (or

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For their many thoughtful comments and questions on earlier versions of this paper I wish to thank audiences at the University of North Carolina at Chapel Hill, the University of Manchester, and Washington University in St. Louis, as well as Kim Brownlee, Heather Gert, Zach Hoskins, Terry McConnell, and several anonymous reviewers.

<sup>1</sup> Or so many contemporary legal philosophers maintain, and so I will assume in this essay.

<sup>2</sup> Of course, agents can have a moral duty to do that which the law requires, independent of the law requiring it. For example, individuals have a moral duty to refrain from murder, and states from genocide, independent of the fact that it is prohibited by law. Even if this is what some commentators mean when they claim that a given state has acted wrongly in violating a particular international legal norm, I suspect that many others believe that the mere illegality of the state's conduct renders it morally wrong.

at least citizens) to obey it.<sup>3</sup> There are good reasons for such a focus: public international law's status as genuine law has often been challenged, it is far less extensive than many domestic legal systems, and until recently it has rarely had the kind of direct impact on individuals that domestic law has. Nevertheless, the growing importance of international law, as illustrated by an increase in the frequency of appeals to it as a basis for justifying or criticizing the conduct of states and other international actors, suggests the need for an analysis of the duty to obey international law.<sup>4</sup>

Philosophers and political theorists have developed a number of different justifications for the duty to obey domestic law.<sup>5</sup> The possibility of using one (or more) of these justifications to demonstrate that states have a duty to obey international law seems a natural starting point for an analysis of international political obligation. Amongst the accounts of the duty to obey domestic law, one that appears to have a great deal of intuitive appeal, and that has attracted a significant number of philosophical defenders, is the principle of fairness (or fair play).<sup>6</sup> In this

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<sup>3</sup> Exceptions include Eric A. Posner, "Do States Have a Moral Obligation to Obey International Law?" (2003) 55 *Stanford Law Review* 1901; Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (New York: Oxford University Press, 2004); and John Tasioulas, "The Legitimacy of International Law" in Samantha Besson and John Tasioulas, eds, *The Philosophy of International Law* (New York: Oxford University Press, 2010).

<sup>4</sup> While international organizations, and in some cases, individuals, also have international legal duties, I focus here only on states' duties to obey international law.

<sup>5</sup> See David Lefkowitz, "The Duty to Obey the Law" (2006) 1 *Philosophy Compass* 571; William A. Edmundson, "State of the Art: The Duty to Obey the Law" (2004) 10 *Legal Theory* 215.

<sup>6</sup> Besides the articles by Hart, Rawls, and Simmons cited below, see also citations in Lefkowitz, *Duty to Obey* at 587. For an example of the appeal to the principle of fairness in the context of international law, see Robert Goodin, "Toward an International Rule of Law: Distinguishing International Law-Breakers from Would-Be Law-Makers" (2005) 9 *Journal of Ethics* 225.

paper, I examine the possibility of using the principle of fairness to justify a moral duty on states to obey international law.

Consent, rather than fair play, may well strike many readers as a better place to begin an analysis of such a duty. This is not only because it has figured prominently in the history of liberal attempts to justify a duty to obey domestic law, but also because for much of the 19<sup>th</sup> and 20<sup>th</sup> century the dominant understanding of international law in both theory and practice treated consent as the only means by which states could come to be bound by international law. I set consent aside here partly because I discuss the prospects for grounding a duty to obey international law in it elsewhere.<sup>7</sup> In addition, however, I believe that the principle of fairness may provide an account of the duty to obey the law in cases where the attempt to justify it by appeal to consent requires contorting that concept almost beyond recognition. For instance, the claim that states have a moral duty to obey customary international legal norms because they accept (in a technical sense to be explained below) the benefits that follow from others' compliance with those norms may do less violence to the phenomena of customary international law than does the claim that states consent to these norms. Customary international law may rest on a consensus among states (and perhaps other international actors), but contrary to the claims of many international legal theorists, the belief by states that N is a norm of international law is

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<sup>7</sup> See David Lefkowitz, "The Sources of International Law: Some Philosophical Reflections" in Samantha Besson and John Tasioulas, eds, *The Philosophy of International Law* (New York: Oxford University Press, 2010). Some would say that because international law is the product of a consensus among states, it makes no sense to ask whether states have a moral duty to obey it. Rather, their voluntary involvement in international law's creation necessarily entails a commitment to obey it. This view confuses the conditions for the creation of an international legal obligation with the conditions for a moral obligation to do that which a state has a legal obligation to do (simply because the law requires it).

not equivalent to those states' consent to be (morally) bound by it. Similarly, a state's non-voluntary accession to an international treaty does not constitute genuine (i.e. morally binding) consent to abide by the terms of that treaty, and arguably many states have signed on to treaties (or acquiesced to evolving norms of customary international law) in circumstances that rendered their actions non-voluntary. Yet if at some later date the state comes to accept the benefits that follow from the other signatories' compliance with those terms, it thereby acquires a duty of fairness to likewise abide by them, though it never genuinely consents to do so. The point of these examples is that, at the very least, the principle of fairness can provide an important supplement to state consent as a basis for the duty to obey international law.

Two distinct interpretations of the principle of fairness have emerged in the literature on political obligation. One treats it as a principle of acquired or voluntary obligation, while the second treats it as a principle of natural (or non-voluntary) duty. Here I focus solely on the voluntarist interpretation (and therefore all future references to the principle of fairness assume this interpretation).<sup>8</sup> Though John Rawls first elaborated such an understanding of the principle of fairness, it is A. John Simmons who provides the clearest defense of fair play obligations in voluntarist terms.<sup>9</sup> Therefore, I begin in section I with a brief summary of Simmons's analysis of the principle of fairness, and the possibility of using it to justify an acquired obligation to obey domestic law. Simmons offers several reasons to doubt that most people have an acquired obligation of fairness to obey the law of their state. My concern here is not with the veracity of these reasons; rather, I mention them in order to consider whether, if true, these reasons or

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<sup>8</sup> In the future I hope to examine the possibility of justifying international political obligation by appeal to a non-voluntary principle of fairness.

<sup>9</sup> John Rawls, *A Theory of Justice* (Cambridge, MA: Belknap Press, 1971); A. John Simmons, *Moral Principles and Political Obligations* (Princeton, NJ: Princeton University Press, 1979).

something analogous to them, undermines the case for states having a duty to obey international law grounded in the principle of fairness. I undertake this task in section III, where I suggest that there is considerably less reason to think that they do.

Before proceeding to that task, however, I respond in section II to two conceptual challenges to the application of the principle of fairness to states and the international legal order. The first concerns the need for states to accept the benefits provided by the international legal order, in a technical sense to be defined below, in order to acquire a moral obligation to do their fair share maintaining it – a task they complete by obeying international law. The second concerns the possibility of states accepting these benefits. I argue that states can do so, and that only if they do does it follow that they have acquired a duty to obey international law grounded in the principle of fairness.

In section IV, I contend that only the officials of a morally legitimate state enjoy the moral standing necessary to create legal obligations that are also morally binding in virtue of their status as law. Correlatively, only the officials and citizens of a legitimate state have a duty to obey its law simply because it is the law. This matters because in practically all cases states must pass domestic legislation or create administrative rules in order to fulfill their international legal obligations. I conclude in section V with the suggestion that a significant number of contemporary states, including the United States, member states of the European Union, Chile, Japan, Australia, and others, likely have a moral duty to obey international law grounded in the principle of fairness. That is, these states have a moral duty to comply with international legal norms, simply in virtue of their status as law, because they accept the benefits provided by other states' participation in the international legal order. As will become clear in the course of the paper, however, my conclusion is provisional in several respects. This is so partly because it

depends on the veracity of empirical hypotheses regarding the beliefs of certain legal officials in those states, proof of which I do not attempt to provide here. It is also provisional, however, because it rests on the outcome of two other conceptual/normative debates, the first concerning the nature and value of political self-determination, and the second concerning the moral legitimacy of states and their governments.

## I

As first stated by H.L.A. Hart, the principle of fairness holds that “when a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions have a right to similar submissions from those who have benefited by their submission.”<sup>10</sup> Famously, Nozick criticizes Hart’s version of the principle of fairness on the grounds that it allows those who organize a joint enterprise, or as Rawls puts it, a cooperative scheme, to simply impose the benefits of that scheme upon anyone, and then demand that those persons contribute their fair share to the operation of the scheme in return for the benefits they have received. The agents who initiate the cooperative scheme thus exercise arbitrary control over the lives and liberty of those on whom they impose the benefits and corresponding obligations. Yet many theorists view freedom from others’ arbitrary imposition of constraints upon an individual as non-instrumentally valuable and of great (even pre-eminent) importance. Thus a defense of the principle of fair play as a genuine moral principle requires that it be limited in some way so that it is consistent with the proper recognition of the value and importance of individual liberty.

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<sup>10</sup> H.L.A. Hart, “Are There Any Natural Rights?” (1955) 64 *Philosophical Review* 175. Something similar in form to this principle was anticipated in C.D. Broad, “On the Function of False Hypotheses in Ethics” (1916) 26 *International Journal of Ethics* 377.

A. John Simmons argues that this can be done by making an agent's obligation to do her fair share in maintaining a cooperative scheme conditional upon her acceptance of the benefit it provides her.<sup>11</sup> To accept the benefit an agent must either try to get it, if it is an excludable one, or if the benefit is one she cannot avoid receiving then she must do so knowingly and willingly. The latter conditions require that the person know she is receiving a benefit; know that the benefit is produced by others' participation in the cooperative scheme; believe the benefits are worth the cost of restricting her liberty in the ways participation in the scheme demands, and not have the benefits forced upon her against her will. Note that on Simmons's interpretation, fair play obligations are voluntary, or acquired, ones; in particular, a person comes to have an obligation to contribute her fair share to the operation of a cooperative scheme that provides her with a non-excludable benefit only as a result of her free and informed formation of a preference order that ranks the receipt of benefits, at the cost of doing her share to maintain the scheme, over freedom from contributing to the scheme at the cost of going without the benefits it provides. By making fair play obligations conditional upon an agent's acceptance of benefits, Simmons renders the principle of fairness consistent with the idea that no person should have her liberty constrained arbitrarily by the will of another.<sup>12</sup>

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<sup>11</sup> Simmons, *supra* note 9 at 122-36; see also Rawls, *supra* note 9 at 111-12.

<sup>12</sup> Might a recipient of non-excludable benefits produced by others' participation in a cooperative scheme be culpable for her ignorance of the fact that she receives the benefits in question, or that they result from others' cooperation, and so have an obligation to do her fair share in producing them even though she does not meet the knowledge condition? Or suppose that she is aware of these facts, but grossly underestimates the value of the benefits she receives and/or overestimates the cost to her of contributing to the scheme that produces them while making little or no effort to determine if her judgments are correct. Is she then liable to the charge that she treats unfairly those who do contribute, even though she does not willingly receive the benefits?



Note that if an agent (successfully) tries to get an excludable benefit produced by others participation in a cooperative scheme, he acquires an obligation to contribute his fair share to that scheme even if he does not believe the benefit to be worth the cost of contribution. That is because he impermissibly helps himself to a benefit to which he has no right, and thereby

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If the agent's alleged ignorance or her public assessment of the value of the benefits and costs seems deeply unreasonable, we may suspect that she is lying precisely in order to take advantage of us. This possibility raises important questions regarding who bears the burden of proof for demonstrating that someone does or does not have a fair play obligation to contribute to a given cooperative scheme, especially in contexts where such judgments are employed to justify coercion (e.g. punishment for the failure to contribute one's fair share). Suppose, however, that the agent's ignorance or judgment of the net value she will receive if she contributes to the scheme is genuine, though we find it (nearly) inexplicable. In either case, I maintain that this agent has no obligation to contribute her fair share to the operation of the scheme in question. Autonomous creatures enjoy the moral liberty to act on a wide range of bad judgments and decisions, including ones that may undermine the operation of various cooperative schemes that make all who benefit from them better off than in their absence. Crucially, the agent in question does not seek to take advantage of or exploit others' sacrifices; she is perfectly willing to have the scheme collapse (though we think this willingness foolish on her part), either because she is unaware that it benefits her, or because she mistakenly believes it is not worth the cost to her of contributing to it. Only in those cases where the failure to contribute one's fair share to a cooperative scheme results necessarily in the violation of others' basic rights – i.e. fails to respect their status as autonomous agents – do agents act wrongly (and not merely imprudently or stupidly) when they fail to recognize the (moral) importance of the cooperative scheme. In this case, however, the duty to contribute one's fair share has its basis in the natural, or non-voluntary, duties correlative to those basic rights, and it is one an agent has even if she never needs (and never receives) the benefit the scheme produces. Perhaps an account of states' duties to obey international law can be built on such a foundation, though proponents of a voluntarist version of the principle of fairness frequently argue that individuals can fulfill their (limited) natural duties to others without subjecting themselves to the authority of a legal order. See, for example, Simmons' argument to this effect in "The Duty to Obey and our Natural Moral Duties" in Christopher Heath Wellman and A. John Simmons, *Is There a Duty to Obey the Law?* (Cambridge: Cambridge University Press, 2005) at 187-88.

acquires a duty to compensate those whose rights he violates, namely those whose participation in the cooperative scheme makes the benefit available. Though I cannot argue for it here, I suggest that all else equal the proper amount of compensation is equal to the cost to the agent of contributing his fair share to the production of the benefit in question (and may well take the form of contributing that amount to the cooperative scheme in question). In the case of a non-excludable benefit, however, an agent cannot impermissibly help himself to the benefit. Nevertheless, if she ranks (a) receipt of the benefit at the cost of doing her fair share to provide it over (b) going without the benefit and the burden of contributing to its provision, then we can infer that were the benefit made excludable she would choose to contribute her fair share to its production. This inference justifies the claim that in failing to contribute her fair share to the provision of what is in fact a non-excludable benefit the agent with this preference ordering takes unfair advantage of those who limit their liberty in order to collectively produce it. Of course, it is possible that were a currently non-excludable benefit made excludable, an agent without this preference order (i.e. one who thinks the cost of contribution outweighs the benefit) still might try to get it. We cannot infer this from her current preferences, however, nor can we derive a duty to contribute her fair share from the claim that she might try to get the benefit were it made excludable, since a duty of compensation arises only in the case of an actual right violation. As I argue below, many of the benefits provided by the international legal order are non-excludable, from which it follows that states acquire an obligation to contribute to its operation only if they think the benefits they receive from it outweigh the costs of doing so.

Many theorists have thought it possible to justify individuals' duty to obey domestic law by appeal to the principle of fair play. They claim that a legal order qualifies as a cooperative scheme that provides those subject to it with various benefits, and that therefore these subjects

have a duty to restrict their liberty in the ways the law specifies. Doing so counts as contributing their fair share to maintaining the mutually beneficial cooperative scheme that is the legal order. But while Simmons defends the principle of fairness as a genuine moral principle, he offers two arguments against its use to justify individuals' duty to obey domestic law.

First, Simmons challenges the description of the state as a genuine cooperative scheme.<sup>13</sup> Genuine cooperation, as distinct from mere coordination, requires that each cooperator know that the others share the goal to be achieved by working together, and understand his or her contribution as part of a joint effort to achieve that goal. No such awareness holds with respect to most people's obedience to law, Simmons suggests. Small-scale cooperative schemes, from which Simmons claims we draw our intuitions regarding obligations of fair play, are characterized by face-to-face interaction, horizontal structures of power and authority, and a conscious and willing sacrifice of individual liberty for the sake of the common good. Modern states, in contrast, are massively impersonal, built around hierarchical structures of power and authority, and populated mainly by agents who comply with the law's demands largely from habit and fear of punishment. If Simmons is right to deny that states constitute genuine cooperative schemes, and that fair play obligations arise only in the case of such schemes, then it follows that the duty to obey domestic law cannot be justified by appeal to the principle of fair play.

Even if Simmons is wrong about either of these two claims, he also suggests that few citizens of modern states accept the benefits their state provides them. Simmons offers three speculations to buttress his contention. First, he claims that "many citizens barely notice (and

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<sup>13</sup> A. John Simmons, "Fair Play and Political Obligation: Twenty Years Later," in *Justification and Legitimacy* (Cambridge: Cambridge University Press, 2001) at 38-42.

seem disinclined to think about) the benefits they receive” from their domestic legal system, to which it might be added that even in cases where they are aware of the benefits, subjects of modern states often fail to recognize that their provision results from others’ obedience to law.<sup>14</sup> If correct, it follows from these claims that few people meet the knowledge condition for the acceptance of benefits. Second, Simmons suggests that many citizens of modern states, faced with high taxes, with military service which may involve fighting in foreign “police actions” or with unreasonably restrictive laws governing private pleasures, believe that the benefits received from government are not worth the price they are forced to pay. While such beliefs may be false, they seem nonetheless incompatible with the acceptance of the open benefits of government.<sup>15</sup>

Note that the exact reasons why people believe that the burdens involved in contributing to the operation of the state are irrelevant, as is the truth of their beliefs. All that matters is that a person does not accept the benefits, delivered as they are at the cost imposed by the state, as long as she or he thinks the burden involved to be greater than the benefit.

Third, Simmons doubts whether most people regard the payment of taxes to the state as a contribution to the operation of a cooperative scheme. Rather, they regard the government as something like a company from which they purchase certain goods, albeit one that in many cases exercises monopoly power and the use of coercion to compel people to buy its products. It would not be surprising if many people did think this way about their state, since private companies often provide the same or similar services. If they do so then they will not recognize the benefits they receive as the product of a cooperative scheme, and so they will not accept the

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<sup>14</sup> Simmons, *supra* note 9 at 139.

<sup>15</sup> *Ibid.*

benefits in the requisite sense. It follows that they have no duty to obey the law grounded in the principle of fairness.

Even if Simmons demonstrates that the principle of fairness rarely justifies an individual's duty to obey domestic law, his arguments for this conclusion may not count equally against an attempt to ground states' duty to obey international law in that same principle. Before examining whether they do, however, I consider in the next section two conceptual challenges to the application of the principle of fairness to states and the international legal order. Many (though not all) of the benefits provided by the international legal order are non-excludable. These include relatively secure borders and peaceful relations between states in most parts of the world, various sorts of environmental benefits (such as protection against the ill effects of a hole in the ozone layer or, hopefully one day, protection against dangerous climate change) and health benefits (such as protection from global pandemics), common rules governing air travel, shipping lanes, and so on. Individual states benefit not only through their own actions under these rules – some of which they might be denied – but more importantly from other states' compliance with them. Insofar as these are benefits states necessarily receive, rather than ones they enjoy only if they try to get them, it follows that they can acquire a fair-play obligation to contribute to their provision only if they receive them knowingly and willingly.<sup>16</sup> But what would it be for states to knowingly and willingly receive the benefits provided by the international legal order? Can any sense be made of this idea? And does it even matter whether they do so, or might mere receipt of the benefits that result from other states' submission to

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<sup>16</sup> In the case of international treaties that generate excludable benefits, however, a state might acquire a moral obligation to abide by the terms of the treaty if it tries to get the benefits the treaty provides, regardless of whether it thinks those benefits worth limiting its liberty in the ways the treaty specifies. Interestingly, this might produce a situation in which a state has a moral, but not a legal, obligation to abide by certain treaty norms.

international law suffice to generate an obligation on a state to do likewise, as its fair share in maintaining international law? I contend that states can accept the benefits international law provides, and that only if they do so do states have a duty to obey international law grounded in the principle of fairness.

## II

By making clear that an agent's having an obligation of fair-play depends on that agent's will – his acceptance of benefits – Simmons reconciles the principle of fairness with a common understanding of the value of individual autonomy and the role it plays in an account of moral personhood, which entails amongst other things the value and importance of individual liberty and self-determination. States are not persons, however, nor does it seem that they can be autonomous in the sense that persons can be.<sup>17</sup> It is not clear, then, why the application of the principle of fairness to states ought to be conditional upon those states' acceptance of benefits.

The initial case for claiming that only states that accept the benefits provided by the international legal order have a fair play obligation to obey it rests on intuitions regarding the importance of political self-determination.<sup>18</sup> As Christopher Heath Wellman points out, without postulating a deontological right to political self-determination it is impossible to account for the judgment that the United States would act wrongly were it to annex Canada (or vice versa), even if doing so were to result in improvements to the welfare of both countries' citizens.<sup>19</sup> Indeed, I suspect that even many Canadian citizens who wanted their country to merge with the U.S. would object to the realization of this goal by means that ignored the will of the Canadian people

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<sup>17</sup> States do enjoy legal personality, of course, and usually enjoy *political* autonomy, but these are not obviously equivalent to moral personhood or moral autonomy.

<sup>18</sup> In this respect it mirrors Nozick's objection to the principle of fairness.

<sup>19</sup> Christopher Heath Wellman, *A Theory of Secession* (Cambridge: Cambridge University Press, 2005) at 47, 50-1.

(or at least the legally proper operation of its political institutions). This example suggests that certain kinds of groups, or suitably organized collections of individuals, enjoy a right to self-determination consisting, at least, of a claim right against others that they not interfere with that group's attempt to live a particular way of life.<sup>20</sup> In this respect, a group's right to political self-determination mirrors an individual's right to self-determination.

In the absence of the acceptance of benefits condition, the principle of fairness conflicts with individual autonomy because it entails that an individual is subject to the arbitrary will of other agents. Those other agents can restrict the individual's liberty and self-determination simply by bestowing benefits upon her; as long as the agent receives a net benefit from the operation of the scheme, she has an obligation to do her fair share in maintaining it. Similarly in the case of political self-determination, without the acceptance of benefits clause, the principle of fairness leaves those states created and/or maintained by groups with a right to political self-determination vulnerable to the arbitrary will of other states. Those other states enjoy a moral power to restrict the political autonomy (or liberty) of the state in question, simply by bestowing upon it certain benefits. As long as the benefits the state receives outweigh the costs to it of contributing to the scheme that produces them, the state will have a moral obligation to do its fair share in maintaining the scheme, *even if it would prefer not to do so and go without the benefits the scheme provides*. But just as it is wrong to deny an individual the liberty to choose to go without a particular benefit, so, too, it is wrong to deny a group the liberty to choose to go without a particular benefit. This is so even if the individual, or the group, would actually be

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<sup>20</sup> As in the case of individuals, a group's claim to non-interference in its pursuit of a particular way of life is limited by certain natural (i.e. non-voluntary) duties it has to other groups and individuals.

better off taking the benefit, and bearing a fair share of the burden involved in its provision, than she or it would be going without it.

Philosophers disagree over the moral foundation for a right to political self-determination. Some attempt to ground it in a notion of individual autonomy, while others defend the view that certain kinds of groups have the same fundamental moral significance individuals enjoy.<sup>21</sup> Rather than examine the merits and demerits of these rival views here, I note only that they may entail different conclusions regarding which states must accept the benefits of the international legal order in order to have a fair play obligation to obey it. For example, a theory that grounds the right to group political self-determination in an account of individual autonomy may entail that only states with democratic governments enjoy a right to political self-determination, while a theory that bases the right to political self-determination on a non-reductive account of group autonomy – that is, one that treats (some) groups as having the same moral standing enjoyed by individuals – may entail that some non-democratic states enjoy a right to political self-determination. The different implications of these two accounts matter because it is only those states constituted by groups exercising a right to self-determination that can accept the benefits the international legal order provides, and so acquire a fair play obligation to obey international law.

But are states even the kind of thing that can accept benefits? And if so, what constitutes a state's acceptance of benefits?

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<sup>21</sup> For a defense of an individualist (or reductivist) account of group political self-determination, see David Lefkowitz, 'On the Foundation of Rights to Political Self-Determination: Secession, Non-Intervention, and Democratic Governance' (2008) 39 *Journal of Social Philosophy* 492.



States are artificial agents. As such, they do not have mental states, and so it might seem, cannot knowingly and willingly receive the benefits provided by the international legal order. Nevertheless, we frequently speak of a state's agency; for example, we say that states launch wars, sign treaties, and disregard norms of international law. State's act, we believe, when individual persons occupying offices in them act, in their capacity as legal officials.<sup>22</sup> Moreover, we frequently speak of state's mental states, saying that states *intend* to launch wars, *decide* to sign treaties, and *choose* to disregard norms of international law. Here too, we mean to refer to legal officials, though in this case their mental states, rather than their actions. There is nothing mysterious in the statement 'China believes that even limited economic sanctions against Iran will threaten its access to Iranian oil, and will therefore choose to veto any proposal that the United Nations Security Council implement such sanctions.' Such a statement is not merely a prediction of future behavior, but also a description of what the speaker takes to be the beliefs and intentions of those Chinese government officials legally empowered to take such an action. I suggest, therefore, that we can speak meaningfully of a state's acceptance of the benefits provided by the international legal order, if we understand it in terms of the mental states had by certain legal officials in that state. Specifically, a state accepts the benefits provided by the international legal order only if those state officials legally empowered to negotiate the terms on which it will participate with other states in (the cooperative scheme that is) the international legal order knowingly and willingly accept the benefits provided by international law. As will become clear below, a further condition concerning the moral legitimacy of the state and its

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<sup>22</sup> As the author of a recent textbook on international law puts the point, "although the protagonists of international life are States as legal entities or corporate structures, of course they can only operate through individuals, who do not act on their own account but as State officials, as the tools of the structures to which they belong" (Antonio Cassese, *International Law, 2<sup>nd</sup> Edition* (New York: Oxford University Press, 2005) at 4).

government must be added to this account of states' acceptance of the benefits provided by the international legal order if it is to entail a fair play duty to obey international law.

The possibility that the legal power to negotiate the terms on which a state interacts with other states may be divided amongst various legal officials raises a potential difficulty for this account of how it is that states can accept the benefits international law provides. Just as it is possible for a legislature to create a law without there being a single intention behind it, so too it is possible for a state to act in the international sphere – for example, to negotiate, sign, and ratify a treaty – without all of the relevant legal officials accepting the benefits of the international legal system. For instance, in order for international treaties to become binding on the United States, the Senate must ratify them. It is possible that at least some of the Congressmen and -women who vote in favor of ratification will not accept the benefits of international law, perhaps because they are not aware of those benefits, but more likely because they do not believe them to be worth the cost to the U.S. Nevertheless, these legal officials might still vote to ratify the treaty on prudential grounds, or because they think that doing so will maximize aggregate utility, or for some other moral reason. Moreover, many representatives may vote to ratify a treaty for reasons that have nothing to do with international law at all; rather, they may do so in order to secure support for the creation of a new domestic law they want Congress to enact, or to win the good graces of a powerful committee chairman who can steer government spending to their district. At least with respect to states that institutionally divide the legal power to determine the form that international relations ought to take, scenarios like the ones just described threaten to undermine any argument for the claim that the state has a fair-play duty to obey international law.

Several observations may serve to limit this threat, however. First, while it may be that the larger the number of agents who must accept the benefits, the more likely it will be that acceptance does not occur, this does not entail that such acceptance will never occur. Second, just as a vote in favor of ratifying a treaty does not necessarily indicate acceptance of the benefits international law provides, so too a vote against a particular treaty is compatible with acceptance of the benefits that follow from the international legal system as a whole. While in some cases it may be quite difficult to determine whether the relevant legal officials have the necessary attitude for a state to be bound to obey international law by the principle of fairness, this epistemological difficulty has no effect on the metaphysical claim that states have a fair-play duty to obey international law if the relevant officials accept the benefits it provides.<sup>23</sup> Third, it may be that the mere authority to endorse or reject a treaty, as in the case where Congress gives the President fast-track authority to negotiate international trade agreements, does not warrant treating the attitudes of members of Congress as relevant to the question of whether the U.S. accepts the benefits of international law. If the conduct of international relations lies wholly within the purview of the executive, except for this one check on his or her authority, then perhaps it suffices if the executive knows the benefits the state receives from the international legal order, and believes them to be worth the cost of obedience to international law.

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<sup>23</sup> International law already confronts a similar difficulty in the case of *opinio juris*, a condition on the existence (and some say creation) of customary international law, according to which states must act from the belief that international law requires that they so act. The obscurity of state's motivations for acting as they do has led some international legal scholars to advocate for the abandonment of *opinio juris*, but this leads to insuperable problems in explaining the normativity of customary international law. For discussion, see David Lefkowitz, "(Dis)solving the Chronological Paradox in Customary International Law: A Hartian Approach" (2008) 21 Canadian Journal of Law and Jurisprudence 129.

A second potential concern with the proposal under consideration here is that it implies that states may have a fair play obligation to obey international law under one government, in which the relevant officials accept the benefits of the international legal order, but not under its successor, whose officials lack the requisite mental state. The very same state will therefore have a moral duty grounded in the principle of fairness to comply with international law at time t1, but not at time t2, and then perhaps be subject to the same duty at some later time t3. In fact, officials in the very same government could accept the benefits provided by international law during one period of their term in office, but not another. As this last case demonstrates, the possibility of an agent “freeing” herself from a duty of fair play is not a special problem raised by the discussion of states’ acceptance of benefits. Rather, it applies as well to individuals in a domestic legal system. For instance, a citizen of the United States may have willingly and knowingly received the benefits provided by her domestic legal order at time t1, prior to the passage of the Patriot Act, the Federal government’s criminalization of medical marijuana, and cuts to various welfare programs, but not do so now. While this agent had a fair play obligation at time t1 to do her fair share in maintaining the United State’s domestic legal order, this is not presently the case.

Note, first, that both the state and the individual will continue to be subject to natural duties that require them to act as certain international or domestic laws would have them act. Thus the individual still has a moral obligation to refrain from murder, and the state a moral obligation to refrain from genocide. Second, even if agents withdraw from participation in a cooperative scheme, in the sense that they no longer accept its benefits, they still owe reciprocal duties to the other parties to the scheme for benefits they received prior to withdrawing. The possibility of withdrawal from a cooperative scheme does not entail a liberty to enjoy the

benefits of others restricting their liberty without having to do so oneself. Furthermore, agents have a limited duty to meet others' legitimate expectations, and to give due notice that they no longer accept the benefits the relevant scheme provides, with the consequence that any future expectation that they will obey the law because they have a fair play obligation to do so will be illegitimate. Thus for some limited period of time after an agent determines that the benefits provided by a particular cooperative scheme are no longer worth the costs of contributing to it, if her failure to contribute her fair share would impose a significant loss on the other contributors, and they are at risk of suffering that loss because they had been relying on this agent's doing her fair share, then the agent would have a moral obligation to meet the other members' legitimate expectations. In fact, the morally proper procedure for renouncing one's fair play obligations mirrors that typically in place for states that wish to renounce their treaty obligations; they must give due warning of their intent, and must still continue to meet their treaty obligations for a limited time thereafter.<sup>24</sup>

Though not beyond challenge, the arguments in this section constitute a plausible case for the conclusion that states can accept the benefits provided by the international legal order, and that such acceptance is necessary if the principle of fairness is to justify the claim that states have an obligation to obey international law. Yet even if we grant that the principle of fair play *could* justify such a claim, it remains to be shown that it *does* justify this claim with respect to contemporary states and the current international legal order. Do the legal officials whose beliefs would constitute a state's acceptance of benefits know of the benefits they receive from

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<sup>24</sup> Matthew Lister makes some of these same points in his defense of states' right to withdraw their consent to international legal norms (except for *jus cogens* norms). See Lister, 'The Legitimizing Role of Consent in International Law,' *Chicago Journal of International Law* [forthcoming in 2011].

the international legal order, and know that the participation of other states in it is what produces these benefits? Do they believe that these benefits are worth the cost to their state of participating in the international legal order; that is, of obeying international law? Do they believe that those benefits (and costs) are forced upon their state? Finally, is the international legal order a genuine cooperative scheme? Do the relevant legal officials view their obedience to international law as doing their fair share to maintain the scheme, or rather as a form of payment for services rendered by other states?

A fully satisfactory response to these questions requires empirical data beyond my ability to provide. However, it seems worth considering whether analogous speculations to the ones Simmons offers in the domestic context apply as well to the international legal order. In the next section, I argue that they may well not.

### III

Consider, first, Simmons's claim that most subjects of a domestic legal order are ignorant of many of the benefits it provides them, or at least of the fact that the state contributes to the provision of those benefits. There is less reason to think that states will suffer analogous ignorance with respect to the benefits provided by the international legal order. For example, even if individuals are unaware of the benefits of public health, or that they are the product (in part) of a cooperative scheme realized in law and public policy, the same is unlikely to be true for legal officials in most states. To the contrary, most states include institutions devoted partially or entirely to pursuing public health via legal and political cooperation with other states and with international bodies such as the World Health Organization. Those who hold offices in these institutions are usually quite knowledgeable when it comes to the contribution international law makes to the realization of public health (both domestically and internationally). Indeed, in

general states are far likelier to meet the knowledge condition for acceptance of benefits, since they do not face the same limitations on time, energy, and ability that individuals do. Moreover, officials in a state institution concerned with issues of public health are often directly involved in negotiations over the aims, scope, content, and implementation of international legal norms that impact public health. Even when they do not participate in such activities themselves, they often influence these decisions indirectly by informing and shaping the views of those officials who do exercise the authority to form international legal agreements and regimes. Thus the existence of such institutions, and the conduct of officeholders in them, provides evidence both that states are aware of the benefits they receive from the participation of other states in the international legal order, and that the benefits they receive are the result of such participation.

But what about the requirement that in order to acquire a fair play obligation, the relevant legal officials must believe the benefits to be worth the cost? Insofar as the costs that international law currently imposes on states are relatively small, it is not implausible to think that most legal officials in most states do believe they receive a net benefit from participation in the international legal order. There are few analogs in the international sphere to the costs Simmons identifies in the domestic sphere, namely high taxes, military service, and unreasonably restrictive laws governing private pleasures. The closest parallel to taxes in the international context are each state's U.N. dues, but these are far less as a percentage of most state's GDP than are domestic taxes as a percentage of an individual's gross income. Nor do states have any obligation of military service. No state has a legal obligation to supply troops for U.N. deployments, or an international legal obligation to wage war under its own flag. Whether the relevant officials of various states view international laws governing private pleasures as unreasonably restrictive is difficult to say. But at least in the case of international law banning

trade in various narcotics, the willingness of legal officials in most states to ban these same drugs domestically may imply that they do not view an international ban on their trade or use as a cost of obedience to international law, but rather as a benefit.<sup>25</sup>

Consider, too, that states exercise far more control over exactly what legal obligations they have than do subjects of modern domestic legal systems. International law is generally recognized as having two sources: treaty and custom. Treaty obligations bind only the parties to the treaty; thus states may, and sometimes do, opt not to sign (or ratify) treaties that they believe do not provide them with a net benefit. And while states can become bound by customary law without explicitly or tacitly agreeing to it, those that persistently object to an evolving customary norm are not legally bound by that norm.<sup>26</sup> The fact that states can avoid international legal obligations they find excessively burdensome makes it all the more likely that they will view their contribution to the maintenance of the international legal order – that is, fulfilling their

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<sup>25</sup> Even if state officials do view certain international legal norms, such as those outlawing trade in certain narcotics, as imposing costs on them, the important question is whether they think the benefits provided by the international legal order are worth these costs. That is, do states believe that, on the whole, they benefit more from the opportunities forgone by other states as a result of those states' obedience to international law than they pay in terms of the opportunities forgone as a result of their own compliance with international law? Answering this question may seem to require that we determine the baseline an agent ought to use when calculating the costs and benefits of participation in a cooperative scheme. But in fact, it does not matter how the baseline question is resolved, since what acceptance of benefits requires is that the relevant agent *believe* that he (or it) receives a net benefit from the cooperative scheme, and not the veracity of this belief. Thus regardless of what baseline an agent ought to use to determine whether a given cooperative scheme provides him with a net benefit, what matters is whether the agent believes it does, whatever baseline he employs.

<sup>26</sup> Note, however, that in light of differences in the size and sophistication of their diplomatic corps, states vary in their actual ability to persistently object to evolving customary legal norms.



specific international legal obligations – as less costly than the benefits they receive from that order.

Finally, consider Simmons’s claim that the principle of fairness only applies to a genuine cooperative scheme, one that “involves a real (and successful) attempt to achieve a jointly valued outcome by coordinated behavior.”<sup>27</sup> A successful defense of an obligation to obey international law grounded in this principle must either demonstrate that the international legal order is a genuine cooperative scheme, or that considerations of fairness govern collective action schemes that are not genuinely cooperative. I explore each of these possibilities in turn.

According to Simmons, the fact that a certain number of agents happen to act in a coordinated way, and so produce benefits for all, does not suffice for genuine cooperation. Rather, agents genuinely work together to produce certain benefits only if they intend to do so; that is, each participant is aware that the others share the goal to be achieved by working together, and understands his or her own contribution as part of a collective effort to achieve that goal. Given this understanding of cooperation, does the international legal order qualify as a genuine cooperative scheme? Perhaps it does. States do share certain broad goals they hope to achieve via participation in the international legal order, peace and prosperity foremost amongst them. In addition, states are often more self-conscious about their obedience to international law than is the case with individuals and their obedience to domestic law. This in turn makes states more likely to view obedience to law as their contribution to the joint achievement of a stable, peaceful, and prosperous society of states.<sup>28</sup>

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<sup>27</sup> Simmons, *supra* note 13 at 39-40.

<sup>28</sup> Some commentators on earlier versions of this paper have argued that international affairs are characterized as much by coercion as by cooperation. Even if this is true, it need not undermine the argument that states can have a

Additionally, several of the features Simmons identifies as distinguishing genuine cooperative schemes from a modern domestic legal order do not apply equally to the international legal order. Simmons emphasizes that our intuitions regarding fair play are drawn from cases of small-scale cooperative schemes, like neighborhood associations, which he contrasts with the massive impersonality of the state.<sup>29</sup> Yet even though the international legal order has more participants than ever before, there are still fewer than in many neighborhood associations. Another way in which Simmons claims the modern state diverges from the small-scale schemes that (allegedly) give rise to our intuitions concerning fairness is “the considerable distance between the origins of the enforced rules and the people against whom they are enforced.”<sup>30</sup> In paradigmatic cooperative schemes, Simmons appears to be suggesting, those who ought to follow the rules (and so are morally liable to having those rules enforced against them) are the same agents who make the rules. But once again, the international legal order appears to closely approximate the features of a genuine cooperative scheme.<sup>31</sup> Even taking into account the fact that the most powerful states exercise greater influence on the creation and/or modification of international legal norms, and perhaps also the norms that structure these processes, almost all states are active to some degree in the formation of treaty and customary

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fair-play duty to obey international law. In particular, where coercion is used to enforce the law, it contributes to the justification for such a duty by providing assurance to those who cooperate that they will not be taken advantage of.

<sup>29</sup> *Ibid* at 40.

<sup>30</sup> *Ibid* at 41.

<sup>31</sup> Thus the oft-lamented “horizontal” nature of the international legal order may turn out to be morally advantageous in some respects.

law. Formally, states are bound only by those legal norms that they create themselves (or at least those to which they do not persistently object).<sup>32</sup>

Simmons emphasizes the degree to which subjects of modern states are motivated to “participate” in it (i.e. obey the law) by a combination of fear of punishment and habit. An agent who contributes to the operation of a scheme only from these motives will not count as a genuine cooperator, since he lacks the necessary motivation to count as working together with others. However, it is not clear that genuine cooperation requires that agents *always* be motivated by a belief that they are working together with others to achieve some jointly valued goal. The degree to which a scheme is genuinely cooperative may vary, depending on how often those who participate in it are motivated to do so by an understanding of their conduct as cooperation with others. I submit that even if it is true that states sometimes obey international law out of habit and/or fear of punishment, they do sometimes comply with it in the belief that, by joining with other states in adherence to international legal norms, they can thereby achieve jointly valued ends. The fact that many international legal norms are the result of a process in which many states have exercised a voice may make it even more likely that states are motivated to comply with those norms, at least in some cases, because they view doing so as their contribution to the achievement of a shared goal. At the very least, then, it is considerably less implausible to claim that the international legal order constitutes a genuine cooperative scheme of the sort where Simmons’s intuitions about fair play are at home than does the domestic legal order of a modern state.

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<sup>32</sup> *Jus cogens* norms – international legal norms from which states may not derogate – constitute a small exception to this essentially voluntarist picture of international legal obligation. I attach the qualifier ‘formally’ to the statement in the text because it is arguable that in practice some states lack the resources to keep abreast of all the developing international legal norms, or to persistently object to them.

Simmons also offers several examples of group political action schemes whose participants lack the requisite motivation to count as genuine cooperators, and asserts that it would be ludicrous to claim that those who receive benefits from these schemes have an obligation to do their fair share in maintaining them. These include cases where the mutually beneficial scheme is the result of ignorant or misinformed agents accidentally coordinating with one another, or where those who coordinate to produce certain benefits intend those benefits to be gifts, rather than grounds for a moral claim to reciprocity on the part of those who receive them. The fact that the agents in these cases lack the mental states necessary to count as genuine cooperators allegedly explains why this is so.

The example of agents acting collectively in order to bestow beneficial gifts may demonstrate the necessity of genuine cooperation for schemes of this sort, but it does not show that schemes not providing gifts – that is, schemes whose participants believe (or intend) that all those who benefit from the scheme have a duty to reciprocate – must be genuinely cooperative. As for agents who unwittingly participate in a group political action scheme with one another in a fashion that provides each with a benefit, whether they have an obligation to contribute seems to depend on whether they accept the benefits the coordination scheme provides, and not on whether they have the attitude necessary for the scheme to count as genuinely cooperative. For instance, Simmons denies that a group of individuals can acquire fair play obligations if “with the entirely selfish intention of benefiting themselves at a *serious cost* to others, [they] act on *misinformation* sufficient to accidentally produce a beneficial coordination.”<sup>33</sup> The reason this conclusion sounds correct is not because the agents in question fail to view it as a case of working together. Rather, it is because the agents likely will not accept the benefits provided by

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<sup>33</sup> *Ibid* at 39.

the scheme, since each would prefer a scheme in which he or she benefits at serious cost to the others.

The root of the disagreement between Simmons and theorists like Richard Arneson, Richard Dagger, and George Klosko, all of whom deny that a group political action scheme must consist in genuine cooperation in order to generate fair play obligations, rests on the question of whether the principle of fairness is understood as a principle of voluntary or non-voluntary obligation. As we have seen, Simmons believes that an agent can acquire an obligation of fair play only by voluntarily participating in a cooperative scheme that provides him with (what he believes to be) some benefit. But an agent who happens to be acting in a coordinated manner with other agents has done nothing to become a participant in that scheme, or to acquire an obligation to others with whom he is coordinating to maintain that scheme. If mere behavior that happens to coordinate with the behavior of others in ways that produces benefits for all were enough to generate an obligation on an agent to continue to behave as necessary to maintain that coordination (and so those benefits), then an agent could once again find his liberty limited as a result of others conduct, completely independent of any autonomous choice (or willing) by that agent. Avoiding this outcome does not require limiting fair play obligations to genuinely cooperative schemes, however. Rather, it suffices that an agent's acquisition of a fair play obligation to contribute to a group political action scheme depends on his, her, or its acceptance of the benefits the scheme provides.<sup>34</sup>

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<sup>34</sup> If the argument set out in the last three paragraphs is correct, then it also undermines one of the arguments Simmons offers in support of the conclusion that the principle of fairness cannot justify a duty to obey domestic law, namely that the legal order partly constitutive of a modern state does not constitute a genuine cooperative scheme.

On the basis of the arguments presented in this and the previous section, the following conclusions can be drawn. First, it is possible for states to accept the benefits provided by (other states' participation in) the international legal order, and doing so is a necessary condition for their acquisition of a fair play obligation to obey international law. Second, Simmons's reasons for thinking that most individuals in a modern state do not accept the benefits the state provides them do not appear to apply to states and the international legal order. Third, the considerations on the basis of which Simmons concludes that a domestic legal order does not constitute a genuine cooperative scheme do not hold (at least to the same degree) in the case of the international legal order. Moreover, there is some reason to doubt his claim that a scheme must be genuinely cooperative if it is to be possible for those who benefit from it to treat the other participants unfairly.

Thus far the fact that states are artificial agents has not led to any difficulties in the application of the principle of fairness; indeed, if anything the opposite has been the case, as demonstrated by the fact that states can devote far more time, effort, and resources than individuals can to identifying the benefits law provides. Yet the state's artificial agency does entail a limitation on any attempt to justify a state's duty to obey international law by appeal to the principle of fairness. States are corporate actors, by which I mean that state action usually requires specific rule-guided conduct by a large number of individual agents acting in either their capacity as legal officials or legal subjects, or both. As I will now argue, it follows from this fact that only a morally legitimate state, one whose officials are morally entitled to enact, apply, and enforce the law, and perhaps also to obedience from those the law addresses, can acquire a fair play obligation to obey international law.

#### IV

Regardless of whether other states in the international legal system recognize a particular state or government as *legally* empowered to sign treaties, acquiesce to or protest new customary norms, and so on, I contend that an illegitimate state or government does not enjoy the *moral* power to bind the people whom it rules. International legal norms purport to bind all members of the political community to collectively ensure that certain courses of action are or are not adopted, and/or that certain states of affairs do or do not obtain. From a moral standpoint, however, there is no difference between an illegitimate official negotiating a treaty and a private citizen doing so; neither is morally entitled to determine the state's and its citizens' obligations to other states or their citizens. It follows that with respect to international law, the subjects of an illegitimate state are entitled to treat the conduct of its government as morally void. So for example, while an illegitimate government's borrowing money in the state's name creates a legal obligation on the state, and so its subjects, to repay that debt even after a change in the state's domestic political order or government, it does not create any moral obligation to do so.<sup>35</sup>

Moreover, illegitimate state officials lack the moral power to give effect to the international legal obligations they acquire. Most international legal norms must be implemented in a state's domestic legal system in order to become operative. For example, a state that signs a treaty requiring the regulation of certain pollutants must enact domestic legislation and/or administrative rules if it is to meet its international legal obligations. Yet in a morally illegitimate state neither those who hold political office (e.g. administrators) nor those subject to any rules they may enact (e.g. factory owners) have a moral obligation to comply with

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<sup>35</sup> A given political community may have other moral reasons, or prudential ones, for repaying money borrowed when that community was organized as a morally illegitimate state. What members of this political community can deny is that a legal obligation acquired at that time entails that they have a moral duty to repay this debt.

those rules simply because they are the law. If we employ a weaker notion of legitimacy, in which a legitimate state enjoys only a right to enact, apply, and enforce law, but no claim to obedience to it, then disregarding the domestic rules put in place by an illegitimate state in order to implement the treaty will not constitute a wrong done to the state or its officials. The state, and so its officials, lack the moral authority to enact, apply, and enforce the law, and no claim against others that they not interfere with their attempts to do so; for instance, by disobeying the law and actively seeking to undermine its application. Furthermore, the failure to uphold the treaty will not count as a wrong done to the other states party to it, just as a person who contracts for the sale of stolen goods is not wronged when the person with whom he has contracted fails to provide him with the goods. Of course, the fact that the people living in the state's territory fail to restrict the amount of pollutants they produce may constitute a wrong to the other parties to the treaty, or their subjects. This wrong, however, is distinct from the wrong that would (also) occur were the state to have a moral duty to obey the law (i.e. the treaty) as such. In sum, a lack of (domestic) legitimacy entails both that those officials legally empowered to conduct a state's foreign affairs lack the moral power to create a fair play obligation on the state to obey international law, and that any domestic legal rules created to implement international legal obligations are not morally binding on those agents they address.

It is possible that individual subjects of an illegitimate state might acquire a moral obligation to contribute their fair share to the collective action scheme that is the international legal order, and that the best or only way for them to discharge this obligation would be to obey domestic laws enacted in order to give effect to their state's international legal obligations. I suspect, however, that few individuals now know the benefits they receive from the international legal order, or to the extent that they are aware of these benefits, that they will recognize them as



a product of international law. If so, then few individuals meet the knowledge condition on the acquisition of a fair-play obligation to support the international legal order. Moreover, these few individuals will not have a fair-play obligation to obey domestic laws enacted to give effect to international legal obligations as such, since the relationship between an individual's fulfillment of his fair play obligation to support the international legal order and obedience to domestic law is a contingent one. As for illegitimate political rulers, even if they individually acquire a fair play obligation to implement those domestic policies necessary to bring about compliance with various international legal norms, that obligation binds them only as individuals, not as agents morally empowered to acquire international legal obligations on behalf of the people they rule, or to implement morally binding domestic laws in an effort to give effect to those obligations. In most cases an illegitimate ruler's fair play obligation will likely be defeated by his obligation to treat those he rules justly, which will likely require that he relinquish his power and facilitate a transition to a legitimate state.

What makes a state legitimate? Elsewhere I argue that while in principle there are several mechanisms by which a state might attain legitimacy, the justification most likely to apply to contemporary states will appeal to their status as effective liberal democracies.<sup>36</sup> Rather than argue here for a specific conception of legitimacy, however, I adopt the same approach I employed earlier with respect to the moral basis for a right to group political self-determination. This is to simply note that the conclusion that ought to be drawn as to whether a given state

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<sup>36</sup> See David Lefkowitz, "A Contractualist Defense of Democratic Authority" (2005) 18 *Ratio Juris* 346. In my view, the rights to political self-determination and to a liberal-democratic form of governance are both grounded in respect for individuals as autonomous agents; i.e. reasonable and rational creatures.

enjoys a moral right to acquire a fair play obligation to obey international law will depend on which theory of state legitimacy, if any, successfully applies in its case.

## V

Simmons concludes that at best only a tiny fraction of a modern state's citizenry are likely to have a fair-play duty to obey that state's laws, and that this is unlikely to change in the foreseeable future. In contrast, I suggest that a significant percentage of existing states may well have a moral obligation to obey public international law grounded in the principle of fairness.<sup>37</sup> Obviously such a claim rests on assumptions regarding political self-determination and the moral legitimacy of states. Suppose, however, that a state enjoys legitimacy if displays a genuine commitment to democratic governance and respect for individuals' basic rights. If so, then arguably the United States, most members of the European Union, Switzerland, Canada, Australia, New Zealand, Japan, South Korea, Chile, Uruguay, Costa Rica, Brazil, and perhaps India, South Africa and various other states have the moral standing necessary to acquire a fair play obligation to obey international law. And judging by their international conduct, many of the remarks they have made regarding international law, and their domestic political institutions and practices, it seems plausible to claim that they have done so. Moreover, with the continued hard work and sacrifice of many people, as well as a little luck, a commitment to democratic

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<sup>37</sup> One additional complicating feature of the international legal order must be noted, namely the possible (or in some cases, probable) injustice of particular international legal rules. It seems implausible to claim that an agent can have a fair play obligation to contribute to a cooperative scheme in a substantively unjust manner; a member of the Mafia cannot acquire a fair play obligation to commit murder because it constitutes doing his fair share in a cooperative scheme. Likewise even a legitimate state cannot acquire a fair play obligation to comply with the demands of a (clearly) unjust treaty (or the clearly unjust provisions of a treaty), even if it goes through all of the steps necessary to create a binding legal obligation to do so.

governance and respect for basic rights will continue to spread and develop in states around the world. The result will be an increase in the number of states morally empowered to acquire a fair play obligation to obey international law. Increasing prosperity in many states will also enable them to devote more funding to officials directly engaged with the development and implementation of international legal norms. This in turn will result in these states having an increased awareness of the benefits (and costs) of the international legal order, and so make it less likely that they will fail to accept the benefits international law provides due to ignorance. It may also make them more likely to view obedience to international law as working with other states to achieve a jointly valued goal. I suggest, therefore, that it is reasonable to expect continued growth in the number of states that have a moral duty to obey international law grounded in the principle of fairness.