

Sovereigns as Trustees of Humanity: The Minimal Other-Regarding Obligations

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Abstract

This essay argues that sovereignty should be conceptualized as a trusteeship not only toward a state's own citizens but also toward humanity at large. Accordingly, sovereigns should be required to take into account other-regarding considerations when forming national policies that may have an effect beyond their national jurisdiction, even absent specific treaty obligations. The essay suggests that the concept of sovereignty, crystallized at a time when distances were large and self-sufficiency was the aspiration, must assume a new face in a densely-populated and deeply integrated world. The traditional view of sovereigns under both constitutional and international law regards them as Janus-faced: public toward their own citizens but private on the outside (*vis-à-vis* all others). This vision is informed by the assumption of a perfect fit between the sovereign and the affected stakeholders who are its citizens. This traditional view of sovereignty yields inefficient, inequitable and undemocratic consequences. After grounding the trustee sovereignty concept on three distinct bases – the sovereign's power of exclusion, human rights and the right to democratic participation – the essay elaborates on the general implications of the theory. It identifies the minimal normative and procedural other-regarding obligations that arise out of this concept and suggests that these minimal obligations are already embedded in several doctrines of international law that delimit the rights of sovereigns. The trustee sovereignty concept can explain the evolution of these doctrines, and it can also inspire the rise of new specific obligations.

I. Introduction

In 2006, a new strain of the deadly bird flu was discovered in Indonesia. As opposed to its previous practice, this time Indonesia announced that it would not transfer samples of the new virus to the World Health Organization unless it receives sufficient assurances that the vaccine developed from the samples would be available to its citizens. Due to the small quantities produced and their selling price, Influenza vaccines had been accessible only to a small portion of the world population, mostly those in the developed North. Dependent on virus samples to produce the vaccine, the World Health Organization and developed countries sharply criticized Indonesia. They

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argued that Indonesia owed a duty under international law to provide information essential to prevent epidemics. Indonesia invoked its sovereign right: the virus, as a biological resource, was Indonesia's property. International law did not oblige it to share this property with others.¹

Was Indonesia's sovereignty-based claim justified? Wasn't Indonesia responsible to act proactively to respond to harm that was emanating from its territory and threatened those outside? On the other hand, was the developed countries' demand to obtain the information about the virus without sharing the vaccine justified? Shouldn't international law prod the parties to share both the virus samples and the vaccine?

This confrontation is but one example of the contemporary challenges that require us to reassess the very concept of sovereignty. We live in a shrinking world where interdependence between countries and communities is increasing. These changes also affect the concept of sovereignty. A concept created in a world where distances were large and communities were striving for self-sufficiency assumes a new face in a densely-populated, interdependent world. Today, sovereignty is no longer akin to ownership of discrete mansions, separated from each other by rivers or deserts. Sovereignty is more analogous to ownership of a small apartment in one densely-packed high-rise in which about two hundred families live.

In our global apartment building, several pressing questions emerge: To what extent should national regulators balance other nations' or foreign nationals' interests when they set public policies? To what extent should sovereigns sacrifice national resources such as land or water, or their soldiers' lives, to contribute to collective goals such as equality, global health and security, and the minimization of casualties in armed conflicts? To what extent should international regulatory bodies intervene in the exercise of discretion by the national authorities? These fundamental questions arise in many if not most areas reserved for national policymaking, from the regulation of trade or foreign investments through transboundary or global resource management, the use of force, the limitations on human rights and the rights of refugees, and the protection of world heritage sites and of biodiversity. That international law and institutions limit the discretion of sovereigns when they are

¹ On this dispute see Andrew Lakoff, Two Regimes of Global Health 1 Humanity 59 (2010) (available at <http://muse.jhu.edu/journals/hum/summary/v001/1.1.lakoff.html>); Endang R Sedyaningsih et al., Towards Mutual Trust, Transparency and Equity in Virus Sharing Mechanism: The Avian Influenza Case of Indonesia 37 Ann Acad Med Singapore 482 (2008).

balancing their interests versus the interests of others is not a novel or disputed proposition; but such limitations are grounded on the sovereign's prior consent and thus are the exception rather than the rule. It may therefore seem radical to propose that sovereignty is inherently limited and requires sovereigns – as agents of humanity – to take other-regarding considerations seriously into account even absent specific treaty obligation. Yet this essay would suggest that such a reconceptualization of the concept of sovereignty is morally required. It will also argue that this new perspective on sovereignty better explains trends in the evolution of positive international law and can predict future developments of the law.

Contemporary sovereigns draw their legitimacy from within, from their promise to protect their citizens and to promote their welfare, as well as from their duty to exercise their people's inherent right to enjoy and utilize their natural wealth and resources. Even if sovereigns were to adopt ethics of care toward others, they would hesitate to recognize a firm legal obligation to do so. Such an obligation might compromise their freedom to define and pursue national goals and values, leaving them at the mercy of collective bargaining processes or unaccountable and uninformed foreign bureaucrats and adjudicators. Sovereigns are therefore unlikely to voluntarily commit themselves to take global welfare seriously into account. As a result, contemporary international law fails to recognize states as public actors that must promote global welfare rather than national welfare only. The dominant view of sovereigns under both constitutional and international law regards them as Janus-faced: public on the inside (towards their own citizens and residents) but private on the outside (*vis-à-vis* all others).² As private citizens in the global sphere, sovereigns are bound at the most "not to allow knowingly [their] territory to be used for acts contrary to the rights of other states."³ But this formula begs the question of what rights the other states have and what they can expect from their fellow sovereign. Contemporary doctrines on state sovereignty and citizenship assume that absent a specific, voluntarily accepted commitment, sovereign governments have no obligation

² For recent challenges to this private face of sovereigns Jeremy Waldron, *Are Sovereigns Entitled to the Benefit of the International Rule of Law?* 22 Eur. J. Int'l. Law 315 (2011) (sovereigns are "trustees for the people"; Benedict Kingsbury, *International Law as Inter-Public Law*, in *NOMOS XLIX: Moral Universalism and Pluralism* (Henry R. Richardson & Melissa S. Williams eds., 2009); Allen Buchanan, *Justice, Legitimacy, and Self-Determination* (2004); David Dyzenhaus, *The Rule of (Administrative) Law in International Law*, 68 *Law & Contemp. Probs.* 127 (2005).

³ *Corfu Channel Case (Merits)* (U.K. v. Alb.), 1949 I.C.J.p-22. Available at: <http://www.icj-cij.org/docket/files/1/1645.pdf>.

to respect, let alone *to promote*, the interests of foreigners, or to otherwise promote global welfare, even if they can achieve these aims with no or with minimal cost.

The Janus-faced vision of the sovereign is informed by the ancient perception of perfect or almost perfect fit between the sovereign and the affected stakeholders – its citizens. Such a vision made eminent sense when sovereigns ruled their discrete mansions. This vision lent legitimacy to the sovereigns' assertion of accountability to their citizens *and only to their citizens*, and which relegated the responsibility toward others to the inter-sovereign sphere. A migrant worker, residents of a town adjacent to an international border, and a child hiding during a bombardment are all expected to enlist their own government for protection: They have no right to take part in policy-making processes of foreign governments, and their interests need not be weighed against the interests of citizens when national regulators form or enforce policies. (In fact, under domestic law, such considerations might well be regarded as irrelevant to the exercise of domestic authority, and therefore unauthorized!). It is this perceived privateness that shields the sovereign from the requirement to internalize the rights and interests of non-citizens in its policy making and serves as a facially neutral form of exclusion.

This Janus-faced vision still conditions the contemporary thinking of many political scientists, philosophers and lawyers regarding sovereignty, citizenship, democracy and international law. Recent suggestions to regard sovereigns as public actors also on the international plane remain moored to the perception that states are agents of their respective peoples, of those “committed to their care”⁴ or within their territorial borders.⁵ This is still a vision of a state-to-state, of “inter-public” law.⁶ The private view of sovereigns remains entrenched in legal doctrine not only because it is influenced by the dominant theories of democracy, but obviously also because it privileges certain domestic political actors and pressure groups, domestic bureaucracies and even national courts, mainly in affluent countries, who have vested interests in retaining their positions of power. The Janus-faced vision provides these

⁴ Waldron, *supra* note 2, at 325 (“states are recognized by IL as trustees for the people committed to their care”).

⁵ Anne Peters, *Humanity as the A and Ω of Sovereignty* 20 Eur. J. Int'l. Law 513 (2009) (respect for human rights of those within its territorial borders is a condition for the state's external sovereignty).

⁶ Kingsbury, *supra* note 2. See also Buchanan, *supra* note 2, at 192 (international justice includes the rights and duties of states – and other global actors – to one another); Andrew Hurrell, *On Global Order* 65-66 (2007) (states are “agents of individuals, groups and national communities that they are supposed to represent, [...] and agents or interpreters of some notion of an international public good” and core norms).

powerful actors with a reasonable explanation for why they have no obligation to share “their” resources with outsiders as well as a justification for having the final say regarding “their” contributions to collective challenges such as global warming.

This traditional perception persists in international legal doctrine despite intensifying economic and social interactions and the increasingly thick international obligations that follow from them. Even as they commit to free movement of goods and services, states are formally regarded as sovereign to balance their treaty obligations against national interests.⁷ State parties to trade agreements may be criticized for considering an irrelevant consideration in limiting certain imports,⁸ but not for assigning a certain relevant (other-regarding) consideration *insufficient* weight. International courts criticize sovereigns for improper balancing between *domestic* interests,⁹ but balk at explicitly criticizing them for improperly balancing domestic *versus foreign* interests. This hesitation is reflected in formalistic, unclear, and even contradictory decisions of the WTO Appellate Body and of foreign investment tribunals, as well as in the on-going debate regarding the proper “standard of review” and “margin of appreciation” of national authorities by international tribunals.¹⁰

As mentioned, the Janus-faced vision made ample economic, social, and political sense in an era in which the sovereign’s authority was limited in scope to the stakeholders routinely affected by its policies. Externalities from the exercise of each sovereign’s authority, such as damage to crops in a neighboring country as a result of

⁷ See, e.g., with respect to obligations under trade law: Ingo Venzke, Making General Exceptions: The Spell of Precedents in Developing Article XX GATT into Standards for Domestic Regulatory Policy German Law Journal (2011); Robert Howse, *Adjudicative Legitimacy and Treaty Interpretation in International Trade Law*, in: The EU, The WTO and The NAFTA: Towards a Common Law of International Trade?, 35 (Joseph H. H. Weiler ed., 2000); Steven P. Croley and John H. Jackson, ‘WTO Dispute Procedures, Standard of Review and Deference to National Governments’, 90 AJIL 193 (1996).

⁸ E.g., in the genetically modified food litigation, the WTO Panel’s assertion that the precautionary principle was an irrelevant consideration for preventing its importation.

⁹ Especially in the context of human rights litigation, but increasingly in many other contexts including the environment (under the Aarhus Convention: see Svitlana Kravchenko, *The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements*, 7 Yb European Environmental Law 1 (2007)), and loans from international and foreign Banks for development projects (see e.g., The World Bank Inspection Panel Report on the Mumbai Urban Transport Project (2004) (<http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,contentMDK:20223785~pagePK:64129751~piPK:64128378~theSitePK:380794,00.html>)).

¹⁰ Despite years of litigation, “the WTO has failed to provide clear and predictable principles to govern the standard of review. As a result Member States and panels are unable to accurately predict how cases will be treated.” (Andrew D. Guzman, Determining the Appropriate Standard of Review In WTO Disputes, 42 Cornell Int’l L.J. 45, 75 (2009)). In the sphere of foreign investments law, the traditional obligation of states to provide “fair and equitable treatment” to foreign investors is “not fine grained enough for many of the specific questions arising in relation to foreign investment issues in the modern regulatory practice of States.” Benedict Kingsbury & Stephan Schill, Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law, at p. 8 (IIJ Working Paper 2009/6, 2009).

pollution, were rare and were deemed manageable by a system based on the principle of sovereign consent and the general negative obligation to avoid harm. In our contemporary global condominium, such an approach is no longer viable. Sovereigns regulate resources that are linked in many ways and on a daily basis with resources that belong to others. Sovereigns constantly shape foreigners' life opportunities. States are not founded on isolated islands or disparate clouds floating past each other but never touching. Rather, "[b]y carving out a territorial jurisdiction for themselves, states withdraw part of the surface of the earth from free access to outsiders."¹¹ They also affect the lives of faraway communities by their daily decisions on economic development, on conservation, on health regulation. Sharing earth's resources, sovereigns are interdependent, and together they shape the fate of humanity. These are strong normative reasons for imposing on sovereigns the obligation to take global welfare into account when setting and implementing policies.

This Essay lays the ground for a theory of global accountability of sovereigns as trustees of humanity, which imposes on sovereigns other-regarding obligations. It then elaborates on the general implications of such a theory and identifies the minimal normative and procedural obligations that arise out of it. Although the same ideas could (and probably should) lead to further, more intrusive implications from the perspective of sovereignty, which might include the obligation of sovereigns to yield to foreign interests in promoting global welfare, these will not be further developed in the limited space of this Essay. Their assessment requires a careful study of the normative grounds for imposing such obligations and of the practices and institutional capacities of the various global regulators and courts that could assess whether such bodies can be entrusted with balancing between the conflicting interests of various communities. The Essay will therefore only outline the relevant considerations for assessing the effectiveness and the legitimacy of such external referees, while a more in-depth analysis will be deferred to subsequent studies built on further research.

II. Sovereigns as Global Trustees

(a) Preliminary Concerns

This Part seeks to propose the normative basis for the obligation of sovereigns to take other regarding interests into account. This Part will argue that the private

¹¹ János Kis, *The Unity of Mankind and the Plurality of States*, in *The Paradoxes of Unintended Consequences*, (Lord Dahrendorf et al., Eds, 2000) at 89, 96.

aspect of the territorially-based, Janus-faced sovereign made sense in previous times, when the exclusivity that sovereigns enjoyed served global welfare maximization relatively well. But this vision is less compelling nowadays because in a period of increasing interdependencies, a glaring misfit exists between the scope of the sovereign's authority and the sphere of the affected stakeholders: national policies directly and indirectly affect foreigners, and those foreigners cannot rely on their own governments to effectively protect them against foreign sovereigns. At the same time, affluent stakeholders manage to shape the policies of foreign sovereigns even without the right to vote. These phenomena result in negative externalities imposed on the unrepresented stakeholders and in their denial of opportunities to participate effectively in shaping the policies that affect them. The Janus-faced system of control leads to outcomes that are often inefficient, unjust and undemocratic. The concept of the trustee sovereign represents an effort to respond to this three-pronged challenge.

But before elaborating on the different possible bases for the trustee sovereignty thesis, it is necessary to remove a potential obstacle that derives from the proposition that sovereignty epitomizes the right of peoples to self-determination¹² and their "inherent right ... to enjoy and utilize fully and freely their natural wealth and resources."¹³ From the perspective of national self-determination, arguing for trustee sovereignty and the sovereign's other-regarding obligations is seemingly at odds with the claim of ownership that distinct peoples have over "their" natural wealth and resources and the "inherent" right to their freedom to utilize the national wealth at their discretion.

Obviously, this claim applies only to those resources that are purely internal, i.e. those resources whose use by one people does not detract from the uses of other resources by other peoples. As the next section will demonstrate, fewer and fewer resources remain nowadays purely internal. But this is but the preliminary response

¹² International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; 6 I.L.M. 368 (1967), (ICCPR) Article 1: (1) "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. (2) All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence."

¹³ ICCPR, Article 47: "Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources." See also Nico Schrijver, *Sovereignty over Natural Resources: balancing rights and duties* (1997).

to the claim about self-determination. The main response denies the relevancy of the self-determination argument to the concept of trustee sovereignty. It posits that although it is clearly possible to interpret the principle of self-determination and of exclusive ownership to mean that those rights inhere in the people and that therefore the people's ownership right precede the rights of others, and although this is how this principle has been understood by many, this is neither the only possible reading nor the appropriate one. Such a reading stands in sharp contrast to the idea – an idea embedded in current international law – that sovereignty is qualified and subjected to fiduciary duties toward non-members.

But as we know from another context where rights “inhere” in sovereigns – the inherent right to self-defense – such rights are not regarded as providing their owners with unfettered freedom to decide when and how to use them, even during critical moments. Rather, they are subjected to well-defined limitations under international law. The tension between self-determination and the concept of trusteeship is ultimately only apparent and not real: the principles of national self-determination and of national ownership of natural resources can and should be understood as rejecting the idea that some peoples (and some sovereigns) are subjected by international law *to other nations*. The right to self-determination is *the right to be free from other nations, but not the right to be free from the obligations toward the collective*.¹⁴ The vision of trustee sovereignty is applicable to all nations equally.

This Part develops three parallel theoretical bases to support the vision of sovereigns as global trustees. These bases regard the concept of sovereignty as embedded within a more encompassing global order, which regards sovereignty as a source of obligations and not only as a source of rights. These theories consider sovereigns as trustees whose powers must be exercised in ways that take democracy, global welfare, and just allocation of resources into account. While sovereigns may have good reasons to give priority in certain areas to the interests of their citizens, they must ultimately keep in mind the interests of others and be accountable to them.

¹⁴ Cf. Hurrell, *supra* note 6, 66 (sovereignty as “a status that signals a capacity to engage in ... international transactions);” Buchanan, *supra* note 2, at 102 (“popular sovereignty does not mean unlimited sovereignty. Instead, popular sovereignty means only that that the people of a state are the ultimate source of political authority within the state and that government is chiefly to function as their agent.”)

These three bases do not depend on any assumption about the existence of an international community, of a shared sense of community or group solidarity, or of the moral obligation to act as if such a community or such a sense of solidarity existed.¹⁵ Rather, these theories derive from the basic ends of efficiency, equality and democracy that determine the legitimacy of any form of governance.

(b) Sovereignty and the Power of Ownership

The first theory for trustee sovereignty is a theory of sovereignty as power. Power is derived from the control over resources. Not only public resources like the atmosphere and the high seas, and transboundary resources such as international rivers and fisheries, but also internal resources.¹⁶ “Whatever amount of resources one country has, it is withdrawn from the inhabitants of other countries.”¹⁷ The derivation of responsibility from power is a well-known move in domestic public law and also in domestic property law. The adage – with authority comes responsibility – has informed the evolution of public law doctrines in the domestic administrative law of many countries.¹⁸ As is well known in property legal scholarship, private ownership is not only “dominion over things” but “also *imperium* over our fellow human beings.”¹⁹ This dominion entails responsibility: “the large property owner is viewed, as he ought to be, as a wielder of power over the lives of his fellow citizens, the law should not hesitate to

¹⁵ See, e.g., Hermann Mosler, *The International Society as a Legal Community* 1974 IV (140) *Recueil des Cours* 1, 17 (1976) (discussing the psychological element required by the concept of the international legal community requires: a conviction shared by independent societies that they are partners and mutually bound by reciprocal rules). On the concept of the international community and its evolution see Mehrdad Payandeh, *Internationales Gemeinschaftsrecht* ((Beiträge zum ausländischen öffentlichen Recht und Völkerrecht Band 219, 2010); Andreas L. Paulus, *Die Internationale Gemeinschaft im Völkerrecht* (2001), Martti Koskeniemi, „International Community” from Dante to Vattel (). On solidarity see Rüdiger Wolfrum, Chie Kojima (eds.), *Solidarity: A Structural Principle of International Law* (2010); Hurrell, *supra* note 6, 65-67; Rüdiger Wolfrum, *Solidarity amongst States: An Emerging Structural Principle of International Law*, in: Pierre-Marie Dupuy et al. (eds.), *Völkerrecht als Wertordnung*, 108 (2006). On solidarity as the basis for other-regarding obligations see *Sergio Dellavalle*, *Opening the Forum to the “Others” – Is There an Obligation to Take Non-National Interests into Account within National Political and Juridical Decision-Making-Processes?* (paper 2011).

¹⁶ Mahnoush H. Arsanjani, *International Regulation of Internal Resources* 53-70 (1981) (noting the need to limit sovereignty due to increasing external demands on internal resources).

¹⁷ Kis, *supra* note 11 at 111.

¹⁸ Peter Cane, *An Introduction to Administrative Law* (2nd Ed., 1992) 13-16 (discussing the scope of “public law” and emphasizing the asymmetric power as generating the need to restrict governmental authority). French law: Jean Rivero and Jean Waline *Droit administratif* 22 (20th edition, 2004) (“Il nous semble que deux notions sont au coeur du droit administrative: celle de *service public* et celle de *puissance publique*.”) (I thank Stephanie Dagrón for this reference).

¹⁹ Morris R. Cohen, *Property and Sovereignty* 13 *Cornell L Q* 8, 13 (1927). See Richard Barnes, *Property rights and natural resources* (2009). Morton J. Horwitz, *The History of the Private/Public Distinction*, 130 *U. Pa. L. Rev.* 1423, 1426 (1981-1982).

develop a doctrine as to his positive duties in the public interest.”²⁰ Therefore, the assignment of property rights and the delineation of their contents must be regarded as a mode of public regulation of human life, and must be subjected to the same scrutiny as any other exercise of public power. The same rationale plays out in the global context: the private face of sovereigns masks their power over others and their responsibility to the ways they exercise such power. A theory of other-regarding obligations of sovereigns can therefore develop along lines similar to the theories in private law concerning the other-regarding obligations of property owners.²¹

That ownership of parts of global resources can be conceptualized as originating from a collective regulatory decision at the global level, rather than being an entitlement that inheres in the sovereigns as a vision with a long pedigree in international law. In fact, it was the basis for the founding of modern international law.²² Notably, Grotius evoked international law to justify *open access* to the high seas.²³ The idea that sovereignty is embedded in, and a crucial component of, a global legal order was famously phrased by Max Huber when he noted that international law “divides between nations the space upon which human activities are employed,”²⁴ and allocates to each the responsibility toward other nations for activities transpiring in its jurisdiction that violate international law.²⁵ It is international law that provides

²⁰ *Id.*, at 26. *Id.*: “In general, there is no reason for the law insisting that people should make the most economic use of their property.”

²¹ The German Basic Law asserts a general limitation on property ownership: Basic Law, Article 14(2): “Eigentum verpflichtet. Sein Gebrauch soll zugleich dem Wohle der Allgemeinheit dienen.” (Officially translated as „Property entails obligations. Its use shall also serve the public good” but perhaps “ownership obliges” is a better translation of the guiding principle). On this limitation see Gregory Alexander, *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* 97-147 (2006); Hanoch Dagan, *The Social Responsibility of Ownership* 92 *Cornell L. Rev.* 1255 (2007). The same logic informs the imposition of public law obligations on private individuals in general, such as the theory of *Drittwirkung* developed in German constitutional law (*Drittwirkung der Grundrechte*—literally third party effect of fundamental rights). This doctrine suggests that the state is under an obligation to ensure that private individuals within its jurisdiction do not violate other people’s rights, from which stem obligations on individuals not to harm the constitutional rights of others. See Paul Sieghart, *The International Law of Human Rights* 43-44 (1984). On this doctrine in the context of international law see Andrew Clapham, *Human Rights in the Private Sphere* (1993).

²² Martti Koskenniemi, *Empire and International Law: The Real Spanish Contribution*, 61 *University of Toronto Law Journal*, 14-16 (2011) (emphasizing Vitoria’s conceptualizing the prince’s dominium over his commonwealth as derived from the collective decision to delegate such authority to him).

²³ Hugo Grotius, *Mare liberum*, 1609 (Hugo Grotius, *The Freedom of the Seas* (Ralph von Deman Magoffin trans., James Brown Scott ed., Oxford Univ. Press 1916).

²⁴ *The Island of Palmas* (Neth. V. US) 2 *U.N. Rep. Intl. Arb. Awards* 829 (1928) p-839. Available at: http://untreaty.un.org/cod/riaa/cases/vol_II/829-871.pdf.

²⁵ See also Huber’s statement in the award re *British Claims in the Spanish Zone of Morocco* (1923–1925): “Responsibility is the necessary corollary of rights. All international rights entail international responsibility” (Daniel-Erasmus Khan, *Max Huber as Arbitrator: The Palmas (Miangas) Case and Other Arbitrations* 18 *EJIL* 145, 156 (2007).

the criteria for recognizing entities as sovereign states that are entitled to manage the resources within their territory, and it is international law – the UN Convention on the Law of the Sea – that recognized states’ rights to extend their sovereign authority to manage certain maritime resources.²⁶ From this perspective, it is not impossible to conceive of international law as imposing the obligation on sovereigns as power-wielding property owners to take other-regarding interests into account when managing the resources assigned to them. Hence, for example, coastal states that manage their Exclusive Economic Zones (EEZ) and police the activity of fishing fleets have the authority to detain foreign vessels to secure compliance with the coastal state’s policies. But when exercising such functions, the coastal state should not discriminate between domestic and foreign ships, and should give fair trial to the foreign ship and crew.²⁷

Regulation of the power of ownership must be sensitive to the different types of property. Property theory distinguishes between different types of goods for the design of property rights. The objects of ownership rights range from purely private to fully public goods.²⁸ Private goods, such as a lake situated entirely within one country, are “fully excludable” and “rival” (to use economic jargon): the owner can prevent others from using it and the consumption of any part of that property by the user or by others detracts from the property. Assigning exclusive control over such property to the user – the sovereign – is efficient because the user will internalize all the costs involved in managing that resource.²⁹

While an unfettered right to exclude could in principle make sense in domestic settings (absent prohibited exclusionary grounds such as race, religion, etc.), it is quite problematic to adopt a similar deferential approach on the global sphere where sovereigns serve as property owners. The reason for a stricter approach to exclusion

²⁶ Namely, the extension of sovereign rights to the continental shelves and the Exclusive Economic Zones: The United Nations Convention on the Law of the Sea (1982), available at: http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf

²⁷ This is a question that has come before an international tribunal (ITLOS) and opinions have differed. A theory of trustee sovereignty that is based on qualified ownership can offer a clear positive answer to this question: see *infra*##.

²⁸ On the different types of goods, see, e.g., Yoram Barzel, *Economic Analysis of Property Rights* (2d ed., 1997); Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (1990), Michael Taylor, *The Possibility of Cooperation* (1987), pp. 5-6. Todd Sandler, *Collective Action*, #; Russell Hardin, *collective action* (1982). Applied to international law of transboundary resources: Eric A. Posner and Alan O. Sykes *Economic Foundations of the Law of the Sea AJIL* (2011); Eyal Benvenisti, *Sharing Transboundary Resources* (2002).

²⁹ See David Miller, *National Responsibility and Global Justice* 214 (2008) (the right to exercise state authority over a given territory is utilitarian: everyone subject to such authority can expect to benefit from its existence).

by sovereigns lies in the much more dramatic consequences of exclusion at the global level: the globe does not have a public space to accommodate those who wish or are forced to exit the country they reside in and find refuge elsewhere. This lack of an equivalent of open spaces, emergency shelters and public property that the government can allocate to the needy, imposes important limitations on the sovereign's right to exclude. It leads to collective efforts to ensure that sovereigns will not deny access to migrants and refugees without taking into account the asylum seekers' individual concerns and without at least providing justifications for their exclusion.³⁰ For the same reason, and again unlike the individual property owner, the sovereign must assume more robust positive obligations to those who can benefit from its exercise of power (foreigners subject to persecution by their own government) in the absence of a public authority at the global level.³¹

More generally, with increasing local demands on natural resources such as land and water, even fully internal resources cannot be regarded as purely private. For their management carries immediate (if indirect) consequences for the use of shared resources. For example, an internal lake that is depleted due to local mismanagement increases the local demand for transboundary lakes and rivers and hence increases competition between domestic and foreign stakeholders. With increasing demands on dwindling supply, few of the erstwhile purely domestic resources can be managed without impacting foreign stakeholders. Even routine land development plans or pesticide use, or the now popular practice of leasing arable lands to foreign companies, can adversely affect neighbors across the border. The increasing global pressures on the available resources and the emerging recognition of moral obligations that inhibit the exercise of exclusion challenge the idea of exclusive ownership and give rise to the demand that sovereigns manage the resources under their control efficiently and sustainably, taking into account global welfare considerations.

But internal resources are only part of the resources that sovereigns use, and the power to exclude is only one source of authority that sovereigns have over others. There are also semi-public goods such as transboundary rivers (that a few countries share) and public goods that all use (and abuse) such as the high seas and the

³⁰ See the *Institut de Droit international's* resolution on international principles concerning the admission and expulsion of foreigners (*Règles internationales sur l'admission et l'expulsion des étrangers*, Session Geneva 1892), also *Principes recommandés par l'Institut, en vue d'un projet de convention en matière d'émigration* (Copenhagen Session 1897).

³¹ Unless, of course, the UN Security Council decides to operate as such.

atmosphere, whose benefits or harms are non-excludable because it is impossible or prohibitively costly to prevent outsiders from using them. The sovereign who controls part of the non-excludable property is capable of inflicting harm (or benefit) on the other users. Such goods are susceptible to the 'tragedy of the commons' syndrome in which each of the appropriators receives direct benefits from his or her unilateral act, while the costs imposed by these acts are borne by others. Shared ownership, or shared management – namely: obligations of sovereigns to the collective of states in the region or globally – are the key to the sustainable management of such resources.

Even the high seas and outer space become impure goods as different users crowd them while using them: too many people using a sidewalk diminish the enjoyment of others. The powers that sovereigns exercise, both in their management of their 'own' internal resources and when they make rival claims on transboundary and public resources, yield a direct and indirect impact on others; hence, sovereigns must be responsible for the impact they create.

Note that such responsibility does not necessarily mean the obligation to share those resources owned by the sovereign. Such an obligation would diminish the incentives sovereigns have to invest taxpayers' money to develop internal public goods such as a flourishing educational system, a comprehensive healthcare system or recreational areas.³² But the right to exclude from certain communal property does not necessarily extend to the right to exclude from the basic resources that the community had been originally assigned. It is one thing to restrict access to, say a state's publicly funded schools, but quite a different thing to raise NIMBY-type arguments.

(c) Sovereignty as Trusteeship of Humankind

Under the second theory, the global resources – air and water, fisheries and the high seas, mineral deposits and agricultural lands – are humanity's resources and sovereigns only have management rights in them as the trustees of humanity. Unlike the previous approach that presupposed ownership by national collectives, the second approach begins with all individuals, and by extension – humanity – as the owner in common of global resources and the beneficiary to whom sovereigns are

³² Roderick M. Hills, Jr., "Compared to What? Tiebout and the Comparative Merits of Congress and the States in Constitutional Federalism," in *The Tiebout Model at Fifty: Essays in Public Economics in Honor of Wallace Oates* (William Fischel, ed., 2006).

accountable. That vision is informed by a universalist approach that regards all human beings as the equal sources of rights, obligations and entitlements. As their trustees, all sovereigns are accountable to them and are duty-bound to protect and even promote their interests (although not at the same level of responsibility). This human rights-based theory of joint ownership imposes strict limits on states with respect to acts that affect the human rights of individuals, no matter how they are defined. It requires sovereigns to take into account global welfare considerations in all of their activities – even those related to the management of purely domestic resources.

From this perspective, it is possible to reconceptualize Huber's vision of sovereigns as trustees of humanity at large, rather than trustees of other nations. To paraphrase Huber's viewpoint: infused by the precedence of human rights and humanity's ownership, sovereigns can and should be viewed as organs of a global system that allocates competences and responsibilities to promote the rights of all human beings and also their interest in sustainable utilization of global resources. As trustees of this global system – to use another paraphrasing of Huber – the competency of contemporary sovereigns to manage public affairs within their respective jurisdictions brings a corollary duty to account for external interests, and often, even to balance internal against external interests as well.

It is not unlikely that Huber's famous dictum concerning the nature of sovereignty was informed by the one suggested earlier by Emerich de Vattel, another Swiss international lawyer.³³ Vattel had anticipated the problem of a nation all too eager to assert control over territory without really occupying it.³⁴ Like Huber, Vattel also insisted on effective control as grounds for recognizing sovereignty, but his explanation was significantly different and more radical. Rather than the obligation to protect the rights of other *states* based on international law, his version of sovereignty has another, more cosmopolitan, underlying purpose:

such a pretension [asserting sovereignty without actually occupying it] would be an absolute infringement of the natural rights of men, and repugnant to the views of nature, which, having destined the whole earth to supply the wants of mankind in general, gives no nation a

³³ Emerich de Vattel, *The Law of Nations or the Principles of Natural Law* (1758).

³⁴ "But it is questioned whether a nation can, by the bare act of taking possession, appropriate to itself countries which it does not really occupy, and thus engross a much greater extent of territory than it is able to people or cultivate." Vattel, *Book I, Chapter 18*, para 208.

right to appropriate to itself a country, except for the purpose of making use of it, and not of hindering others from deriving advantage from it.³⁵

In his view,

The earth belongs to mankind in general; destined by the Creator to be their common habitation, and to supply them with food, they all possess a natural right to inhabit it, and derive from it whatever is necessary for their subsistence, and suitable to their wants.³⁶

Therefore, sovereigns are obliged toward humankind to use their resources under their control efficiently and sustainably.³⁷ It would be wrong to impute to Vattel a purely cosmopolitan vision. He views nations as collective entities responsible for their acts and omissions and authorized to promote their collective goals. But with human beings as the core justification for sovereign power, sovereigns have the obligation to accommodate the interests of foreign stakeholders or at least to consider in good faith those interests.³⁸

While Vattel may have been the most direct and elaborate, other philosophers shared the basic premise that, in Kant's words "all men are originally in *common possession* of the land of the entire earth."³⁹ Contemporary philosophers reach the same outcome by recognizing the primacy of individuals' human rights over state

³⁵ Id.

³⁶ Id., at para 203.

³⁷ "The cultivation of the soil deserves the attention of the government, not only on account of the invaluable advantages that flow from it, but from its being an obligation imposed by nature on mankind. The whole earth is destined to feed its inhabitants; but this it would be incapable of doing if it were uncultivated. Every nation is then obliged by the law of nature to cultivate the land that has fallen to its share" Id., at § 81.

³⁸ "A man, by being exiled or banished, does not forfeit the human character, nor consequently his right to dwell somewhere on earth. He derives this right from nature, or rather from its Author, who has destined the earth for the habitation of mankind; and the introduction of property cannot have impaired the right which every man has to the use of such things as are absolutely necessary — a right which he brings with him into the world at the moment of his birth. [...] no nation can, without good reasons, refuse even a perpetual residence to a man driven from his country. But, if particular and substantial reasons prevent her from affording him an asylum, this man has no longer any right to demand it." Id., at paras 229, 231.

³⁹ Immanuel Kant, *The Metaphysics of Morals* 6:267 (Mary Gregor Ed., 1996); see also Kant's *Perpetual Peace*, Third Article (referring to the "common right to the face of the earth, which belongs to human beings generally"). Hugo Grotius in his book *De Jure Praedae* (1604-1605) p. 218 states that " In the existing state of affairs, it has come to pass, in accordance with the design of Divine Justice, that one nation supplies the needs of another, so that in this way what ever has been produced in any region is regarded as a product native to all regions." See Georg Cavallar, *The Rights of Strangers the Global Community and Political Justice since Vitoria* (2002).

interests.⁴⁰ This vision has informed the writing of prominent international lawyers who viewed “the State as a unit at the service of the human beings for whom it is responsible,”⁴¹ and thus “merely a part, a branch of humanity [which as such] must recognize in the legal community of states as the political unity of humanity a higher power than itself.”⁴² Humanity therefore exercises its eminent domain authority not only over shared resources but also over the state’s internal resources and thereby affirms the transformation of sovereignty as a social function of the global community of peoples.⁴³

This rationale is supported by the contemporary vision of human rights. The Universal Declaration of Human Rights of 1948 does not assign responsibilities, only rights. It mentions those who deserve to be protected – all humans – but there is no assignment of the obligations to ensure those rights. The only meaningful inference from this silence is that the Universal Declaration assigns responsibilities collectively on all states. The states in turn have allocated these responsibilities among them (in the various human rights treaties), assigning to each responsibility over the area under its jurisdiction. But this is a secondary allocation – an allocation among the trustees who are collectively required to protect everyone’s rights.⁴⁴

Finally, the lack of public space that would accommodate those who wish to or must exit their countries (noted earlier) obviously also carries a human rights dimension. Indeed, to be fully effective, the right of exit of individuals from their

⁴⁰ Mathias Risse, *Common Ownership of the Earth as a Non-Parochial Standpoint: A Contingent Derivation of Human Rights*, 17 *European Journal of Philosophy* 277 (2008); *id.*, *The Grounds of Justice* (book in progress, 2010) (available at <http://ksghome.harvard.edu/~mrisse/GoJ.htm>); David Miller, *National Responsibility and Global Justice* 217 (2008), James Griffin, *On Human Rights*, 31 (2009).

⁴¹ Christian Tomuschat, *International Law: Ensuring the Survival of mankind on the eve of a New Century* 1999 (281) *Recueil des Cours*, (2001), at 95. *See also* Christian Tomuschat, *Obligations Arising for States Without or Against their Will*, 1993 IV (241) *Recueil des Cours* 195 (1994); Bruno Simma, *From Bilateralism to Community Interest in International Law* 1994 VI (250) *Recueil des Cours* 217, (1997); Georges Scelle *Précis de droit des gens – principes et systématique*, 42 (1934) (the international society is composed of individuals). For a general discussion of the particularist and universalist approaches to international law, *see* Armin von Bogdandy and Sergio Dellavalle, *Universalism and Particularism as Paradigms of International Law* (IILJ Working Paper 2008/3 <http://www.iilj.org/>).

⁴² C. Kaltenbronn von Stachau, *Kritik des Völkerrechts* (1847) 260-61 (in Jochen von Bernstorff, *The Public International Law Theory of Hans Kelsen* 19 (2010)). This is the monist view, carefully explored by Hans Kelsen, *Pure Theory of Law* 214-215, 333-347 (trans. Max Knight, 1967). *See also* Hans Kelsen, *General Theory of Law and State* (Anders Wedberg trans. 1949) p. 383-388; *id.*, *Principles of International Law* (1952) p. 440-447. *See* Jochen von Bernstorff, *The Public International Law Theory of Hans Kelsen* (2010).

⁴³ René-Jean Dupuy, *La Communauté internationale entre le mythe et l’histoire* 169-170 (1986).

⁴⁴ Charles Beitz, *The Idea of Human Rights* (2009) suggests a schema that identifies human rights as interests sufficiently important to be protected by the state, and that when states fail to provide the protection, the failure would be a suitable object of international concern (p. 137). This is a two-level model of human rights (108).

countries must include also a right of at least temporary entrance, namely a duty owed by sovereigns toward foreigners.⁴⁵

(d) Sovereignty and the Right to Democracy

The third theoretical basis for imposing other-regarding obligations on sovereigns is based on the democratic right of individuals to take part in decisions that shape their life opportunities. The effectiveness of this right is significantly undermined under contemporary conditions. There are a number of reasons for the impoverishment of the traditional rights of democratic participation. Firstly, the well-known inherent failures of domestic democratic processes – the muted voice of the ‘discrete and insular minorities’ and the special domestic interest groups that capture government – are exacerbated by the continuous lowering of the technical and legal barriers to the free movement of people, goods, services and capital across territorial boundaries. Those who benefit from the availability of this virtual or actual ‘exit’ option gain more voice in the democratic process of their countries of citizenship, at the expense of those who have limited opportunities to move.⁴⁶

The second type of challenge is more fundamental. It stems from the same difficulty that we encountered with the contemporary notion of sovereignty: the lack of match between the group that has the right to vote and the other group that is affected by the decisions made by or on behalf of the first group. The basic assumption of state democracy – that overlap exists between the two types of stakeholders – was perhaps correct in earlier times, when the territorial boundaries defined not only the persons entitled to vote but also the limits of governmental decisions’ impact. Today, policies formed by one government affect foreign stakeholders on a regular basis without their having the right of vote for that government. This leads scholars to acknowledge that the “geography-based constituency definition introduces an arbitrary criterion of inclusion/exclusion right at the start.”⁴⁷

Thirdly, the space for discretion that many sovereigns (and hence voters) are left with is further restricted by policymaking at the global level.⁴⁸ A few powerful states set up such policy venues – be they formal bodies or informal ones – not only to

⁴⁵ Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (2004)

⁴⁶ Eyal Benvenisti *Exit and Voice in the Age of Globalization* 98 Mich. L. Rev. 167 (1999).

⁴⁷ Nadia Urbinati and Mark E. Warren, *The Concept of Representation in Contemporary Democratic Theory* 11 Annu. Rev. Polit. Sci. 387 (2008); Jean L. Cohen *Constitutionalism beyond the State: Myth or Necessity? (A Pluralist Approach)* 1 Humanity (2011).

⁴⁸ Kingsbury, *supra* note 2.

coordinate the interaction among themselves but also to compel weaker states to change their behaviour.⁴⁹

Finally, the growing dependence on foreign capital inflow and on the demands of foreign markets increase the political leverage that foreign private actors enjoy. Some foreign actors use their economic leverage to support local candidates or influence domestic public opinions, and thereby overcome their lack of voting power, a phenomenon that in itself exacerbates the democratic difficulties and also skews policies further against the interests of diffuse and unrepresented stakeholders.⁵⁰ Other actors, such as retail associations and NGOs, do not attempt to shape public policies directly, but the standards that they adopt force producers in foreign countries to adapt. In practical terms, a foreign supermarket chain may be more effective in setting food safety standards in a foreign country than the local government.⁵¹

The weakness of territorially-based electoral democracy should not immediately mean that they be replaced by wider circles of electorates.⁵² Rather, territorially-based democracy could be supplanted with other forms of participation, including regional and international bodies that would monitor sovereigns and have the authority to demand that the sovereigns take the interests of non-territorial constituencies into account.⁵³ The right to participate in public decisions affecting one's life that forms the basis for democracy must now manifest itself through access to national arenas of policy making and through the right to demand that the sovereign consider and internalize the interests of foreigners.

⁴⁹ See *Eyal Benvenisti and George W. Downs, The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 *Stan. L. Rev.* 595 (2007).

⁵⁰ On the influences of foreign lobbies see David Schneiderman, *Investing in Democracy? Political Process and International Investment Law*, 60 *University of Toronto Law Journal* 909, 931-940 (2010) (presenting and assessing evidence that foreign corporate actors are as effective as nationally-based corporate actors and hence do not need special judicial protection).

⁵¹ Jan Wouters, Axel Marx, Nicholas Hachez, *Private Standards, Global Governance and International Trade: The Case of Global Food Safety Governance* (working paper, 2011); Fabrizio Cafaggi, *New Foundations of Transnational Private Regulation*, European University Institute, EUI Working Paper RSCAS 2010/53 (2010); *id.*, *Private regulation, supply chain and contractual networks: The case of food safety*, European University Institute, EUI Working Paper RSCAS 2010/10 (2010).

⁵² On possible modalities to extend suffrage for aliens, see Cristina M. Rodríguez, *Noncitizen voting and the extraconstitutional construction of the polity* 8 *ICON* 30 (2010).

⁵³ on the need for new modalities for democratic deliberation see, *e.g.*, James Bohman, *Democracy across Borders: From Dêmos to Dêmoi* (2007); Miguel Poiares Maduro, *Passion and Reason in European Integration* (2010). (<http://ssrn.com/abstract=1709950>) (on the EU as democracy-enhancing institution), Robert O. Keohane, Stephen Macedo & Andrew Moravcsik, *Democracy-Enhancing Multilateralism* 16-33 (IIJ working paper No. 4, 2007), Kal Raustiala, *Rethinking the Sovereignty Debate in International Economic Law* 6 *Intl J. Econ. Law* 841 (2003).

III. Implications

(a) A Range of Potential Obligations of Other-Regarding Sovereigns

Each of the different grounds for arguing for the other-regarding obligations of sovereigns can serve as the basis for recasting sovereigns as public actors that are accountable to foreign stakeholders and are bound to promote global welfare equitably and sustainably. There are, however, significant difficulties with the implementation of such a vision. None of those theories suggests that all sovereigns must invest the same resources as other sovereigns, or promote the interests of foreigners like those of their own citizens, just like the recognition of duties that property owners have toward others does not spell the end of capitalism. Trustee sovereignty does not amount to cosmopolitanism, and sovereigns are not expected to give foreigners the same access to their resources and democratic processes as to their citizens, as this would amount to the dismantling of democracy at the national level and destroy the incentives of domestic communities to invest in promoting their communal goods.⁵⁴

There is a wide spectrum of possibilities to implement the sovereigns' other-regarding obligations. These include *procedural obligations* that range from the simple obligation to give reasons for the action; the duty to inquire into the potential impact of policies on foreigners; the obligation to add procedural guarantees to ensure that foreigners' interests are indeed taken into account, including the obligation to invest resources to ensure a more transparent decision-making process; through the obligation to subject such procedural guarantees to international monitoring and review.

Other-regarding obligations also include several *normative obligations* ranging from the obligation simply to 'note' foreigners' interests, and to accommodate them only if this would not entail adverse impact on domestic interests; the obligation to give 'some' weight to foreigners' interests in the balancing process; the identification of certain considerations as irrelevant or insufficient;⁵⁵ the obligation to inquire whether a given measure was necessary, or even narrowly tailored to achieve

⁵⁴ See, e.g., David Miller, *National Responsibility and Global Justice*, 224 (2008) (positing that each political community should be able to determine the balance it wishes to strike between economic growth and environmental values).

⁵⁵ For example, already in 1892 the *Institut de Droit international's* resolution on international principles concerning the admission and expulsion of foreigners (*Règles internationales sur l'admission et l'expulsion des étrangers*, Session Geneva 1892) stipulated that the protection of the domestic labor market is not a sufficient reason for non-admission (Article 7: "*La protection du travail national n'est pas, à elle seule, un motif suffisant de non-admission.*")

a legitimate goal; through finally subjecting the selected policy to the rigorous proportionality analysis, which questions the appropriateness of even the narrowly tailored measure (proportionality in the narrow sense). A fully developed set of normative criteria for weighing the other-regarding obligations of a sovereign will have to address the different issues at stake: for example, the different weights assigned to policies aimed at saving lives and those seeking economic development, and between the different spheres of impact that sovereigns have (over citizens, over foreigners just outside the borders, over other foreigners in neighboring countries, etc.) that can be translated to decreasing levels of responsibility. Factors such as relative power, responsibility towards foreign stakeholders due to past acts (as a former colonial power, an occupier) or omissions (e.g. the failure to control exploitation by nationally registered companies) should also be taken into account. Obviously, burden-sharing among different sovereigns is an important facet of the normative assessment of responsibilities.

Finally, the diverse *institutional* possibilities that are available can raise the stakes even higher for sovereigns who may be expected to delegate parts or all of their sovereign discretion to third parties. The normative grounding of an obligation to take others' interests into account is therefore only the first step in the inquiry into the other-regarding obligations of sovereigns. What needs to be considered further is the scope and depth of such obligations and the modalities for deliberating and deciding upon their actual implementation. There are several possible propositions for giving effect to the obligation to regard others' interests.

The choice among the different procedural, normative and institutional obligations and their possible permutation depend on a host of considerations. The assessment of the appropriate choices must take into account three different but related sets of considerations. The normative one must be informed by the relative value one thinks is due to national vs. cosmopolitan interests. The institutional consideration must examine the potential venues for actually effectuating these tests. More fundamentally, a system that imposes other-regarding obligations on sovereigns must not compromise the rights and interests of these sovereigns and their citizens. The analogy to property owners is pertinent here too: a system of taxation is just only if it is imposed under strict conditions that take the owners' interests and rights into account and ensures equal treatment for all stakeholders. A system that subjects sovereign discretion to external scrutiny must ensure some

minimal guarantees. For example: institutions must be accountable to all those affected (either positively or negatively) by their intervention; they must provide opportunities for effective participation in shaping the policies adopted by the institutions; and the institutional policies must be equally and effectively implemented.⁵⁶

This is not to suggest that such institutions are beyond human imagination. In fact, they exist in federal systems that seek to ensure that states and provinces internalize out-of-state interests.⁵⁷ They also exist in the European Union,⁵⁸ and

⁵⁶ See Thomas Nagel's famous objection to the application and implementation of standards of justice at the global level: "Current international rules and institutions [...] lack something that according to the political conception is crucial for the application and implementation of standards of justice: They are not collectively enacted and coercively imposed in the name of all the individuals whose lives they affect; and they do not ask for the kind of authorization by individuals that carries with it a responsibility to treat all those individuals in some sense equally." Thomas Nagel, *The Problem of Global Justice*, 33 *Phil. & Pub. Aff.* 113 (2005). See also Henry Sidgwick, *The Elements of Politics* 299-300 (4th Ed., 1919); Jack L. Goldsmith, *Liberal Democracy and Cosmopolitan Duty*, 55 *Stan L Rev* 1667, 1673 (2003); Eric A. Posner, *International Law: A Welfarist Approach*, 73 *U. Chicago L. Rev.* 487 (2006), David Miller, *National Responsibility and Global Justice* 274-275 (2007). On the moral obligation to set up global institutions to regulate national regulators, see Simon Caney, *Justice Beyond Borders* (2008) Chapter 5.

⁵⁷ Federal courts in federal states in fact exercise a similar task by making sure that political sub-units like states and provinces do not undermine collective welfare or harm out-of-state stakeholders. In the US, federal courts have developed their capacity to ensure that competition between states does not detract from common welfare at the federal level, or that states do not disregard the interest of out-of-state residents. These interventions were based on the Dormant Commerce Clause, which stipulates that courts have the authority to monitor policy-making by states that disregarded the interests of out-of-state actors. If state regulation causes "an undue burden on interstate commerce" it can be struck down only if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits" *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) This so-called Pike test requires the court to review the validity of the state rule by balancing between its costs to interstate commerce and its benefits, and only when the benefits outweigh the costs will the regulation be regarded as consistent with the Dormant Commerce Clause. According to Laurence Tribe, the justification for this rigorous examination is not only to ensure economic efficiency through open inter-state commerce, but also to "ensure national solidarity" as the democratic processes within states tend to give precedence to local interests: Laurence Tribe, *American Constitutional Law* Third ed., 2000. Vol. 1, p. 1057 (ref. to *Baldwin v. G.A.F. Seelig Inc* 294 US 511, 522-23 (1935)). See also Tribe 1051-52. The rigorous tests adopted by the US Supreme Court with respect to the Dormant Commerce Clause reflects the court's implicit recognition that state lawmakers protect and promote the interests of their own constituents, inevitably at the expense of citizens of other states. In such cases, an external judicial examination is more conducive to promoting the general goal than deferring to the state institutions.

⁵⁸ Similarly, the European Court of Justice invoked the principle of the free movement of goods between member states as the "fundamental principle" from which it derived a similar burden on national regulation by EU members, under the proportionality test: ECJ *Dutch Vitamins Case* (2004), *Danish Beer*, etc. See Simona Morettini, *Community Principles Affecting the Exercise of Discretionary Power by National Authorities in the Service Sector* 106, 118 in *Global and European Constraints Upon National Right to Regulate: the Services Sector* (Stefano Battini, Giulio Vesperini Eds., 2008?) ("The level of intensity [of the proportionality analysis] varies [...] according to the public interest pursued by the national legislation. For example, in the cases of restrictions justified by the protection of domestic public health and safety, the review is less searching, insofar as these areas are closely related to national sovereignty and there is not always unanimity between the States as to the adequate level of protection. In the case of consumer protection, by contrast, the Community court is able to carry out a more penetrating review, insofar as this is an area of Community competence and there is agreement among the Member States as to the appropriate level of protection.")

under specific regimes in international law.⁵⁹ But the elaborate discussion on the minimal preconditions necessary to legitimize such modalities for external review of sovereigns' other-regarding considerations will have to await further elaboration. For the purposes of this essay, suffice it to underline the concept of trustee sovereignty by exploring the most basic demands that can be expected from the other-regarding sovereign. With respect to the host of potential modalities for promoting inter-sovereign cooperation, it will be adequate at this point to suggest that trustee sovereigns have the obligation to explore and develop the most effective supra-national institutions that could respond to the challenges to efficiency, equity and democracy that result from the system of sovereign states.⁶⁰

(b) Exploring the Minimal Normative Requirement: The Restricted Pareto Superiority Criterion

What should be the minimal expectations from a sovereign that is required to internalize the interests of humanity without undermining its responsibilities and obligations toward its own citizens, assuming there is no external system that ensures reciprocity among the sovereigns? The first to have raised and responded to this question was Christian Wolff, who was also the first to propose in 1749 the concept of other-regarding duties of sovereigns.⁶¹ He asked: "Who is judge as to whether one nation can do anything for another without neglect of its duty toward itself"? In his response, he elaborates on what he terms the "imperfect obligations" that the sovereign owes to its fellow sovereigns:

[S]ince ... every nation is free and by virtue of natural liberty it must be allowed to abide by its own judgement in determining its action, every nation must be allowed to stand by its judgement, as to whether

⁵⁹ See the observation made by the European Court of Human Rights with respect to the appropriate scrutiny of the court in matters relating to the taking of property belonging to non-nationals: "Especially as regards a taking of property effected in the context of a social reform, there may well be good grounds for drawing a distinction between nationals and non-nationals as far as compensation is concerned. To begin with, non-nationals are more vulnerable to domestic legislation: unlike nationals, they will generally have played no part in the election or designation of its authors nor have been consulted on its adoption." (James and others v. The United Kingdom (*Application no. 8793/79*) (1986), paragraph 63 *available at*

<http://cmiskp.echr.coe.int/tpk197/viewhbk.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=13922&sessionId=56031483&skin=hudoc-en&attachment=true>). Arbitrators of investment disputes invoked the normative requirement of protecting expectations of investors as the key to their scrutiny of national decisions.

⁶⁰ Compare Kis, *supra* note 11 at 121.

⁶¹ 2 Christian Wolff, *Jus Gentium Methodo Scientifica Pertractatum* (1749) 84-95 (Joseph H. Drake trans., 1934).

it can do anything for another without neglect of its duty toward itself; consequently if that which is sought is refused, it must be endured, and the right of nations to those things which other nations owe them by nature, is an imperfect right.⁶²

Wolff even suggests that the sovereign “is not bound to give to other nations the reason for this decision, consequently they must simply abide by its will.”⁶³

This position might have been apt for the emerging global order in 18th century Europe, and certainly reflected the prevailing expectations of and from sovereigns. But this position is less than convincing under contemporary circumstances of interdependency, resources scarcity, and democratic deficiency even at the national level.⁶⁴ In its place, this Section will develop a restricted version of the Pareto superiority principle as setting the minimal obligations of the other-regarding sovereign.

The restricted Pareto superiority criterion: A Pareto superior outcome is one in which at least one of the parties is better off relative to an alternative outcome, while the other parties are not made worse off. Reaching Pareto superior outcomes is a quest whose days are as old as international law itself. In his first treatise, Hugo Grotius referred to this principle to justify his proposed regime of freedom of navigation on the high seas.⁶⁵ He referred to it as “the law of human society” when he stated:

If any person should prevent any other person from taking fire from his fire or light from his torch, I should accuse him of violating the law of human society, because that is the essence of its very nature [...] why then, when it can be done without any prejudice to his own interests, will not one person

⁶² *Id.*, *Para. 157*. Wolff continues with the example: “So when there is a scarcity of crops the nation which has an abundance of grain ought to sell grain to the other, which needs it. But if indeed it is to be feared that, if grain should be sold, it would suffer the same disaster, it is not bound to allow that the other procure grain for itself from its territory. But the decision as to whether it can be sold without risk, is to be left to that nation from which the other wishes to provide grain for itself, and the latter ought to abide by this decision.”

⁶³ *Id.*, . 99: § 188.-*Who decides whether commerce is possible*

⁶⁴ On the changing nature of obligations due to the changing demands on global resources, see already René-Jean Dupuy, *supra* note 43, *id* (“Evolution logique en un temps où la surpopulation et la menace de pénurie exigent la conservation de tous les biens de cette terre.”).

⁶⁵ *Mare liberum*, 1609 (Hugo Grotius, *The Freedom of the Seas* (Ralph von Deman Magoffin trans., James Brown Scott ed., Oxford Univ. Press 1916).

share with another things which are useful to the recipient, and no loss to the giver?⁶⁶

Any legal system that perceives itself as reflecting a common enterprise of a “human society” must endorse *at least a restricted* Pareto superiority criterion as a principle that regulates the interaction between the members of the group. As Hanoch Dagan has observed, whether a legal system adopts this principle or not depends on the underlying self-commitment of the relevant society to long-term cooperation.⁶⁷

German constitutional law, which reflects the idea of “a democratic and *social* federal state,” (my emphasis)⁶⁸ stipulates that “ownership obliges. Its use shall also serve the public good.”⁶⁹ Jewish law, another example, requires individual owners to weigh other-regarding interests. It might even force them to act accordingly.⁷⁰ Jewish law eschews the arms-length attitude of “what’s mine is mine and what’s yours is yours,” which is frowned upon as “the manner of Sodom.”⁷¹ The sense of collective responsibility yields the obligation to act according to the principle known as “one benefits and the other sustains no loss.” This principle is a restricted version of Pareto efficiency, because it limits itself to situations where the one who “sustains no loss” does not sustain any *direct* loss (as opposed to situations where the owner is compensated through side payments for the direct loss and thereby is put back in situation of no loss). In this stricter version, side payments to compensate for the loss are not an option.

All three justifications for the trustee sovereignty concept support the restricted Pareto criterion as a minimal obligation. This principle nudges states to promote efficient use of resources and thereby reduces the adverse effects of the excluding power that sovereignty entails (ground 1, the power of ownership). It pays tribute to the human equality and collective commitment to human flourishing (ground 2, humanity); and it at least minimally corrects the democratic deficit from the perspective of outsiders (ground 3, democracy): had they participated, in most likelihood they would have prevailed on the others to extend to them the benefit

⁶⁶ *Id.*, at 30.

⁶⁷ Hanoch Dagan, *Unjust Enrichment: A Study of Private Law and Public Values* (1997).

⁶⁸ Basic Law, Article 20(1).

⁶⁹ *See supra* note 21 (check: Rudolf Dolzer, *Property and Environment: The Social Obligation Inherent in Ownership* (1976)).

⁷⁰ Dagan, *id.*, 112-120; Aaron Kirschenbaum *Equity in Jewish law* 185-197 (1991).

⁷¹ Kirschenbaum, *supra* note 70, at 188-191.

from which they (the current insiders) do not lose. By imposing the minimal obligation, the community values and preferences of the insiders are not compromised.

Applied to other-regarding sovereigns, the restricted Pareto principle in which “one benefits and the other sustains no loss” is a more limited imposition on sovereignty than the regular Pareto superiority criterion because it entails less intrusion on sovereigns’ discretion regarding their use of their resources. To legitimize a stronger demand from sovereigns to modify their choices and be compensated would require, first, a theory of global justice that expects sovereigns to accept tradeoffs and even to contribute to others. Second, it would depend on a sufficiently robust institutional infrastructure with reliable mechanisms that sovereigns could trust. While it is not impossible to envisage such normative arguments and institutional mechanisms, my attempt here is to focus on the minimal version of sovereigns’ other-regarding obligations before delving into the further considerations. Hence my choice of a “restricted Pareto criterion” that stipulates that the minimal other-regarding normative obligation incumbent on all sovereigns is the obligation that they accept others’ interests when the sovereigns “sustain no loss.”

But is this principle redundant in the global context? Why would a rational sovereign not refuse to allow others to benefit while it suffers no loss? To answer this question we should go back to *Mare liberum* in 1609. Why should Portugal not continue to own the sea routes to the east? The Dutch East India Company could have paid Portugal for the right to use them, and assuming that Portugal acted rationally, it would have sold foreign companies rights of access to the sea routes to the Far east (as Spain would do with the sea routes to the West of Europe). The reason for ‘expropriating’ Portugal’s sovereignty over the high seas was probably based on two cost-benefit considerations. First, no benefit accrues from unilateral ownership of the high seas. No commons problems could emerge that would lead to the depletion of the resource and require the regulation of access and use. Second, the costs of unilateral governance by Portugal could, just like any other trade barrier, be detrimental to the efficient use of the sea for global trade: the fees paid to Portugal by foreigners and the unfair advantage enjoyed by Portuguese vessels would needlessly raise the global costs of trade.

The principle of restricted Pareto superiority is embedded in the international law on sovereignty even if it has not been explicitly acknowledged.⁷² We can trace the implicit influence of this principle on judgments related to the definition of sovereignty and to the obligations imposed on sovereigns. When it makes no economic sense to assign full sovereignty rights to one country, courts would redefine the relevant property as shared. Take, for example, the issue of freedom of navigation on international rivers. The judgment handed down by the Permanent Court of International Justice (PCIJ) in the *Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder*⁷³ provided an efficient solution by redefining the rights of sovereigns over an international river. This case involved a dispute concerning the scope of authority assigned in the Versailles Treaty to an international commission established to administer international navigation on the River Oder. Poland, the upstream state, refused to recognize the commission's jurisdiction over the tributaries of the river situated wholly within its territory. The PCIJ had to interpret the relevant treaty provision with little guidance from the text or from state practice. The Court opted for the efficient outcome, invoking the desire to allow international access to all navigable parts of the river, explaining that such an outcome was mandated by "the requirements of justice and the considerations of utility."⁷⁴ Most probably, the judges were concerned with the possibility that riparians would be tempted to impose exorbitant costs on other riparians or on third parties – costs that would operate like barriers to trade. This decision has since been resorted to, without any hesitation, as proof of the existence of a duty to allow free navigation on international watercourses,⁷⁵ and even as a basis for the rather radical assertion that international rivers are shared resources (a concept vehemently opposed by states until very recently).⁷⁶

The restricted Pareto superiority criterion was probably also an influential consideration in resolving the dispute concerning *Lac Lanoux*.⁷⁷ This was a case where France benefited from its diversion of a river shared with Spain, while Spain

⁷² Eyal Benvenisti, Customary International Law as a Judicial Tool for Promoting Efficiency, in *The Impact of International Law on International Cooperation* (Eyal Benvenisti & Moshe Hirsch Eds., 2004) p. 85.

⁷³ PCIJ, Ser. A, No. 23 (1929).

⁷⁴ *Supra* note 73, at 27.

⁷⁵ Lucius Caflisch, *Regles generales du droit des cours d'eau internationaux*, 219 RECUEIL DES COURS 9, 32-33, 109-110 (1989-VII).

⁷⁶ The see *Gabcikovo-Nagymaros Project (Hungary/Slovakia) Judgment*, ICJ Reports 7 (1997); 37 ILM 167 (1998), at p 54.

⁷⁷ *Lake Lanoux Arbitration*, 24 I.L.R. 101 (1957).

sustained no loss because it continued to receive the same quantity and quality of water albeit from a different river. Spain insisted that under its treaty with France it had the right to approve any changes, however slight, that France would want to introduce to the flow of a shared river before it entered Spanish territory. The relevant treaty that defined the parties' respective rights imposed a reservation on the principle of territorial sovereignty ("except for the modifications agreed upon between the two Governments") upon which Spain based its claim for a right of veto.⁷⁸ Spain perhaps hoped that its refusal would lead France to offer her a larger share of water or part of the electricity generated by the hydro-electrical project that used the diverted water from Lake Lanoux.⁷⁹ The tribunal rejected Spain's claim. In doing so, the tribunal did refer to "international practice" and to customary international law,⁸⁰ yet it did not provide any example of such practice to support its findings. Instead, it emphasized the inefficiency of Spain's assertion of what the tribunal regarded as "a 'right of veto', which at the discretion of one State paralyses the exercise of territorial jurisdiction of another."⁸¹ Although its doctrinal foundations are supported more by logic than by precedents, the *Lac Lanoux* decision is hailed as an important milestone in the development of international freshwater law.⁸²

The restricted Pareto superiority criterion was no doubt also a guiding principle in the 2009 case concerning the dispute over the uses of the San Juan River in an area subject to Nicaragua's sovereignty.⁸³ A treaty from 1858 between the two countries granted Costa Rica the right of navigation for the purposes of commerce in that part of the river. ICJ had to interpret whether the term "commerce," included also the transport of tourists. The court rejected the claim that provisions restricting sovereignty should be interpreted narrowly,⁸⁴ and opted for the more

⁷⁸ IJR p. 120.

⁷⁹ Although the Spanish delegation to the negotiations explicitly denied such aims (French memorial, cited in p. 141).

⁸⁰ See, for example, Patricia W. Birnie & Allan E. Boyle, *International Law and the Environment* (1992).

⁸¹ *Id.* at 128.

⁸² Phillippe Sands, *Principle of International Environmental Law 348-349* (1995); Birnie & Boyle, *supra* note 80, at 102-03.

⁸³ Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua) 2009 ICJ Rep.

⁸⁴ *Id.*, at para. 48: "the Court is not convinced by Nicaragua's argument that Costa Rica's right of free navigation should be interpreted narrowly because it represents a limitation of the sovereignty over the river. [...] While it is certainly true that limitations of the sovereignty of a State over its territory are not to be presumed, this does not mean that treaty provisions establishing such limitations, such as those that are in issue in the present case, should for this reason be interpreted *a priori* in a restrictive way."

comprehensive reading of the term, which reflect contemporary conditions.⁸⁵ But what about non-commercial navigation of the indigenous Costa Rican population that resides on the bank of the river? Here the court clearly resorts to the Pareto superior principle:

79. The Court is of the opinion that it cannot have been the intention of the authors of the 1858 Treaty to deprive the inhabitants of the Costa Rican bank of the river, where that bank constitutes the boundary between the two States, of the right to use the river to the extent necessary to meet their essential requirements, even for activities of a non-commercial nature, given the geography of the area. While choosing, in Article II of the Treaty, to fix the boundary on the river bank, the parties must be presumed, in view of the historical background to the conclusion of this Treaty and of the Treaty's object and purpose as defined by the Preamble and Article I, to have intended to preserve for the Costa Ricans living on that bank a minimal right of navigation for the purposes of continuing to live a normal life in the villages along the river. The Court considers that while such a right cannot be derived from the express language of Article VI, it can be inferred from the provisions of the Treaty as a whole and, in particular, the manner in which the boundary is fixed.

The ICJ also found, following the same logic, that the treaty allowed for "certain Costa Rican official vessels which in specific situations are used solely for the purpose of providing that population with what it needs in order to meet the necessities of daily life" (para. 84). Finally the Court, based on "the failure of Nicaragua to deny the existence of a right arising from the practice which had continued undisturbed and unquestioned over a very long period" concluded that Costa Rica had a customary right to subsistence fishing by the Costa Ricans living on the bank of the Nicaraguan river.⁸⁶ Nicaragua never argued that the Costa Rican uses of the river harmed its interests.

One can trace a similar concern with the principle of "one benefits and the other sustains no loss" in other cases related to the right of use of a foreign sovereign's territory. In such cases, the tribunals acknowledge the authority of the

⁸⁵ At para 71: "Accordingly, the Court finds that the right of free navigation in question applies to the transport of persons as well as the transport of goods, as the activity of transporting persons can be commercial in nature nowadays."

⁸⁶ Para 141.

sovereign to police the exercise of the right of passage and implicitly oblige the sovereign not to weigh irrelevant considerations, just as an administrative court would do.⁸⁷ In *Case concerning Right of Passage over Indian Territory (Merits)*⁸⁸ the ICJ examined India's refusal to allow passage by the Portuguese between enclaves they controlled on Indian territory and satisfied itself that India's refusal to allow passage was "covered by its power of regulation and control of the right of passage of Portugal," implicitly accepting that irrelevant considerations would not have justified such a restriction. In the Arbitration regarding The Iron Rhine ("Ijzeren Rijn") Railway,⁸⁹ the tribunal similarly sought to ensure that The Netherlands, which had granted Belgium the right of passage through its territory, confined its regulatory functions to measures required by environmental concerns.

Pareto Superiority compared with the "Abuse of Rights" Doctrine: Arguably, the Pareto superiority consideration may have informed at least partly the application of the general doctrine of abuse of rights in international law. This doctrine, as Hersch Lauterpacht noted, depends on the view that

rights are conferred by the community, and the community must see to it that the rights are not exercised in an anti-social manner. To deny this in regard to international law is to maintain that in the international sphere rights are faculties whose source lies not in the objective law created by the community, but in the will and the power of the State.⁹⁰

Lauterpacht lauded the doctrine as the way for international tribunals to respond to the lack of "legislative machinery adapting the law to changed conditions" by "the judicial creation of new torts" through this doctrine.⁹¹ He was aware of the dangerously open-ended scope of this doctrine,⁹² but his reliance on international tribunals to set the proper balance between state sovereignty and "unscrupulous appeals to legal rights endangering the peace of the community"⁹³ could not

⁸⁷ On the similarity between such analysis and administrative law adjudication see Taylor, *The Content of the Rule Against Abuse of Rights in International Law*, 46 *Brit Yb Int'l L* 323 (1972-73).

⁸⁸ *Judgment of 12 April 1960: I.C.J. Reports 1960*, p. 6, at 45.

⁸⁹ (Belgium v. The Netherlands) 2005.

⁹⁰ Hersch Lauterpacht, *The Function of Law in the International Community* 298 (1933).

⁹¹ *Id.*, at 287.

⁹² *Id.*, at 304.

⁹³ *Id.*, at 306.

convince governments to forward more disputes to judicial settlement.⁹⁴ In contrast, the restricted Pareto test is much more deferential to states in terms of its interference with sovereign discretion.

Application of the Restricted Pareto Analysis in Concrete Cases: As this essay limits itself to the minimal duties of sovereigns as trustees of humanity that can be expected from sovereigns even absent reciprocity or reliable third party adjudicators, each sovereign must determine what constitutes compliance with the restricted Pareto principle. Nevertheless, the sovereign “suffers no loss” when it weighs a number of other-regarding considerations in deciding on policies that might affect the interests of others⁹⁵ and when it publicly offers an account for its chosen policies. Among the pertinent other-regarding considerations would be the degree of risk (to others) and the availability of means of preventing it, as well as

the importance of the activity, taking into account its overall advantages of a social, economic and technical character for the State of origin in relation to the potential harm for the State likely to be affected, ... [t]he degree to which the State of origin and, as appropriate, the State likely to be affected are prepared to contribute to the costs of prevention, [t]he economic viability of the activity in relation to the costs of prevention and to the possibility of carrying out the activity elsewhere or by other means or replacing it with an alternative activity, [and t]he standards of prevention which the State likely to be affected applies to the same or comparable activities and the standards applied in comparable regional or international practice.”⁹⁶

This list of consideration is taken from the draft Articles on Prevention of Transboundary Harm from Hazardous Activities, but the conception of trustee

⁹⁴ For expansive readings of the doctrine, applying it to the reasonableness of the sovereign’s policies see Michael Byers, *Abuse of Rights: An Old Principle, A New Age* 47 McGill LJ. 389 (2002), G.D.S. Taylor, *The Content of the Rule Against Abuse of Rights in International Law*, 46 Brit. YB. Int’l L. 323 (1972-73).

⁹⁵ As draft article 9(3) of the *2001 draft Articles of the International Law Commission on Prevention of Transboundary Harm from Hazardous Activities (Yearbook of the International Law Commission, 2001, Vol. II, Part Two)* stipulates “If the consultations ... fail to produce an agreed solution, the State of origin shall nevertheless take into account the interests of the State likely to be affected in case it decides to authorize the activity to be pursued.”

⁹⁶ *Draft Article 10 (id.) Factors involved in an equitable balance of interests.*

sovereignty suggests that there is no reason to limit those considerations to a particular definition of “hazardous activities.”⁹⁷

The Potential Contribution of the Restricted Pareto Analysis to International Law: As demonstrated above, the restricted Pareto superiority criterion is not only a requirement incumbent upon sovereigns as trustees of humanity; it is already ingrained in several doctrines of international law that define sovereign rights and can also explain their evolution. Arguably, a general articulation of this principle grounded in the normative expectations from sovereigns as trustees of humanity can add support for invoking it and it can also inspire new specific obligations. Take, for example, Uruguay’s decision to build a large paper mill on the its bank of the Uruguay River, which created a huge aesthetic damage that created significant losses to the Argentinean tourist industry on the other bank of the shared river. While aesthetic harm is not yet a recognized tort in international law, the restricted Pareto criteria could have been used to recognize an obligation for Uruguay to at least consider situating that mill further down the course of the river, where it is not seen from the Argentinean side.⁹⁸

(c) The Beneficial Allocation of the “Pareto Surplus”

The Pareto superiority criterion is oblivious to the question of allocation – who benefits and who suffers no loss. Often, the answer to this question is obvious: the host states, like Nicaragua or India in the above examples, are the ones who suffered no loss. In certain instances, several or even all states are both beneficiaries and suffer no loss, as in the case of riparians to an international river (or the high seas). In other instances, the host state would be the one that benefits, as in the case of France’s use of the water of Lake Lanoux. The restricted Pareto superiority criterion is too crude to apportion the benefits between the relevant parties (for example, allocating to Spain a share of the benefit accrued from the hydro-electric plant built by France on the river). Such apportionments might be possible under shared

⁹⁷ Defined as activities “which involve a risk of causing significant transboundary harm through their physical consequences” while “[r]isk of causing significant transboundary harm” includes risks taking the form of a high probability of causing significant transboundary harm and a low probability of causing disastrous transboundary harm” (draft Articles 1 & 2).

⁹⁸ Cf. The Judgment of the ICJ in the case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay) (20 April 2010). It should be noted that the ICJ had jurisdiction only to inquire about conflict arising under a treaty that related to water pollution.

regimes that can obtain and assess relevant information and facilitate apportionment schemes.

A final note relates to a necessary qualification of the right of the benefiting party. Because the Pareto superiority consideration is derived from the obligation of the sovereign to humanity, the benefit accrued to the other or others should also – and perhaps with even greater force – be subjected to the obligation toward humanity. Hence, if we return to the example of Indonesia’s discovery of the new mutant virus, then while we can argue that, based on the “one benefits and the other sustains no loss” maxim, Indonesia must to share the information about the virus with states that produce vaccines; but by the same token, those states must make sure that the drugs they produce are accessible also to Indonesian citizens and in fact to all other citizens.

(d) Minimal Normative Obligations beyond Restricted Pareto Superiority

The minimal requirements of states as trustees of humanity may well extend beyond the general restricted Pareto superiority criterion. There are recognized instances where sovereigns are required to invest resources in the effort to protect humanity’s concerns. The obvious cases involve the prevention and repression of crimes against humanity and grave breaches of the laws of war.⁹⁹ Indeed, it is noteworthy that in the famous Eichmann judgment, the Israeli Supreme Court justified the assertion of universal jurisdiction to prosecute and adjudicate crimes against humanity on the role of individual states as “the ‘guardians of international law’ and its enforcers.”¹⁰⁰

Another type of more rigorous other-regarding obligations relates to the treatment of those individuals who seek refuge in foreign countries. States have assumed strict obligations concerning refugees¹⁰¹ and are also obliged under human

⁹⁹ The Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ (2007) paras. 396-407, W. Michael Reisman, Acting *Before Victims Become Victims: Preventing and Arresting Mass Murder*, 40 Case W. Res. J. Int’l L. 57 (2007-2008).

¹⁰⁰ Israel Supreme Court, *Eichmann v. Attorney General*, 16 Piskei Din, 2033, at p. 2066. The court relied (on p. 2064) on Morris Greenspan’s *The Modern Law of Land Warfare* 503 (1959) (“Since each sovereign power stands in the position of a guardian of international law, and is equally interested in upholding it, any State has the legal right to try war crimes, even though the crimes have been committed against the nationals of another power and in a conflict to which that State is not a party.”)

¹⁰¹ The 1951 Geneva Convention relating to the Status of Refugees.

rights treaties to protect other foreigners who may be subjected to maltreatment by foreign governments.¹⁰²

(e) Procedural Implications of the Restricted Pareto Superior Criterion

Pareto superiority might also explain and legitimize the procedural obligations that sovereigns should have toward foreigners. International law has long recognized an obligation to inform other (usually neighboring) countries about possible hazards and about planned measures, although such an obligation is currently recognized only with respect to activities expected to cause “significant harm” to others.¹⁰³ But a more general duty of accountability to foreign stakeholders can be easily derived from the restricted Pareto superiority criterion.

Granted, providing hearing to foreign stakeholders and complying with other “global administrative law” procedural requirements such as basing policies on scientific assessments or on international standards is not costless. It may well burden the decision-making processes. But this does not necessarily mean that providing notice, granting proper hearing to affected stakeholders and any potential other acts involved is detrimental for the planning state. As we know from the literature on administrative law, procedural rights entail significant benefits for the hearing agencies. Such procedural guarantees enable them to obtain a fuller view of the consequences of adopting the contemplated policies. Such procedures also limit the possibilities of capture by narrow interests.

So the sovereign would “suffer no loss” if it allows foreign stakeholders to participate effectively in the decision-making processes relevant to them and to give proper account for the policies it adopts. Even a third party review of the sovereign’s compliance with these minimal procedural obligations would not impose a loss on the

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¹⁰³ In the *Corfu Channel* case (*supra* note 3), the ICJ characterized the duty to warn as based on “elementary considerations of humanity” (p. 22). See, e.g., Convention on the Law of the Non-navigational Uses of International Watercourses 1997 Article 12 (“Notification concerning planned measures with possible adverse effects”): “Before a watercourse State implements or permits the implementation of planned measures which may have a significant adverse effect upon other watercourse States, it shall provide those States with timely notification thereof. Such notification shall be accompanied by available technical data and information, including the results of any environmental impact assessment, in order to enable the notified States to evaluate the possible effects of the planned measures.” See also 2001 draft Articles on Prevention of Transboundary Harm from Hazardous Activities, *supra* note 95, Article 8. (“Notification and information”: “1. If the assessment referred to in article 7 indicates a risk of causing significant transboundary harm, the State of origin shall provide the State likely to be affected with timely notification of the risk and the assessment and shall transmit to it the available technical and all other relevant information on which the assessment is based.”

sovereign. Under the minimalistic approach developed in this essay, the sovereign retains the ultimate discretion regarding compliance with its normative obligations. It suffers no loss, however, if it has nevertheless to comply with procedural obligations that are more onerous than it initially provided.

From this angle, it is possible to assess the efforts of sovereigns to evade international scrutiny of their policies in a slightly different light. Take, for example, the recent trend of coastal states to confiscate foreign vessels fishing in their Exclusive Economic Zones.¹⁰⁴ By the very act of confiscation, which in some countries takes place immediately at the moment of capturing the vessel, the sovereign act of transferring ownership to the coastal state operates to deny the title of the flag state. By doing so, they pull the rug from under the flag state's standing to commence litigation at the International Tribunal for the Law of the Sea and demand the prompt release of its vessel upon the depositing of reasonable bond.¹⁰⁵ Such a practice undermines the fine balance struck by UNCLOS between the rights of the coastal states and those of the flag states and foreign vessel owners. But UNCLOS itself does not address this matter. ITLOS judges disagree as to the proper response. Whereas some judges refused to accept the effect of the confiscation on the court's jurisdiction based on the theory that the confiscation does not enter into effect "until after the completion of national procedures that meet the standard of due process as developed in international law,"¹⁰⁶ others disagreed, suggesting that "[t]he specific nature of the [confiscation] procedure in no way allows the Tribunal to judge the actions of a coastal State in the exercise of its sovereign rights."¹⁰⁷ According to the approach developed in this essay, regardless of the specific UNCLOS provisions, a right of hearing is incumbent on the coastal states by virtue of their other-regarding obligations. The qualified sovereign right of the coastal states entails an obligation to humanity to manage the sea resources under its jurisdiction in an optimal and non-discriminatory way, namely

¹⁰⁴ Most coastal states have adopted provisions for the confiscation of vessels alleged to have engaged in illegal fishing (www.fao.org/docrep/v9982e/v9982e08.htm#table%20e:%20penalties%20for%20unauthorized%20foreign%20fishing). See Oyvind Molven, *The International Tribunal for the Law of the Sea and its Review of Domestic Authorities in the so-Called Prompt Release Cases* (2010, paper on file).

¹⁰⁵ Bernard Oxman, *The "Tomimaru" (Japan v. Russian Federation)* in 102 AJIL 316, 320 (2008).

¹⁰⁶ The "Juno Trader" Case (Saint Vincent and the Grenadines v. Guinea-Bissau), Prompt Release (ITLOS), separate opinion by judge Mensah and judge Wolfrum, para. 12 (available at: http://www.itlos.org/case_documents/2004/document_en_253.pdf). See also Judge Treves, Separate Opinion, *id.*, (http://www.itlos.org/case_documents/2004/document_en_255.docat) para. 6.

¹⁰⁷ See separate opinion of judge Ndiaye in paragraph 25 in the *Juno Trader* case, *id.*, Available at: http://www.itlos.org/case_documents/2004/document_en_256.pdf.

without erecting barriers to competitive markets for fishing. This latter consideration imposes on the coastal states certain obligations, including the duty to ensure fair trial to foreigners and to provide reasons for confiscating foreign vessels.

IV. Beyond the Minimal Requirements

The minimal obligations the trustee sovereigns explored here do not necessarily require sovereigns to accept the jurisdiction of third parties to pass judgment on their own assessment of their normative and procedural obligations under the restricted Pareto test. The sovereigns ultimately retain the final say. But they must, at the very least, be accountable to foreign stakeholders by providing them with effective opportunities to voice their concerns, and they must also explain their reasons for imposing burdens on the foreigner. This may be an “imperfect obligation” in Wolff’s terms, but it is a significant move toward internalizing the general concept of sovereigns as trustees of humanity.

There are several additional moves beyond the restricted Pareto criterion to more binding regimes under which sovereigns would be expected to accommodate foreigners’ interests by accepting compensation (the general Pareto test), or even regimes that require sovereigns to sacrifice certain resources by sharing them with others or that monitor and assess the sovereign’s discretion and can strike down as illegal policies that are regarded as improperly balancing domestic versus foreign interests. All of these steps require normative grounds for such demands, a reliable institutional infrastructure and other prerequisites discussed above. Exploring these conditions in theory and practice is beyond the scope of this specific Essay. But what is important to emphasize here is that the minimalist requirements of trustee sovereigns explored here do not necessarily reflect a thoroughly progressive move for international law. The minimalist requirements are actually timid relative to the freedom some global regulators and tribunals have taken in imposing on sovereigns other-regarding obligations. This Part will illustrate this observation.

International courts and tribunals and global regulatory bodies increasingly signal their willingness to challenge the solipsistic position of states and regard them as public bodies that are expected to promote collective interests. The growing reliance on global regulatory systems leads their members – judges and bureaucrats – to seize opportunities available to them and promote – albeit only intermittently – global

interests.¹⁰⁸ National regulators, and increasingly also national courts, participate in this process of negotiating the interface between the national and the global perspectives. National courts increasingly find themselves involved in regulating global policies in diverse areas such as migration, environment protection and counter-terrorism.¹⁰⁹ The move from ad-hoc dispute settlement by tribunals and courts to judicially-enforced global governance heralds therefore the potential rise of the concept of the trustee sovereign and increases its promise of effective implementation. Global governors hesitate to use this language, of course, because they do not have the explicit mandate from the “masters of the treaties”¹¹⁰ to do so. But they nevertheless give effect to such considerations even if they do not acknowledge this outright.

Scholars of private law will in no way be surprised to hear that national and international courts and tribunals and other decision-makers increasingly act as global regulators (even if they themselves are not fully aware of their newly-assumed role). In domestic law, the traditional tools to regulate externalities have been and still are property law and tort law. Both fields of law define private and public entitlements and protect against externalities. In both spheres, societies have assigned to courts an important role in regulating private conduct that affects private entitlements. When these courts undertake this regulatory role they do not only take into account the interest of the immediate litigants, but they also address the general interests of society. Through the agency of the court, the private dispute is “publicized” as the court’s judgments promote global welfare rather than the immediate interest of the litigants, either by design or by the very fact that inefficient outcomes would be

¹⁰⁸ There are different assessments of the relative success and durability of this function. See Benedict Kingsbury, *International Courts: Uneven Judicialization in Global Order* (forthcoming in Cambridge Companion to International Law) J Crawford and M. Koskeniemi Eds. <http://ssrn.com/abstract=1753015> (2010) (“there are large gulfs between contemporary political theorizing about global justice and what actually is done in most international tribunals.”); Yuval Shany, *No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary*, 20 EJIL 73, 81-81 (2009) (maintaining that international tribunals have assumed the functions of norm-advancement and regime maintenance),

¹⁰⁹ Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 Am. J. Int’l L. 241 (2008).

¹¹⁰ As was the reference for governments by the German Constitutional Court in the Lisbon Treaty judgment, para. 150 (June 30, 2009). The ICJ used the term “legislator” to refer to the parties negotiating UNCLOS (Fisheries Jurisdiction case, para. 53: “In the circumstances, the Court, as a court of law, cannot render judgment *sub specie legis ferendae*, or anticipate the law before the legislator has laid it down.”).

litigated over and over again.¹¹¹ In contrast, when parties instead agree to have an arbitrator settle their dispute, the latter is authorized to consider only the parties' interests. But the arbitrators may be tempted to seize the opportunity and take other considerations into account, and as more and more stable international fora are established, their opportunities to act like global regulators are increasing.

In recent years, several international decision-makers have had opportunities to limit sovereigns' discretion while balancing the sovereign's interests against those of foreign stakeholders. None has reached the level of the US Supreme Court vis-à-vis state laws, or even the ECJ vis-à-vis the EU members, whose jurisprudence imposed on states strict demands to take community interests strongly into account.¹¹² But several of them have in fact increased the demands on compliance with global interests when monitoring or adjudicating national policymaking for its compatibility with treaty obligations.

We cannot expect such global decision-makers to be very explicit about their right to undertake such inquiries. After all, the treaty language does not explicitly acknowledge such responsibilities, and general international law does not offer much additional strength to this approach. But there are certain judgments that can be explained most convincingly by being informed by the vision of global welfare. To realize the extent to which international adjudicators promote the vision of sovereigns as global trustees, it is necessary to read between the lines of their reasoning and to connect the dots created by the different judgments.

The outlook that adjudicators adopt when they settle disputes and make law is important for the purposes of our discussion. If adjudicators take into account only the perspectives of the litigants before them, they will reinforce the bilateral nature of the dispute and ignore systemic and global concerns. But adjudicators often, although not always and not even in most cases, take into account also systemic concerns, since they consider it their role to promote global interests. This latter role, if played consistently over time by the variety of international tribunals that have mushroomed

¹¹¹ See the continuing debate whether the common law is efficient: Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. Pa. L. Rev. 1697 (1996); Robert Cooter & Lewis Kornhauser, *Can Litigation Improve the Law Without the Help of Judges?*, 9 J. Legal Stud. 139, (1980); John C. Goodman, *An Economic Theory of the Evolution of the Common Law*, 7 J. Legal Stud. 393, (1978); George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. Legal Stud. 65 (1977); Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 J. Legal Stud. 51 (1977).

¹¹² See *infra*, #

in recent years, can meaningfully chip away the concept of Janus-faced sovereign and encourage a different one.

International tribunals have developed several doctrines and approaches that reflect their willingness and capability to act as global regulators that promote global interests.¹¹³ First, International tribunals are not shy to assert their self-perception of their role. Although they stop short of explicitly referring to themselves as global regulators, there are several expressions of commitment to a systemic vision of the law and to their role as guardians of the international legal system rather than resolvers of specific bilateral inter-state disputes.¹¹⁴ Informed by the vision of international law as a legal system, international tribunals have developed several doctrines that allowed them to expand international law beyond the intention of governments as expressed in the language of specific treaties.¹¹⁵ Whereas governments tend to prefer rules on treaty interpretation that look back to the historical intention of the negotiators, thereby maximizing governments' influence on the outcomes of the interpretation process,¹¹⁶ International tribunals have developed alternative interpretative approaches. The latter, including for example "evolutionary interpretation,"¹¹⁷ are inspired by systemic goals such as coherence and efficiency.¹¹⁸ Recourse to the imprecise doctrine of customary international law allows global regulators to assert globally binding norms and raise the costs of individual states that wish to be excluded from the newly declared custom. Collective concepts cannot be explained without an underlying premise that a global vision exists, and that it legitimately imposes restrictions on sovereigns. This includes concepts such as *jus*

¹¹³ See *Eyal Benvenisti and George W. Downs, The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 *Stanford Law Review* 595, # (2007).

¹¹⁴ This is done mainly in separate opinions appended to ICJ judgments.

¹¹⁵ *Hersch Lauterpacht, The Development of International Law by the International Court* (1958). Benvenisti, System

¹¹⁶ Vienna Convention of the Law of Treaties, art. 31(1) (emphasis on "the ordinary meaning to be given to the terms of the treaty in their context"); *id.* art. 32 (reference to the preparatory work of the treaty and the circumstances of its conclusion).

¹¹⁷ For this type of interpretation, see *Gabcikovo-Nagymaros Judgment*, *supra* note 76. On the WTO Appellate Body's preference for contemporary concerns over the historic intergovernmental agreements, see Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 *AM. J. INT'L L.* 247 (2004) (suggesting, for example, that, in its *Shrimp/Turtle* decision, the Appellate Body invoked "contemporary concerns of the community of nations about the protection and conservation of the environment" in its interpretation of the particular treaty by referring to "the secondary rank attributed to this criterion by the Vienna Convention, the lack of reliable records, and the ambiguities resulting from the presence of contradictory statements of the negotiating parties," despite the availability of records of the negotiations).

¹¹⁸ For coherence as a concern in interpretation, see the growing use of Article 31(3)(c) of the VCLT, for example, in the *Iron Rhine (Ijzeren Rijn) Railway (Belgium v. Netherlands)* (award of May 24, 2005), available at <http://www.pca-cpa.org/upload/files/BE-NL%20Award%20240505.pdf> (last visited #).

cogens obligations that may not be derogated from, *erga omnes* obligations that all states have standing to ensure respect with, and finally the concept of “the international community” and the obligations sovereigns owe “towards the international community as a whole,”¹¹⁹ including the obligation to take effective actions to end violations by other states.¹²⁰ These doctrines allow judges wide discretion to make new law while couching it in existing practices or fundamental norms.¹²¹

Second, International tribunals have developed a number of substantive norms that redefine their rights to the resources under their control. While global regulators do not have the mandate or the tools to affect global redistribution of assets and resources, they do have opportunities to participate in shaping and re-shaping property rights. When pursuing these opportunities they promote global interests. For example, by invoking customary international law, courts have the opportunity to correct global market failures that result from sovereigns’ unilateral action. Inventing customary international law is a tool to change existing inefficient Nash equilibria into more efficient ones.¹²² We saw several examples above, and there are numerous others. In the Trail Smelter case,¹²³ the tribunal found Canada in violation of a duty to prevent activities within its territory from causing injury in or to the territory of another state. Absent clear pronouncements of this principle by other international

¹¹⁹ Case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium V. Spain), 1962 at 32.

¹²⁰ Legal Consequences of the construction of a Wall in the Occupied Palestinian Territory, ICJ Advisory Opinion of 9 July, 2004, at para 159: “It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment [resulting from the violation – in that case the construction of the wall and thereby the violation of the exercise by the Palestinian people of its right to self-determination] is brought to an end.”

¹²¹ The self-perception of international tribunals as global regulators is apparent even in the work of investment tribunals, despite their ad-hoc-ish character. Despite the discrete nature of their activity, these ad-hoc panels of private arbitrators whose task is to interpret and apply bilateral obligations under bilateral treaties, they strive to converge on common principles and collectively develop a systemic vision of “investment law.” As recently stated in one arbitral award (among many), every panel must adopt a global vision: “The fact that any particular tribunal need not live with the challenge of applying its reasoning in the case before it to a host of different future disputes (the challenge faced by standing adjudicative bodies) does not mean such a tribunal can ignore that challenge. A case-specific mandate is not license to ignore systemic implications. To the contrary, it arguably makes it all the more important that each tribunal renders its case-specific decision with sensitivity to the position of future tribunals and an awareness of other systemic implications.” (Glamis Gold Ltd. V. United States of America, AWARD (NAFTA ch. 11 Arb.Trib, June 8, 2009) p. 2, para. 6).

¹²² A Nash equilibrium is defined as “a steady state of the play of a strategic game in which each player holds the correct expectation about the other players’ behavior and acts rationally.” MARTIN J. OSBORNE & ARIEL RUBINSTEIN, A COURSE IN GAME THEORY 14 (1994).

¹²³ The Trail Smelter Case (U.S. v. Canada), 3 UN Reports of Arbitral Awards, 1905, reprinted in Annual Digest of Public International Law Cases 315 (1938-40).

tribunals, the tribunal followed “by analogy” in the footsteps of three decisions handed down by the U.S. Supreme Court.¹²⁴ Although it did not rely explicitly on the efficiency argument, the tribunal did point to the saliency of this factor as part of its reasoning. It asserted that “great progress in the control of fumes has been made by science in the last few years and this progress should be taken into account.”¹²⁵ Despite meager evidence of state practice to support the decision, the norm prescribed was never questioned. It has since become a cornerstone of international environmental law.¹²⁶

One more illustrative example of redefining property rights by a global body can be found in the activities of the World Heritage Committee. The Convention Concerning the Protection of World Cultural and Natural Heritage (“World Heritage Convention”) of 1972 was established with the aim of assisting states to maintain sites located in their respective territories.¹²⁷ One of the World Heritage Committee’s more important powers is the maintenance of the World Heritage List of sites and its “In Danger” list. The Committee approves the sites submitted by member states to be listed and can also remove them altogether. Strikingly, while initially the idea behind the convention was to provide outside assistance to states who wished to protect their own cultural and natural sites, over time the rationale changed as the Committee started to review the national treatment of sites. The Operational Guidelines for the Implementation of the World Heritage Convention introduced two important innovations to enable this transformation: A system of “Reactive Monitoring” was introduced to allow treaty bodies (the Secretariat and the Advisory Bodies), and sources “other than the State Party concerned,” to advise the Committee regarding the state of conservation of specific properties “under threat.” Second, the Committee considers itself empowered to include a property on the “in Danger” list even without the consent of the interested State.¹²⁸ Despite the fact that the only threat the committee poses to states is shaming, it proved itself quite effective. The examples of

¹²⁴ *Id.* at 318.

¹²⁵ *Id.*, *id.*

¹²⁶ Phillippe Sands, *supra* note 82; Patricia W. Birnie & Allan E. Boyle, *supra* note 80.

¹²⁷ “establishing an effective system of collective protection of the cultural and natural heritage of outstanding universal value, organized on a permanent basis and in accordance with modern scientific methods.” preamble

¹²⁸ According to art. 184 of the Operational Guidelines, “the Committee is of the view that its assistance in certain cases may most effectively be limited to messages of its concern, including the message sent by inscription of a property on the List of World Heritage in Danger and that such assistance may be requested by any Committee member or the Secretariat”

state compliance with the committee's criticism include the 2006 protection of Lake Baikal in Russia (which cost Russia an additional billion dollars to re-route the East Siberia-Pacific Ocean oil pipeline) and intervention in mining at the Yellowstone Park area in the US.¹²⁹

The third set of rules developed by international tribunals relates to procedural requirements that national regulators must conform to as they exercise their discretionary power. Although state parties seek to retain their right to be the ultimate arbiter of the delicate balancing between national interests and commitment to collective goals such as free trade or environmental protection,¹³⁰ several international tribunals have intervened and subjected this discretion to an external assessment that gives weight, if not precedence, to global welfare considerations.¹³¹ As Alan Sykes observed, in the area of trade law “a serious tension indeed arises, and [...] the goals of open trade and respect for national sovereignty can be irreconcilably at odds to the point that one must give way.”¹³² Famously, in its Korea—Beef decision, the Appellate Body of the WTO elaborated on how the test of necessity required to justify restrictions on trade. While “[i]t is not open to doubt that Members of the WTO have the right to determine for themselves the level of enforcement of their WTO-consistent laws and regulations,”¹³³ it asserted,

the determination of ‘necessary’ . . . involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values

¹²⁹ See analysis by Stefano Battini, *Taking Local Decisions by Global Decision-Making Processes: the World Heritage Convention and the Procedural Side of Legal Globalization*, p. 27 available at <http://www.irpa.eu/public/File/npl/Battini.pdf>. [Yael's memo]

¹³⁰ Steven P. Croley and John H. Jackson, ‘WTO Dispute Procedures, Standard of Review and Deference to National Governments’, 90 AJIL 193 (1996).

¹³¹ Ingo Venzke, *Making General Exceptions: The Spell of Precedents in Developing Article XX GATT into Standards for Domestic Regulatory Policy* German Law Journal (2011); Robert Howse, *Adjudicative Legitimacy and Treaty Interpretation in International Trade Law*, in: *The EU, The WTO and The NAFTA: Towards a Common Law of International Trade?*, 35 (Joseph H. H. Weiler ed., 2000).

¹³² Alan O. Sykes, *Domestic Regulation, Sovereignty, and Scientific Evidence Requirements: A Pessimistic View*, 3 Chi.J. Int'l L. 353, 368 (2002). See also John H. Jackson, *World Trade and the Law of GATT* (1969) 788: “The perpetual puzzle . . . of international economic institution is ... to give measured scope of legitimate national policy goals while preventing the use of these goals to promote particular interests at the expense of the greater common welfare.”

¹³³ WTO Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (Korea – Beef), WT/DS/161/AB/R, adopted 11 December 2000, para. 176.

protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.¹³⁴

Reviews of the AB's decisions on this subject found that:

the regulatory value protected by the disputed measure weighs heavily in the AB's judgment. If the value at stake is high, e.g. human health and safety or protection of the environment, the AB tends to respect the Member's judgment and to consider necessary very strict enforcement aimed at zero risk, even if that means a very heavy burden on imports.¹³⁵

The jurisprudence of the International Tribunal for the Law of the Seas (ITLOS) demonstrates a similar inclination to introduce global interests. Markus Benzing noted that in the Southern Bluefin Tuna case (1999)¹³⁶ ITLOS raised environmental concerns of its own motion during the provisional measures decision.¹³⁷

The fourth and final strategy was to enhance the tribunal's own tools to obtain information and provide redress for violations. International tribunals can enhance their authority essentially by opening their doors to complaints by non-state actors who would initiate review, as well as by allowing NGOs and other third parties to provide information that is not controlled by state executives to the courts.

¹³⁴ Id at para 164

¹³⁵ Michael Ming Du, *Autonomy in Setting Appropriate Level of Protection under the WTO Law: Rhetoric or Reality?* 13 *Journal of International Economic Law*, 1077, 1100 (2010). See also Robert Howse and Elisabeth Tuerk, *The WTO Impact on Internal Regulations—A Case Study of the Canada–EC Asbestos Dispute in The EU and the WTO: Legal and Constitutional Issues*, 283, 315 (G. de Bu'rcá and J. Scott (eds), 2001) ("How far a member should be expected to go in exhausting all the regulatory alternatives to find the least trade-restrictive alternative is logically related to the kind of risk it is dealing with. Where what is at stake is a well-established risk to human life itself (as we will argue, this is exactly the case with asbestos), a member may be expected to act rapidly, rely on the scientific *acquis* to a large extent, tending towards the more obviously effective and enforceable kinds of regulatory tools, as opposed to the more sophisticated and speculative ones.") Michael M Du, *Standard of Review under the SPS Agreement after EC- Hormones II*, 59 *ICLQ* 441, 448 (2010) ("Although the AB explicitly rejected the *de novo* review as a proper standard to be applied by WTO panels, I concur with several other commentators who note that it is this standard of review which panels are close to applying under the SPS Agreement."); Gisele Kapterian, *A Critique of the WTO Jurisprudence on 'Necessity'* 159 *ICLQ* 89, 91 (2010) ("the meaning of necessity as interpreted by the adjudicating bodies has, until recently, demonstrated increasing divergence from the language of the treaty text, and needlessly curtailed the domestic regulatory freedom afforded to Members under the treaty. [...]the balancing test expands the jurisdiction of the adjudicating bodies, demonstrating a disconcerting dependence on their discretion for the survival of domestic regulatory choices. The jurisprudence reveals a strong tendency to judge the value of the policy goal using the adjudicating bodies' own value system and opaque reasoning on how the elements of the balancing test interact when applied to the particular circumstances of the case. Substantial cross-fertilization of the necessity tests appearing in different agreements has further promoted the creation of a GATT necessity test at odds with the language of the text.")

¹³⁶ Para 70.

¹³⁷ Markus Benzing *Community Interests in the Procedure of International Courts and Tribunals* 5 *Law & Prac. Int'l Cts & Tribunals* 369, 382 (2006).

Together, the existence of these four approaches and the demands they make on sovereigns demonstrate that international adjudicators can and often do depart from the intention of state executives, venturing to impose global interests on state parties. This goes significantly beyond the minimal requirements defended in this essay. The desirability and legitimacy of such judicial entrepreneurship, as well as the prospects of such judicial activism, require closer attention beyond the scope of this Essay.

V. Conclusion

In an era of intense interdependency between human communities around the globe, the Janus-faced vision of sovereigns creates three types of challenges: a challenge to the efficient and sustainable management of global resources, a challenge to equality with the non-egalitarian consequences of partisan action of sovereigns, and a challenge to democracy due to the diminishing opportunities for many individuals to participate in shaping the policies that affect their lives. This Essay sought to demonstrate the plausibility of the claim that sovereigns should be regarded as trustees of humanity and thereby be subjected to at least some minimal normative and procedural other-regarding obligations. The Essay explored the restricted Pareto superiority criterion not only as a requirement that should shape sovereigns' discretion but also as an obligation that arguably is already ingrained in several doctrines of international law that define sovereign rights. The trustee sovereignty concept can explain the evolution of these doctrines, and it can also inspire the rise of new specific obligations. Finally, the trustee sovereignty concept suggests that sovereigns have the obligation to explore and develop the most effective supra-national institutions that could respond to the challenges to efficiency, equity and democracy that result from the system of sovereign states.

It is not necessary to rely on third parties to reach a Pareto superior outcome that allocates the benefits between sovereigns equitably. The conflict between Indonesia, the drug producing countries and the WHO ended in a compromise that ensures the availability of drugs to citizens from developing countries.¹³⁸ Obviously, this is not yet a story with a happy ending, as implementation of the compromise agreement raises its own challenges. But the story at least highlights the promise of

¹³⁸ See the Pandemic Influenza Preparedness: Sharing of Influenza Viruses and Access to Vaccines and other Benefits (http://apps.who.int/gb/ebwha/pdf_files/WHA64/A64_57Draft-en.pdf) adopted by the World Health Organization' Assembly May 2011 (www.who.int/mediacentre/news/releases/2011/world_health_assembly_20110524/en/)

the vision that regards all sovereigns as trustees of humanity. If sovereigns agree to view themselves as such trustees, and to negotiate from this premise, they may well reach compromises that improve global welfare.

Global regulators have contributed to indirectly correct the consequences of the traditional doctrine that still regards sovereigns as Janus-faced. A theory of qualified sovereignty may further support such efforts. Moving beyond the minimal requirements of the trustee sovereignty concept must be based on an assessment of the opportunities and potential drawbacks that arise from the involvement of global regulators. Subsequent writings will address this necessary further examination.