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SOVEREIGNS AS TRUSTEES OF HUMANITY: ON THE ACCOUNTABILITY OF STATES TO FOREIGN STAKEHOLDERS

*By Eyal Benvenisti**

We live in a shrinking world where interdependence between countries and communities is increasing. These changes also affect—as they should—the concept of sovereignty. In past decades the predominant conception of sovereignty was akin to owning a large estate separated from other properties by rivers or deserts. By contrast, today’s reality is more analogous to owning a small apartment in one densely packed high-rise that is home to two hundred separate families. The sense of interdependency is heightened when we recognize the absence of any alternative to this shared home, of any exit from this global high-rise. The privilege of bygone days of opting out, of retreating into splendid isolation, of adopting mercantilist policies or erecting iron curtains is no longer realistically available.

In our global apartment building, several pressing questions have emerged concerning the neighbors’ entitlement to a voice in the decision-making processes of their fellows—in which they increasingly have a stake: To what extent should national regulators weigh other nations’ or foreign nationals’ interests when they make decisions that could affect them? To what extent should legislators and government agencies involve neighboring stakeholders in their decision-making processes? To what extent should states share with strangers their scarce national resources such as land, water, or rare minerals, or sacrifice the lives of their security forces, in order to alleviate the suffering of foreigners in need and, more generally, to contribute to global welfare? A further question is whether any of these obligations are legal ones—and, if so, what consequences they do or should entail. These fundamental questions arise in many, if not most, areas reserved for national policymaking, ranging from the regulation of markets, including trade, investments, and securities, through the management of natural resources, including matters relating to biodiversity and the protection of World Heritage sites, to human rights issues, including the obligation to respond to pandemics and the rights of refugees and asylum seekers. International organizations face similar questions when they decide on matters

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that could affect stakeholders in countries that are not members of the particular organization in question.

These new realities play out in an intellectual, political, and legal environment still rooted in the vision of state sovereignty as the ultimate source of authority. True, in many ways sovereignty is not what it was in the nineteenth century. Most notably, the sovereign-king has been “dethroned”¹ by the people, whose will is now “the basis of the authority of government.”² Increasingly, a sovereign’s right to rule (whatever form the sovereign may take) is regarded as conditioned upon its respect for its own people, for those “committed to [its] care”³ or found within its territorial borders;⁴ international law no longer regards the relationship between the state and its citizens as a purely domestic affair. Sovereignty itself has not been “dethroned,” however, and states continue to assert their freedom of action as the default rule. In most areas of international law, limitations on state sovereignty must still be grounded on the state’s prior consent. While the major actors are no longer kings and princes, the sovereigns’ assertion of authority is as strong as in the past because it is now typically rephrased in terms of self-determination: as the trustees of their people, they have fiduciary duties to them and only to them. Precisely because sovereignty inheres in the people, the primary responsibility of its agents is held to be that of protecting and promoting their citizens’ interests rather than that of heeding others’ concerns. By acknowledging general obligations toward strangers beyond their borders, national bodies might compromise their people’s exclusive right to define and pursue national goals and values, and might expose them to exploitation by other peoples’ free riding on their good faith contributions. Sovereigns are therefore unlikely to commit voluntarily to taking strangers’ concerns and global welfare seriously into account. Their answer to the preceding set of questions is brief: we are bound to take other-regarding interests into account only when and to the extent that we explicitly and formally commit to doing so; nothing more may be assumed.

Despite nominal references to the reality of interconnectedness and shared destinies, contemporary sovereigns still obstinately retain their commitment to only their own nationals. They may agree to a few specific commitments toward others, such as obligations under human rights treaties to refugees approaching their borders⁵ or to individuals situated in foreign areas under their effective control,⁶ or obligations not to obstruct the export of food, and even to

¹ W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AJIL 866, 868 (1990).

² Universal Declaration of Human Rights, Art. 21(3), GA Res. 217A (III) (Dec. 10, 1948) (“the will of the people shall be the basis of the authority of government”).

³ See Jeremy Waldron, *Are Sovereigns Entitled to the Benefit of the International Rule of Law?*, 22 EUR. J. INT’L L. 315, 325 (2011) (“states are recognized by [international law] as trustees for the people committed to their care”); see also Evan Fox-Decent & Evan J. Criddle, *The Fiduciary Constitution of Human Rights*, 15 LEGAL THEORY 301 (2009); Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT’L L. 331 (2009) (developing the concept of fiduciary relationship that exists between the state and persons subject to its powers, as the moral basis for recognizing human rights obligations).

⁴ Anne Peters, *Humanity as the A and Ω of Sovereignty*, 20 EUR. J. INT’L L. 513 (2009) (respect for human rights of those within its territorial borders is a condition for the state’s external sovereignty).

⁵ The *non refoulement* obligation under the Convention Relating to the Status of Refugees, July 28, 1951, 189 UNTS 137.

⁶ MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES 106–17 (2011); Samantha Besson, *The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To*, 25 LEIDEN J INT’L L. 857 (2012).

provide food, to countries in need.⁷ But they are typically reluctant to assume other obligations, such as the obligation under trade law to allow the export of raw materials,⁸ and they resist any general limitation on their discretion. Although the concepts of “sovereignty as responsibility” and “responsibility to protect” have been recognized by states,⁹ most states strongly resist the expansion of such responsibilities even to cases of natural disasters.¹⁰

Given this history, it may seem utopian to propose reinterpreting sovereignty and the “inherent” rights of peoples to self-determination as requiring states to assume certain underlying obligations toward strangers situated beyond national boundaries and also to take foreigners’ interests seriously into account even absent specific treaty obligations. Nevertheless, that is exactly what will be undertaken here. This article argues that such a reconceptualization of sovereignty is morally required and that, even if not explicitly acknowledged, this concept already manifests itself in certain doctrines of international law and in specific judicial decisions.

The solipsist vision of sovereignty as the ultimate source of authority has survived due to the perception of a perfect or almost perfect fit between the sovereign and the affected

⁷ See Food Aid Convention, Apr. 13, 1999, 2073 UNTS 135; Food Assistance Convention, Apr. 25, 2012. Both conventions are available at <http://www.foodaidconvention.org>. See also *infra* notes 110–11, 173–75, and accompanying text.

⁸ See Panel Report, China—Measures Related to the Exportation of Various Raw Materials, WT/DS394/R (adopted Feb. 22, 2012) (holding that by joining the WTO, China agreed to limit its sovereign rights over its natural resources and therefore could not restrict the export of certain raw materials). On the possibility that specific trade law obligations limit states’ discretion to restrict exports of minerals and raw materials in high global demand, see GU Bin, *Mineral Export Restraints and Sustainable Development—Are Rare Earths Testing the WTO’s Loopholes?*, 14 J. INT’L ECON. L. 765, 769–70 (2011).

⁹ On the responsibility to protect, see the report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (2001), at <http://responsibilitytoprotect.org> (“the concept of sovereignty as responsibility” now must extend to the responsibility of the state to protect its citizens.); In Larger Freedom: Toward Development, Security and Human Rights for All: Report of the Secretary-General, para. 135, UN Doc. A/59/2005 & annex (Mar. 21, 2005), at <http://www.un.org/largerfreedom/> (“[T]he responsibility to protect . . . lies, first and foremost, with each individual State, whose primary *raison d’être* and duty is to protect its population. But if national authorities are unable or unwilling to protect their citizens, then the responsibility shifts to the international community . . .”). Various grounds have been invoked for this principle, including *jus cogens* and *erga omnes* obligations, see Jutta Brunneé & Stephen J. Toope, *The Responsibility to Protect and the Use of Force: Building Legality?*, 2 GLOBAL RESP. TO PROTECT 191, 206–07 (2010), Hannah Yiu, “*Jus Cogens*,” *the Veto and the Responsibility to Protect: A New Perspective*, 7 N.Z. Y.B. INT’L L. 207, 232 (2009), human rights law, see Sheri P. Rosenberg, *Responsibility to Protect: A Framework for Prevention*, 1 GLOBAL RESP. TO PROTECT 442, 459 (2009), “the equation of sovereignty as governmental responsibility,” see Christopher Joyner, “*The Responsibility to Protect: Humanitarian Concern and the Lawfulness of Armed Intervention*,” 47 VA. J. INT’L L. 693, 706 (2006–07), Ramesh Thakur, *Iraq and the Responsibility to Protect*, 62 BEHIND THE HEADLINES 1, 8 (2004), and “simply on our common humanity,” see Gareth Evans, *The Responsibility to Protect: An Idea Whose Time Has Come . . . and Gone?*, 22 INT’L REL. 283, 296 (2008)).

¹⁰ As was demonstrated by the cold responses to the International Law Commission’s recent suggestions in this respect. See Eduardo Valencia-Ospina (Special Rapporteur), Fifth Report on the Protection of Persons in the Event of Disasters, paras. 16 (“Delegations endorsed the Commission’s view . . . that the concept of ‘responsibility to protect’ . . . applied only to four specific crimes: genocide, war crimes, ethnic cleansing and crimes against humanity.”), 28 (“[A] number of States opposed the idea that the affected State was placed under a legal obligation to seek external assistance in cases where a disaster exceeded its national response capacity. In their view, the imposition of such a duty constituted infringement of the sovereignty of States as well as of international cooperation and solidarity and had no basis in existing international law, customary law or State practice.”), UN Doc. A/CN.4/652 (Apr. 9, 2012), at http://untreaty.un.org/ilc/documentation/english/a_cn4_652.pdf; cf. Institut de droit international, *Resolution: Humanitarian Assistance*, para. III(3) (Sept. 2, 2003) (“Whenever the affected State is unable to provide sufficient humanitarian assistance to the victims placed under its jurisdiction or *de facto* control, it shall seek assistance from competent international organizations and/or from third States.”).

stakeholders—its citizens.¹¹ Such a vision made eminent sense when sovereigns ruled their discrete mansions. Because externalities were at the time relatively rare, the assumption of such a fit was regarded as the most effective way to overcome collective-action problems in the production of public goods, such as maintaining public order or ensuring food security and public health. Cross-border pollution and other interstate externalities were seen to be effectively handled at the inter-sovereign level and negotiated by emissaries and ambassadors (and, later, within international organizations). It was this perception of sovereign spheres as discrete and private—with each people entitled to self-determination—that shielded states from being required to internalize the rights and interests of noncitizens in their policymaking and that offered an ostensibly neutral conception of the state and its responsibilities that excluded “the other.”

But in our contemporary global condominium, the “technology” of global governance that operates through discrete sovereign entities no longer fits. What had previously been the solution to global collective action problems has now become part of the problem of global governance. Sovereigns regulate resources that are linked in many ways and on a daily basis with resources that belong to others. Some states regularly shape the life opportunities of persons in faraway states by their daily decisions on economic development, conservation, or health regulation, whereas the foreign citizens thereby affected are unable to participate meaningfully in shaping such measures either directly or by relying on their own governments to effectively protect them.

The reverse also occurs, as citizens may find their own governments subject to capture by affluent foreigners who intervene in domestic decision making. Moreover, the fragmented global space makes it difficult for disparate sovereign states to overcome their differences and to collectively resist powerful third parties, whether other states or business enterprises. As a result, these sovereigns lose their discretionary space and are driven into submission by “divide and rule” strategies exercised by more powerful global actors. The postcolonial promise of national self-determination remains for them partly, if not largely, unfulfilled.

The private, self-contained vision of state sovereignty is also challenged by the intensifying interdependency in relation to shared resources. States rely more on, and have greater influence regarding, the availability and quality of transboundary resources such as air, water, and fisheries.¹² But from a global perspective, even “their own” resources are not solely theirs. States are not founded on separate clouds floating past each other. Rather, “[b]y carving out a territorial jurisdiction for themselves, states withdraw part of the surface of the earth from free access to outsiders.”¹³

The problematic juxtaposition of pressing contemporary demands on an increasingly obsolete and inadequate nineteenth-century conception of sovereignty has led several moral and political philosophers, as well as legal scholars, to eschew statism in search of more contemporarily relevant *globalist* concepts and institutions—though in the process, often too quickly

¹¹ For such a functional justification of sovereignty, see HENRY SIDGWICK, *THE ELEMENTS OF POLITICS* 252 (4th ed. 1919) (“the main justification for the appropriation of territory to governments is that the prevention of mutual mischief among the human beings using it cannot otherwise be adequately secured”).

¹² EYAL BENVENISTI, *SHARING TRANSBOUNDARY RESOURCES* (2002).

¹³ János Kis, *The Unity of Mankind and the Plurality of States*, in *THE PARADOXES OF UNINTENDED CONSEQUENCES* 89, 89, 96 ([Ralf] Dahrendorf et al. eds., 2000). For discussion of this point, see *infra* notes 67–93 and accompanying text.

heralding the demise of sovereignty. These responses include the most ambitious suggestions for systemically reorganizing global institutions and even creating a world government,¹⁴ range through cosmopolitan perspectives on redistributing global resources based on visions of global justice,¹⁵ general “solidarity” obligations,¹⁶ global constitutional paradigms that assign limited authority to states,¹⁷ overarching international rule of law obligations¹⁸ or procedural duties that local and global decision makers owe to affected stakeholders,¹⁹ spatial extension of general human rights obligations,²⁰ and specific obligations to ensure economic and social rights beyond national boundaries,²¹ down to the most minimalistic and specific state obligations, such as the “responsibility to protect” against genocide or similar man-made calamities.²²

Each of these approaches has important merits but also limitations: global federalism or constitutionalism raises questions regarding the appropriate “architectural design” of political

¹⁴ E.g., DANIELE ARCHIBUGI, *THE GLOBAL COMMONWEALTH OF CITIZENS: TOWARD COSMOPOLITAN DEMOCRACY* (2008); Robert E. Goodin, *Enfranchising All Affected Interests, and Its Alternatives*, 35 PHIL. & PUB. AFF. 40 (2007). On possible modalities for extending suffrage to aliens, see Cristina M. Rodríguez, *Noncitizen Voting and the Extraconstitutional Construction of the Polity*, 8 INT’L J. CONST. L. 30 (2010).

¹⁵ Some of the leading books include CHARLES BEITZ, *THE IDEA OF HUMAN RIGHTS* (2009); DAVID MILLER, *NATIONAL RESPONSIBILITY AND GLOBAL JUSTICE* (2008); THOMAS POGGE, *WORLD POVERTY AND HUMAN RIGHTS: COSMOPOLITAN RESPONSIBILITIES AND REFORMS* (2d ed. 2008); ALLEN BUCHANAN, *JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATION FOR INTERNATIONAL LAW* (2004).

¹⁶ The mutual sense of “solidarity” that presumably unites all individuals and must guide states was developed by GEORGES SCELLE, 2 PRÉCIS DE DROIT DES GENS 1 (1934). On solidarity in international law and politics, see SOLIDARITY: A STRUCTURAL PRINCIPLE OF INTERNATIONAL LAW (Rüdiger Wolfrum & Chie Kojima eds., 2010); ANDREW HURRELL, ON GLOBAL ORDER: POWER, VALUES, AND THE CONSTITUTION OF INTERNATIONAL SOCIETY 65–67 (2007); Rüdiger Wolfrum, *Solidarity Amongst States: An Emerging Structural Principle of International Law*, in VÖLKERRECHT ALS WERTORDNUNG 1087 (Pierre-Marie Dupuy et al. eds., 2006).

¹⁷ Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: On the Relationship Between Constitutionalism in and Beyond the State*, in RULING THE WORLD: INTERNATIONAL LAW, GLOBAL GOVERNANCE, CONSTITUTIONALISM (Jeffrey Dunoff & Joel Trachtman eds., 2009). For refined conceptions of sovereignty, see, for example, Samantha Besson, *Sovereignty in Conflict*, 8 EUR. INTEGRATION ONLINE PAPERS (2004), available at <http://eiop.or.at/eiop/pdf/2004-015.pdf>; SOVEREIGNTY IN TRANSITION (Neil Walker ed., 2003).

¹⁸ Waldron, *supra* note 3; HELMUT AUST, *COMPLICITY AND THE LAW OF STATE RESPONSIBILITY* (2011) (see especially chapter 3 on “Complicity and the International Rule of Law”); Benedict Kingsbury, *International Law as Inter-public Law*, in NOMOS XLIX: MORAL UNIVERSALISM AND PLURALISM 167 (Henry R. Richardson & Melissa S. Williams eds., 2009); David Dyzenhaus, *The Rule of (Administrative) Law in International Law*, 68 LAW & CONTEMP. PROBS. 127 (2005).

¹⁹ On global administrative law, see Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROB. 15 (2005); on the focus on international public authority, see Armin von Bogdandy, Philipp Dann & Matthias Goldmann, *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities*, 9 GERMAN L. J. 1375 (2008); THE EXERCISE OF PUBLIC AUTHORITY BY INTERNATIONAL INSTITUTIONS: ADVANCING INTERNATIONAL INSTITUTIONAL LAW (Armin von Bogdandy, Rüdiger Wolfrum, Jochen von Bernstorff, Philipp Dann & Matthias Goldmann eds., 2010).

²⁰ MILANOVIC, *supra* note 6, at 106–17 (setting “universality” as the “baseline, which requires at least a rational justification for a wholesale denial of rights” by states).

²¹ See the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2011), at http://www.rtfn-watch.org/uploads/media/Maastricht_ETO_Principles_EN.pdf; MARGOT E. SALOMON, *GLOBAL RESPONSIBILITY FOR HUMAN RIGHTS: WORLD POVERTY AND THE DEVELOPMENT OF INTERNATIONAL LAW* (2007); see also *infra* notes 171–75 and accompanying text.

²² See *supra* note 9. The most obvious cases involve the prevention and suppression of crimes against humanity and grave breaches of the laws of war. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bos. & Herz. v. Serb. & Mont.), 2007 ICJ REP. 43, paras. 396–407 (Feb. 26); W. Michael Reisman, *Acting Before Victims Become Victims: Preventing and Arresting Mass Murder*, 40 CASE W. RES. J. INT’L L. 57 (2008).

institutions and the allocation of competences between the different layers of governance; global justice debates spark disagreements about outcomes and about how to operationalize redistribution; the “solidarity” school presupposes that an “international community” with shared expectations is already in place (an assumption that not everybody shares); and the global administrative law school, which consciously seeks to avoid all these normative and structural questions, has yet to articulate a theory as to why sovereigns (and international organizations established by them) owe any procedural obligations toward *foreign* stakeholders, and how conflicts between citizens and foreigners should be resolved.

This article is not quick to endorse the demise of sovereignty. To the contrary. It regards sovereigns as key venues for policymaking. The article follows the last, administrative law–based tradition, which takes decision-making processes seriously. This tradition puts faith in the power of giving voice to affected stakeholders and in the discipline of holding decision makers accountable. The belief is that public participation and accountability not only are valuable intrinsically but also contribute to better informed, more efficient, and egalitarian outcomes.²³ In other words, the claim is that through *other-regardingness*, sovereigns can indirectly promote global welfare as well as global justice.

This article seeks to confront the challenges of global governance by suggesting that the concept of sovereignty under international law²⁴ be adapted to the realities and needs of our shrinking global high-rise and to our conceptions of democracy and justice, and outlining the responsibilities that sovereigns are inherently bound by—regardless of their consent, and from which they cannot contract out. That is, as agents of humanity, sovereigns are obligated to take other-regarding considerations seriously into account in formulating and implementing policies, even absent specific treaty obligations.

In two respects, this reading of sovereignty pursues a middle course between the statist and the globalist approaches outlined above. First, this reinterpretation of sovereignty retains the state as an important democratic venue for exercising personal and communal self-determination. The associated vision of trusteeship respects the people’s right to self-determination, reflecting both the intrinsic value of self-government and the belief that the people know best what is good for them and how best to obtain public goods such as security, health, and education. There is consequently no monism, but rather other-regarding dualism. Second, by demanding that sovereigns—namely, national legislatures, regulators, and courts—take strangers’ interests into account, this reinterpretation is not thereby suggesting that sovereigns necessarily have an obligation to sacrifice the interests of their own citizens when balancing them against the interests of foreigners. Sovereigns are entitled to award priority to the interests and values of their citizens. The assertion that a state’s “first duty [is] to itself” is still good law,²⁵ and the principle of “charity begins at home” still makes eminent sense.²⁶ Absent strong reciprocal commitments and other institutional assurances, sovereigns

²³ For criticism of this assumption see, for example, MARK MAZOWER, *GOVERNING THE WORLD* 415–21 (2012).

²⁴ The present article refers to the concept of sovereignty from the external perspective of international law rather than from the internal perspective of constitutional law. For a parallel effort to outline a cosmopolitan paradigm of constitutionalism, see Kumm, *supra* note 17, at 258.

²⁵ *French Co. of Venezuelan R.R. (Fr. v. Venez.)*, 10 R.I.A.A. 285, 353 (Fr.-Venez. Mixed Cl. Comm’n 1905) (“[The Government’s] first duty was to itself. Its own preservation was paramount.”).

²⁶ SIDGWICK, *supra* note 11, at 309–10; Charles R. Beitz, *Cosmopolitan Ideals and National Sentiment*, 80 J. PHIL. 591, 599–600 (1983).

are subject only to certain minimal obligations that do not impose substantial burdens on them and that may actually assist them in adopting optimal policies. This article therefore urges that sovereignty not be disparaged; to the contrary, its crucial role in the evolving global architecture of governance must be recognized. The retention of national discretion—albeit somewhat limited—can promote, rather than stifle, worldwide deliberation and experimentation. Sovereignty must not be condemned but, instead, celebrated, as long as it incorporates some responsibilities toward the rest of humanity. Realistically speaking, such a view represents the most that national actors would be willing to tolerate.

The article begins by outlining three moral arguments supporting the interpretation of contemporary sovereignty as trusteeship that entails other-regarding obligations for sovereigns (part I). It then elaborates on the general normative implications of such an interpretation and identifies the minimal substantive and procedural legal obligations that arise from it, while seeking to trace evidence for recognizing such obligations in contemporary international law (part II). Part III examines possible criticisms, and part IV sketches how these obligations might be extended beyond the minimal level and what the necessary conditions are for that to occur. Part V concludes.

I. THE NORMATIVE BASES FOR CONSIDERING SOVEREIGNS AS GLOBAL TRUSTEES

This part presents three distinct normative approaches for grounding the obligation of sovereigns to weigh other-regarding considerations. The first emphasizes sovereignty as the vehicle for the exercise of self-determination; the second focuses on the justification of government authority as an agent of human society; and the third discusses the justification of exclusive ownership over portions of the earth. These inherently interrelated grounds are informed by the assessment, explored below, that the private, self-contained concept of sovereignty is less compelling than it was in the past because of the glaring misfit between the scope of the sovereign's authority and the sphere of the affected stakeholders. For the un- or underrepresented stakeholders (and often also for citizens who have representation but in relatively weak countries), this misfit results in both negative externalities and the loss of potential positive externalities—that is, in outcomes that are often inefficient, undemocratic, and unjust.

The concept of the trustee sovereign represents an attempt to provide a normative basis for responding to these challenges. In the framework of all three theoretical approaches presented here, sovereignty is regarded as embedded in a broader, more encompassing global order that serves as a source not only of powers and rights, but also of obligations. These obligations essentially require sovereigns both to exercise their authority in ways that take the rights of all individuals to democracy and to equality into account, and to bear in mind the promotion of global welfare. While sovereigns may have good reasons to give priority to the interests of their citizens, they must nonetheless keep in mind the interests of others and, to some non-negligible degree, be accountable to them.

These three bases do not depend on any assumption about the existence of an “international community”—that is, of a shared sense of group solidarity.²⁷ Rather, they derive from the same grounds that justify democracy in the domestic setting: the recognition of the equal moral

²⁷ See, e.g., Hermann Mosler, *The International Society as a Legal Community*, 140 RECUEIL DES COURS 1, 17 (1974 IV) (discussing the psychological element required by the concept of the international legal community: a

worth of all individuals. They stem from the basic moral obligation of each and every individual to exercise his or her right to personal self-determination in a way that takes into account the interests of others.²⁸

Sovereignty as the Instrument for Personal and Collective Self-Determination

The main justification for sovereignty is self-determination. Externally, sovereignty epitomizes the freedom of the group to pursue its interests, further its political status, and “freely dispose of [its] natural wealth and resources.”²⁹ In fact, ever since its genesis in the modern era, the claim to sovereignty has been inherently tied to the notion of freedom: from the church, from empires, from colonial powers,³⁰ and the collective and the personal claims to freedom are strongly linked. As Martti Koskenniemi put it, “Sovereignty articulates the hope of experiencing the thrill of having one’s life in one’s own hands.”³¹

Group self-determination stems from the right to *individual* self-determination, or “self-authorship” in the words of Joseph Raz.³² John Stuart Mill noted that justice requires that all citizens have “a voice in the exercise of that ultimate sovereignty [and] an actual part in the government.”³³ Otherwise, “Everyone is degraded, whether aware of it or not, when other

conviction shared by independent societies that they are partners and mutually bound by reciprocal rules). For Nicolas Politis, the “international community” was “an immense sum of fictions” better conceived as “composed of individuals grouped in national societies.” Nicolas Politis, *Le problème des limitations de la souveraineté et la théorie de l’abus des droits dans les rapports internationaux*, 6 RECUEIL DES COURS 5–6 (1925) (“Si l’État est une pure abstraction, la communauté internationale . . . est une abstraction plus grande encore: c’est une immense somme de fictions. . . . Elle est tout simplement composée d’individus groupés en sociétés nationales.”). HURRELL, *supra* note 16, at 65–66, refers to a solidary vision according to which states are “agents for the individuals, groups, and national communities that they are supposed to represent[.] . . . and agents or interpreters of some notion of an international public good” and of core norms. On the concept of the international community and its evolution, see MEHRDAD PAYANDEH, *INTERNATIONALES GEMEINSCHAFTSRECHT* (2010); ANDREAS L. PAULUS, *DIE INTERNATIONALE GEMEINSCHAFT IM VÖLKERRECHT* (2001); Martti Koskenniemi, “*International Community*” from *Dante to Vattel*, in *VATTEL’S INTERNATIONAL LAW FROM A XXI CENTURY PERSPECTIVE* 49 (Vincent Chetail & Peter Haggemacher eds., 2011).

²⁸ See Kumm, *supra* note 17, at 315. (“Within liberal democracies citizens are encouraged to conceive of themselves as free and equals and to reflect on the legitimate limits of their individual freedom to do as they please within a framework that takes other persons seriously as free and equal.”).

²⁹ Article 1 of the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171, provides:

- (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.

See also *id.*, Art. 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.”); NICO SCHRIJVER, *SOVEREIGNTY OVER NATURAL RESOURCES: BALANCING RIGHTS AND DUTIES* (1997) (emphasizing not only the rights of the sovereign people but also its duties as recognized by international law).

³⁰ As new states quickly realized even in the nineteenth century, sovereignty conferred much less autonomy and equality than they had anticipated. Arnulf Becker Lorca, *Sovereignty Beyond the West: The End of Classical International Law*, 13 J. HIST. INT’L L. 7 (2011).

³¹ Martti Koskenniemi, *What Use for Sovereignty Today?*, 1 ASIAN J. INT’L L. 61, 70 (2011).

³² JOSEPH RAZ, *THE MORALITY OF FREEDOM* 204 (1986) (“An autonomous person is part author of his own life. . . . A person is autonomous only if he had a variety of acceptable options to choose from, and his life became as it is through his choice of some of these options.”).

³³ JOHN STEWART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 57 (1861).

people, without consulting him, take upon themselves unlimited power to regulate his destiny.”³⁴ This proposition is grounded not only in the inherent moral worth of the individual but also in utilitarian considerations. Again quoting Mill:

[T]he rights and interests of every or any person are only secure from being disregarded when the person interested is himself able, and habitually disposed to stand up for them. . . . [T]he general prosperity attains a greater height, and is more widely diffused, in proportion to the amount and variety of the personal energies enlisted in promoting it.³⁵

It is this internal aspect—this fundamental groundwork—of sovereignty that is currently being challenged by contemporary global conditions. What was true in a world of separate democratic mansions is even truer and more acute in today’s shared high-rise: domestic democratic processes are vulnerable to systemic failures that hamper individuals’ ability to have a voice and take an actual part in government.³⁶ In today’s world, the insulated exercise of self-determination exclusively by national communities can prove oppressive to many and can undermine people’s ability to have their lives in their own hands. The state system has metamorphosed into a form that often excludes politically weaker individuals and communities from relevant venues of public deliberation and that may enable politically or economically stronger external powers to dominate weaker states and their citizens. Therefore, respect for the self-determination of the individual, and of many collectivities, coupled with an effort to ensure that people have their lives in their own hands, must be translated into appropriate institutional mechanisms that can correct, or at least minimize, the systemic democratic failures that inhere in the sovereign-based system.

Under current global interdependencies, there are three main reasons why the allocation of global resources among sovereign states strains the ability of individuals to exercise their own sovereignty. First, the ongoing lowering of the technical and legal barriers to the free movement of people, goods, services, and capital across territorial boundaries exacerbates the well-known inherent failures of domestic democratic processes—the muted voices of the relatively less mobile “discrete and insular minorities”³⁷ and the disproportionate influence on national policymaking of special domestic interest groups that thrive on asymmetric information.³⁸ Those who benefit from the availability of the virtual or actual “exit” options that globalization offers gain more voice in the democratic processes of their countries of citizenship, at the expense of those who have limited opportunities to move; domestic deliberative processes are either captured by these mobile interests or depleted by the transfer of authority to transnational private

³⁴ *Id.*, ch. VIII; see also JOHN STUART MILL, *On Liberty*, in ON LIBERTY AND OTHER WRITINGS 59 (Stefan Collini ed., 1989) (1859) (“He who lets the world, or his own portion of it, choose his plan of life for him, has no need of any other faculty than the ape-like one of imitation. He who chooses his plan for himself, employs all his faculties.”).

³⁵ MILL, *supra* note 33, at 58.

³⁶ RONALD DWORKIN, SOVEREIGN VIRTUE 202 (2000) (“[A]n adequate political process must strive, against formidable obstacles, to . . . insure a degree of political leverage for each citizen.”).

³⁷ *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938); JOHN HART ELY, *DEMOCRACY AND MISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

³⁸ On the information asymmetries that plague diffuse voters, see ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957), and the public choice literature—for example, *RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW* (Daniel A. Farber & Anne Joseph O’Connell eds., 2010), and JERRY L. MASHAW, *GREED CHAOS AND GOVERNANCE* (1997). On the administrative procedures that overcome such asymmetries, see STEVEN P. CROLEY, *REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNANCE* (2008).

corporations.³⁹ Some foreign actors use their economic leverage to support local candidates or influence domestic public opinion, a phenomenon that exacerbates the difficulties of the democratic process and also skews national policies further against the interests of diffuse and unrepresented stakeholders.⁴⁰

A second, more fundamental type of challenge stems from the lack of fit between the group that has the right to vote and the group that is affected by the decisions made by, or on behalf of, the first group. The basic assumption of state democracy—that these two types of stakeholders overlap—was perhaps correct in the world of separate mansions, when territorial boundaries defined not only the persons entitled to vote but also the community affected by those choices. Because of that fit, exclusive state sovereignty was both efficient and democratically just. Today, the policies of one government affect foreign stakeholders on a regular basis, however, without the latter having the right to vote for that government or otherwise being able to influence its decisions. Scholars have accordingly acknowledged that the “geography-based constituency definition introduces an arbitrary criterion of inclusion/exclusion right at the start”⁴¹ and have sought to outline theories defining the scope of the affected stakeholders to whom decision makers must be accountable.⁴²

A third challenge that sovereignty poses to democracy is that political boundaries make it difficult, at times impossible, for a discrete group of sovereigns to unite against a common external rival that practices “divide and rule” strategies against them. From this perspective, the spectacular success of the decolonization movement made the numerous new states vulnerable to a new type of exploitation by a handful of powerful states or other global actors. Weaker states that find it difficult to bundle up their disparate preferences submit to the dictates of the few powerful actors and the global institutions that they have created.⁴³ As a result, the space for discretion that many sovereigns (and hence voters) are left with is severely restricted.⁴⁴ Witness the regime of bilateral investment treaties by which investment-importing countries have

³⁹ Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 MICH. L. REV. 167 (1999) (discussing how globalization increases the political leverage of the more mobile voters). On the interplay between voice, exit, and loyalty, see ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970).

⁴⁰ On the influences of foreign lobbies, see David Schneiderman, *Investing in Democracy? Political Process and International Investment Law*, 60 U. TORONTO L.J. 909, 931–40 (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).

⁴¹ Nadia Urbinati & Mark E. Warren, *The Concept of Representation in Contemporary Democratic Theory*, 11 ANN. REV. POL. SCI. 387, 397 (2008); Jean L. Cohen, *Constitutionalism Beyond the State: Myth or Necessity? (A Pluralist Approach)*, 2 HUMANITY 127 (2011); Nancy Fraser, *Reframing Justice in a Globalizing World*, 36 NEW LEFT REV. 1 (2005). For similar concerns about the “political space” in the context of local government, see Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1844 (1994).

⁴² There is a literature that attempts to determine the sphere of the affected stakeholders. See, e.g., NANCY FRASER, *SCALES OF JUSTICE: REIMAGINING POLITICAL SPACE IN A GLOBALIZING WORLD* 65–66 (2009) (suggesting the “all-subjected principle,” which includes all those subjected to a structure of governance that sets the ground rules that govern their interaction); Goodin, *supra* note 14 (arguing for the “all possibly affected principle,” with “affected” including “anything that might possibly happen as a result of the decision”). On the definition of affected stakeholders adopted by the Aarhus Convention Compliance Committee, see *infra* text accompanying note 131.

⁴³ In general, developed economies have similar preferences, whereas developing countries are more diverse and hence more vulnerable to divide-and-rule strategies. See Eyal Benvenisti & George W. Downs, *The Empire’s New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595 (2007).

⁴⁴ Kingsbury, *supra* note 18.

had to forgo sovereign control over the management of such investments,⁴⁵ or the subsidized loans given by the International Monetary Fund and International Bank for Reconstruction and Development to incumbent governments to help them win elections.⁴⁶ Other actors, such as retail associations and nongovernmental organizations, do not attempt to shape public policies directly, but the standards that they adopt force producers in exporting countries to adapt. For example, a supermarket chain's decision not to import certain foodstuffs treated with specific pesticides indirectly sets food safety and environment standards in the food-exporting countries;⁴⁷ The International Olympic Committee, a private body, has effectively insulated the Olympic Games (and many other sports events) from national regulation, even in areas affecting the athletes' privacy and other rights, because states hesitate to confront the committee unilaterally.⁴⁸ The promise of "sovereignty as freedom" has not materialized for many countries, which experience their traditional or hard-won formal freedom as having erected new types of walls that separate them from each other and from the actual public or private venue of deliberation and decision making.

These three sources of democratic deficits within states challenge the basic assumption that sovereignty promotes the individual's and the collective's ability to shape their life opportunities. They necessitate fresh thinking about possible modalities that could remedy the inherent democratic failures that the current state system suffers from and that could provide opportunities for individuals and communities to exert effective influence on policymaking that affects them—even when the decision maker is a foreign government. Any government and any global regulator must bear in mind, when dealing with any particular government, that the other government may be captured by internal or external actors and therefore be unable to represent adequately all the stakeholders that it claims to represent. The argument from self-determination suggests that those unrepresented voices should be taken into account.

Sovereignty as Constrained by the Equal Moral Worth of All

In the memorable phrase of the U.S. Declaration of Independence, "[T]o secure the[ir] Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed . . ."⁴⁹ As James Madison noted in the *Federalist Papers*, "The federal and State governments are in fact but different agents and trustees of the people . . . [because] the ultimate authority . . . resides in the people alone . . ."⁵⁰ These famous quotes emphasize the domestic dimension—namely, the relationship between the national government and its

⁴⁵ Benvenisti & Downs, *supra* note 43, at 609–11.

⁴⁶ Axel Dreher & Roland Vaubel, *Do IMF and IBRD Cause Moral Hazard and Political Business Cycles? Evidence from Panel Data*, 15 OPEN ECON. REV. 5 (2004).

⁴⁷ Jan Wouters, Axel Marx & Nicholas Hachez, *Private Standards, Global Governance and Transatlantic Cooperation: The Case of Global Food Safety Governance*, in PRIVATE STANDARDS AND GLOBAL GOVERNANCE 244 (Axel Marx, Miet Maertens, Johan Swinnen & Jan Wouters eds., 2012); Fabrizio Cafaggi, *New Foundations of Transnational Private Regulation* (Eur. Univ. Inst., Working Paper No. RSCAS 2010/53, 2010); Fabrizio Cafaggi, *Private Regulation, Supply Chain and Contractual Networks: The Case of Food Safety* (Eur. Univ. Inst., Working Paper No. RSCAS 2010/10, 2010).

⁴⁸ Alec Van Vaerenbergh, *Regulatory Features and Administrative Law Dimensions of the Olympic Movement's Anti-doping Regime* (Inst. for Int'l L. & Just. Working Paper No. 2005/11, 2005).

⁴⁹ THE UNANIMOUS DECLARATION OF THE THIRTEEN UNITED STATES OF AMERICA (1776).

⁵⁰ THE FEDERALIST NO. 46 (James Madison).

citizens. This section suggests that in today's global high-rise, the principal-agent model should be viewed as extending beyond the state. It is humanity at large that assigns to certain groups of citizens the power to form national governments.

Why should a government be regarded as the trustee only of its people rather than of the whole of humanity? Informed by the notion that all individuals are of equal moral worth, it is necessary to justify the exclusion of specific individuals or groups from the set of principals for whom national governments act as agents. This is how Mill justified the exclusion in *Considerations on Representative Government*:

A portion of mankind may be said to constitute a nationality if they are united among themselves by common sympathies which do not exist between them and any others—which make them co-operate with each other more willingly than with other people, desire to be under the same government, and desire that it should be government by themselves, or a portion of themselves, exclusively. . . .

. . . Free institutions are next to impossible in a country made up of different nationalities. Among a people without fellow-feeling, especially if they read and speak different languages, the united public opinion necessary to the working of representative government cannot exist.⁵¹

These factors remain valid to this day: the heterogeneity of a nation's population determines the nation's optimal size.⁵² But what is crucial to note is the moral obligation to justify the exclusion of some part of the population by that "portion of mankind" who seek to govern themselves. Mill recognized that these two different segments of the population are not necessarily alien to each other, and he devoted much attention to explaining why the idea of representative government was inapplicable to England's overseas dependencies and colonies; he regarded exclusion from participation as the lesser evil. That Mill devoted three detailed chapters of *Considerations on Representative Government*⁵³ to these questions likely reflects his sense of a moral obligation of communities to render an account to others as to why they have been excluded. The burden of convincing the other community rests clearly on the excluding community,⁵⁴ which is precluded from asserting the moral inferiority of the other. As Bruce Ackerman points out, "The liberal state is not a private club"; it therefore must justify its power to exclude noncitizens in "a public dialogue by which each person can gain social recognition of his standing as a free and rational being."⁵⁵

⁵¹ MILL, *supra* note 33, at 303.

⁵² Economic analysis of the optimal size of nations also explores the negative aspects of heterogeneity within states. See ALBERTO ALESINA & ENRICO SPOLAORE, *THE SIZE OF NATIONS* (2003); Robert A. Dahl, *A Democratic Dilemma: System Effectiveness Versus Citizen Participation*, 109 POL. SCI. Q. 23 (1994) (discussing the inverse relation between the scale of the political institutions and the opportunities for the citizen to participate in and influence them).

⁵³ See Mill, *supra* note 33, ch. XVI ("Of Nationality as Connected with Representative Government"), XVII ("Of Federal Representative Governments"), XVIII ("Of the Government of Dependencies by a Free State").

⁵⁴ Cf. MICHAEL WALZER, *SPHERES OF JUSTICE* 40 (1983) (presenting this question as requiring only internal debate within the excluding community).

⁵⁵ BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 93 (1980); see also SEYLA BENHABIB, *THE RIGHTS OF OTHERS: ALIENS, RESIDENTS AND CITIZENS* (2004) (arguing that national communities have a moral duty to justify to strangers seeking access the reasons for excluding them).

Mill's implicit recognition of the equal moral worth of all human beings as a relevant consideration for nations is now, of course, widely shared.⁵⁶ It is deeply ingrained in the contemporary concept of universal human rights. The Universal Declaration of Human Rights envisions all of human society—"everyone"—as right holders, entitled to "universal respect."⁵⁷ The declaration does not allocate responsibilities among the different state parties who are the duty bearers—that is, those who collectively share the duty to regard these obligations as "a common standard of achievement."⁵⁸ The implication is that the entire system of state sovereignty is subject to the duty to respect human rights.⁵⁹ In subsequent human rights treaties, the states, in turn, allocated these shared responsibilities among themselves, assigning to each state the prime responsibility for the area under its jurisdiction. This allocation is secondary, however, and it must *itself* be accounted for, justified, and if found wanting, corrected because all the trustees are collectively required to protect everyone's human rights.⁶⁰ This inclusive vision can be best interpreted as a collective assignment of authority to sovereigns, on behalf of all human beings. To paraphrase Madison, then, "state governments are in fact but different agents and trustees of all human beings because the ultimate, residual, authority resides in humanity."

This vision is reflected also in the writings of Vattel, who maintained that sovereigns have an obligation to accommodate the absolutely necessary interests of every man and that they should therefore consider such interests in good faith. Thus, for example, "no nation can, without good reasons, refuse even a perpetual residence to a man driven from his country."⁶¹ A long tradition of scholarship has viewed "the State as a unit at the service of the human beings for

⁵⁶ Contemporary philosophers reach the same outcome by recognizing the primacy of individuals' human rights over state sovereignty. MATHIAS RISSE, ON GLOBAL JUSTICE 134–51 (2012); JOHN RAWLS, THE LAW OF PEOPLES 79 (1999); BEITZ, *supra* note 15, at 128–31; MILLER, *supra* note 15; JAMES GRIFFIN, ON HUMAN RIGHTS 31 (2009).

⁵⁷ Universal Declaration of Human Rights, *supra* note 2, pmb1.

⁵⁸ *Id.*

⁵⁹ Joseph Raz, *Human Rights in the Emerging World Order*, 1 TRANSNAT'L LEGAL THEORY 31, 42 (2010) ("[H]uman rights, as they function in the world order, set limits to sovereignty."); Institut de droit international, *Resolution on the Protection of Human Rights and the Principle of Non-intervention in Internal Affairs of States* (1989), Art. 1., at http://www.idi-ii.org/idiE/resolutionsE/1989_comp_03_en.PDF. ("Human rights are a direct expression of the dignity of the human person. The obligation of States to ensure their observance derives from the recognition of this dignity as proclaimed in the Charter of the United Nations and in the Universal Declaration of Human Rights. This international obligation, as expressed by the International Court of Justice, is 'erga omnes'; it is incumbent upon every State in relation to the international community as a whole, and every State has a legal interest in the protection of human rights. The obligation further implies a duty of solidarity among all States to ensure as rapidly as possible the effective protection of human rights throughout the world."); Prosecutor v. Tadić, Case No. IT-94-1-I, Defence Motion for Interlocutory Appeal on Jurisdiction, para. 97 (Oct. 2, 1995) ("[T]he impetuous development and propagation in the international community of human rights doctrines, particularly after the adoption of the Universal Declaration of Human Rights in 1948, has brought about significant changes in international law A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well.")

⁶⁰ BEITZ, *supra* note 15, at 137 (defining human rights as interests sufficiently important to be protected by the state, and arguing that when states fail to do so, the failure is a suitable object of international concern).

⁶¹ EMER DE VATTEL, 1 THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW §231 (1758); *see also id.* §229. ("[N]ature, or rather . . . its Author, . . . 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.")

whom it is responsible”⁶² or as a social function of the global community of peoples.⁶³ As such, the state is “merely a part, a branch of humanity,” and it must therefore recognize—in the “legal community of states as the political unity of humanity”—a “power higher than itself.”⁶⁴

Accordingly, it may be possible to reconceptualize Max Huber’s famous vision of a global legal order. Whereas he saw that order as one that “divide[s] between nations the space upon which human activities are employed”⁶⁵ and that allocates to each the responsibility toward other nations for activities transpiring in its jurisdiction that violate international law, we can now understand it as a relationship of trusteeship governed by international law. To paraphrase Huber’s viewpoint: given that the global legal order has its foundation in human rights, sovereigns can and should be viewed as organs of a global system that allocates competences and responsibilities for promoting the rights of all human beings and their interest in sustainable utilization of global resources. As trustees of this global system—to paraphrase another statement of Huber’s⁶⁶—the authority of contemporary sovereigns to manage public affairs within their respective jurisdictions brings with it a corollary duty to take account of external interests and even to balance internal against external interests.

This vision of trusteeship does not downgrade state governments; to the contrary: it assigns them immensely important tasks. At the same time, however, it recognizes that, in principle, they may have certain basic obligations toward the rest of humanity. What these obligations are is a matter of fierce debate that rages in philosophical discussions on global justice. But in their modes of reasoning, these debates are similar to the debates about domestic justice. The point of the trusteeship concept is that sovereigns must engage in these debates, just as they engage in domestic debates about the allocation of resources and other public matters.

Sovereignty as the Power to Exclude Portions of Global Resources

As much as it is an extension of the personal right to autonomy, sovereignty is also the extension of the private claim for ownership. Both ownership and sovereignty are claims for the intervention in the state of nature by carving out valuable space for exclusive use:⁶⁷ “Whatever

⁶² Christian Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century: General Course on Public International Law*, 281 RECUEIL DES COURS 9, 95 (1999); see also Christian Tomuschat, *Obligations Arising for States Without or Against Their Will*, 241 RECUEIL DES COURS 195 (1993 IV); Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 RECUEIL DES COURS 217 (1994 VI).

⁶³ RENÉ-JEAN DUPUY, *LA COMMUNAUTÉ INTERNATIONALE ENTRE LE MYTHE ET L’HISTOIRE* 169–70 (1986).

⁶⁴ C. KALTENBRON VON STACHAU, *KRITIK DES VÖLKERRECHTS* 260–61 (1847), cited in JOCHEN VON BERNSTORFF, *THE PUBLIC INTERNATIONAL LAW THEORY OF HANS Kelsen* 19 (2010). This is the monist view, carefully explored by Kelsen, *PURE THEORY OF LAW* 214–15, 333–47 (Max Knight trans., 1967). See also HANS Kelsen, *GENERAL THEORY OF LAW AND STATE* 383–88 (Anders Wedberg trans., 1949); HANS Kelsen, *PRINCIPLES OF INTERNATIONAL LAW* 440–47 (1952); JOCHEN VON BERNSTORFF, *THE PUBLIC INTERNATIONAL LAW THEORY OF HANS Kelsen* (2010).

⁶⁵ *Island of Palmas (Neth./U.S.)*, 2 R.I.A.A. 829, 869 (Perm. Ct. Arb. 1928).

⁶⁶ See Huber’s statement in *British Claims in the Spanish Zone of Morocco* (Spain v. U.K.), 2 R.I.A.A. 615, 641 (Perm. Ct. Arb. 1925) (Huber, sole arb.) (“La responsabilité est le corollaire nécessaire du droit. Tous droits d’ordre international ont pour conséquence une responsabilité internationale.” [Responsibility is the necessary corollary of rights. All international rights entail international responsibility.] (translation from Daniel-Erasmus Khan, *Max Huber as Arbitrator: The Palmas (Miangas) Case and Other Arbitrations*, 18 EUR. J. INT’L L. 145, 156 (2007)).

⁶⁷ SIDGWICK, *supra* note 11, at 255 (“I do not think that the right of any particular community to the exclusive enjoyment of the utilities derived from any portion of the earth’s surface can be admitted without limit or qualification, any more than the absolute exclusive right of a private landowner can be admitted.”).

amount of resources one country has, it is withdrawn from the inhabitants of other countries”⁶⁸ Grotius refers to Cicero’s metaphor of the theater—a public place for which “it is correct to say that the seat which a man has taken belongs to him.”⁶⁹ This perspective provides yet another basis for grounding an obligation on sovereigns being property owners who must take others’ interests into account even when managing their “own” internal resources.⁷⁰ According to Grotius, “We must, in fact, consider what the intention was of those who first introduced individual ownership; and we are forced to believe that it was their intention to depart as little as possible from natural equity.”⁷¹ Grotius infers that ownership must be limited to situations of “supreme necessity” and also be subject to what he refers to as the right of “innocent use”—namely, the right of others to benefit from another person’s property when doing so does not cause any detriment to the owner.⁷²

The implications of this approach to international law are obvious: ownership of parts of global resources is conceptualized as originating from a collective regulatory decision at the global level, rather than being an entitlement that inheres in sovereigns.⁷³ Grotius invokes this argument both to reject claims for exclusive entitlements to portions of the oceans and to justify open access to the high seas⁷⁴ and to rivers, and even crossing over someone else’s lands.⁷⁵ Vattel follows suit. For him, sovereignty has a cosmopolitan, underlying purpose. He therefore argues that “nature, which, having destined the whole earth to supply the wants of mankind in general, gives no nation a 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.”⁷⁶ In Vattel’s 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.”⁷⁷ Sovereigns are therefore obligated toward humankind to use the resources under their control efficiently and sustainably.⁷⁸

⁶⁸ Kis, *supra* note 13, at 111.

⁶⁹ HUGO GROTIUS, *DE JURE BELLI AC PACIS* [ON THE LAW OF WAR AND PEACE] (1625), *reprinted in* 2 *CLASSICS OF INTERNATIONAL LAW* 186 (Francis W. Kelsey trans., James Brown Scott ed., 1925).

⁷⁰ 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).

⁷¹ GROTIUS, *supra* note 69, at 193.

⁷² *Id.* at 196–7 (“[I]t is altogether possible that ownership was introduced with the reservation of such a use, which is of advantage to the one people, and involves no detriment to the other.”).

⁷³ Martti Koskenniemi, *Empire and International Law: The Real Spanish Contribution*, 61 *U. TORONTO L.J.* 1, 14–16 (2011) (emphasizing Vitoria’s conceptualization of the prince’s dominium over his commonwealth as deriving from the collective decision to delegate such authority to him).

⁷⁴ HUGO GROTIUS, *MARE LIBERUM* [THE FREEDOM OF THE SEAS] (Ralph von Deman Magoffin trans., James Brown Scott ed., Oxford Univ. Press 1916) (1609).

⁷⁵ GROTIUS, *supra* note 69, at 196–97.

⁷⁶ *Supra* note 61, §208.

⁷⁷ *Id.* §203.

⁷⁸ *Id.* §81 (“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[.]”); *see also* IMMANUEL KANT, *PERPETUAL PEACE: A PHILOSOPHICAL ESSAY* (M. Campbell Smith trans., 1917) (1795), (referring to “the common right to the face of the earth, which belongs to human beings generally”); GEORG CAVALLAR, *THE RIGHTS OF STRANGERS: THEORIES OF INTERNATIONAL HOSPITALITY, THE GLOBAL COMMUNITY AND POLITICAL JUSTICE SINCE VITORIA* (2002).

While Grotius and Vattel invoke God's gift to humanity as the basis for this vision, there are equally powerful secular grounds. Grotius refers to an imaginary consent "of those who first introduced individual ownership."⁷⁹ Kant refers to a "common possession" of a globe where all inhabitants must "tolerate one another as neighbors" based on equal entitlement.⁸⁰ Recently, Thomas Risse has invoked human rights as the secular ground for this claim.⁸¹ For contemporary international lawyers, the argument of consent is readily available because it is international law that provides the criteria for recognizing entities as sovereign states entitled to manage the resources within their territory, and it is international law—the UN Convention on the Law of the Sea—that recognizes states' rights to extend their sovereign authority to manage certain maritime resources,⁸² which otherwise belong to the "common heritage of mankind."⁸³ 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, and thereby to increase global welfare. Hence, for example, coastal states that manage their exclusive economic zones and that 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 must not discriminate between domestic and foreign ships and crew, and must provide all with a voice before the detaining institutions.⁸⁴ Discrimination in such circumstances would be harmful both to the crew and to healthy competition among fishing fleets.

Concerns for the disregarded stakeholders that are left out are also addressed by property law theory.⁸⁵ Scholars regard private ownership not only as "*dominion* over things" but also as "*imperium* over our fellow human beings."⁸⁶ This dominion entails responsibility: "[T]he 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 develop a doctrine as to his positive duties in the public

⁷⁹ GROTIUS, *supra* note 69, at 193.

⁸⁰ "[O]riginally no one has more of a right to be at a given place on earth than anyone else." IMMANUEL KANT, TOWARD PERPETUAL PEACE AND OTHER WRITINGS ON POLITICS, PEACE, AND HISTORY 82 (Pauline Klein-geld ed., 2006).

⁸¹ RISSE, *supra* note 56 (referring to "Common Ownership").

⁸² Namely, the extension of sovereign rights to the continental shelves and the exclusive economic zones. UN Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 UNTS 396, *available at* <http://www.un.org/Depts/los/index.htm>.

⁸³ *See id.*, Arts. 136 ("The Area and its resources are the common heritage of mankind."), 137(2) ("All rights in the resources of the Area are vested in mankind as a whole . . ."); *see also* Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, *opened for signature* Jan. 27, 1967, 610 UNTS 205. On the concept, *see* Rüdiger Wolfrum, *Common Heritage of Mankind*, in THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum ed., online ed. 2009).

⁸⁴ *See* the judgment of the International Tribunal for the Law of the Sea in "*Juno Trader*" (St. Vincent v. Guinea-Bissau), ITLOS Case No. 13 (Dec. 18, 2004) (expressing different opinions on the right of hearing of foreign crew before the domestic detaining institutions), *at* http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_13/judgment_181204_eng.pdf.

⁸⁵ *See* HANOCH DAGAN, PROPERTY: VALUES AND INSTITUTIONS 57–75 (2011); GREGORY S. ALEXANDER, THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE 97–147 (2006); 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 (1982).

⁸⁶ Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8, 13 (1927).

interest.”⁸⁷ Therefore, the assignment of property rights and the delineation of their contents must be regarded as a mode of public regulation of human life. This approach is also reflected in domestic legal systems. German constitutional law, for example, stipulates that “ownership obliges. Its use shall also serve the public good.”⁸⁸

Ownership, so described, raises questions about the appropriate level of public scrutiny of private ownership, about other remedial institutions, and about the scope of the affected public for whom such institutions are set up⁸⁹ (and many property scholars hold the view that a property regime must be complemented by a public system that supports non-owners).⁹⁰ If one extends this debate onto the global level, it exposes the acute deficiencies of the traditional concept of sovereignty as allocating the power to exclude but without establishing a public system that can regulate the exercise of that power. While a permissive approach to the right to exclude may, in principle, make sense in domestic settings, adopting a similar deferential approach to sovereigns as property owners in the global sphere would be problematic.

There are three compelling reasons for imposing more onerous other-regarding obligations on sovereigns as owners. The first concerns the dramatic consequences of states universally acting to exclude entry. Our shared high-rise does not have public spaces to accommodate those who wish, or are forced, to exit the country of residence and to find refuge elsewhere. At the global level, the lack of an equivalent of open spaces, emergency shelters, and public property that the government can allocate to the needy needs to be redressed with certain limitations on the sovereign’s right to exclude. One such limitation would be the obligation not to deny entry to migrants and refugees without taking into account the asylum seekers’ individual concerns and without at least providing justification for their exclusion.⁹¹ Likewise, in the absence of an effective public authority at the global level—and again, unlike the individual property owner—each sovereign must assume more robust positive obligations toward the outsiders who can benefit from its exercise of power (for example, foreigners subject to persecution by their own governments).

The second reason for imposing stricter limitations on sovereigns’ ownership claims is that the policies pursued by sovereigns do not necessarily reflect the preferences of domestic stakeholders and hence do not fully internalize the social costs of those policies (not only for outsiders, but also for insiders). The assumption that generally holds for individuals and that justifies their exclusive authority to use their property as they deem fit⁹²—namely, that they have

⁸⁷ *Id.* at 26. For Locke, the assumption underlying and justifying the owner’s power of exclusion was that “there was still enough, and as good left” for others. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT*, sec. 33 (C. B. Macpherson ed., 1980) (1690).

⁸⁸ Article 14(2) of Germany’s Basic Law provides: “Property entails obligations. Its use shall also serve the public good.” The official translation is available at http://www.gesetze-im-internet.de/englisch_gg/index.html. On this limitation, see Hanoch Dagan, *The Social Responsibility of Ownership*, 92 *CORNELL L. REV.* 1255 (2007), ALEXANDER, *supra* note 85, and RUDOLF DOLZER, *PROPERTY AND ENVIRONMENT: THE SOCIAL OBLIGATION INHERENT IN OWNERSHIP* (1976).

⁸⁹ Absent prohibited exclusionary grounds such as race, religion, or situations of considerable need. Jeremy Waldron, *Property, Justification and Need*, 6 *CAN. J.L. & JURISPRUDENCE* 185 (1993) (on the necessity of developing a theory to justify the exclusion that inheres in private property).

⁹⁰ See DAGAN, *supra* note 85.

⁹¹ See Institut de droit international, *Règles internationales sur l’admission et l’expulsion des étrangers* (1892); Institut de droit international, *Principes recommandés par l’institut, en vue d’un projet de convention en matière d’émigration* (1897); see also SCELLE, *supra* note 16, at 79.

⁹² Cohen, *supra* note 86, at 26.

a motive to make the most economic use of their property—is not always and not even often valid even for democratic sovereigns, due to inherent failures in democratic processes, as explored above.

Third, the domestic law systems for assigning property rights retain the authority to introduce adjustments and limitations on property rights, including the taking of property when the owner's use conflicts with social demands. No property right is absolute, and ownership remains subject to public control. The contemporary doctrine on sovereignty recognizes no such limitations at the global level. It posits a potentially immobilizing “anti-commons” regime that requires everybody's consent to achieve socially beneficial outcomes.⁹³

To conclude, the powers that sovereigns exercise, both in managing their “own” internal resources and in making rival claims on transboundary and public resources, have both a direct and an indirect impact on others. The increasing global pressures on available resources, along with 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 the interests of others.

Translating Moral Grounds to Legal Obligations

Contemporary international law is compatible with this trusteeship concept. The law does not rule out imposing limits on national discretion. Although the concept of sovereignty has come to reflect the right of peoples to self-determination understood as an “inherent” right that is to be “freely” exercised,⁹⁴ this right does not free sovereign peoples from the obligation to conform to the obligations that states owe to all other states and individuals under international law. As we know from another context where rights “inhere” in sovereigns—the inherent right to self-defense—“inherent” rights do not provide their owners with unfettered freedom to decide when and how to invoke them, even at critical moments. Rather, such rights are inherently subject to well-defined limitations under international law. The principles of national self-determination and of national ownership of natural resources have never meant supreme and unfettered authority for each people—but only that peoples are free from *other nations*. That is, the right to self-determination is the right to be free from other nations, not from the obligations toward the collective.⁹⁵ As the German

⁹³ MICHAEL HELLER, *THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES* (2008); Michael Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998).

⁹⁴ The tension between this freedom and the obligations toward others is already present in Article 1 of the International Covenant on Civil and Political Rights, *supra* note 29, as the freedom is “without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law.”

⁹⁵ Cf. Alfred Verdross, *Le fondement du droit international*, 16 RECUEIL DES COURS 249, 314 (1927 I) (“sa souveraineté ne désigne que le fait [que l'État souverain] est subordonné à aucune autre puissance qu'au droit de gens”); BUCHANAN, *supra* note 15, at 102 (“[P]opular sovereignty does not mean unlimited sovereignty. Instead, popular sovereignty means only 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.”); DAVID P. CALLEO, *RETHINKING EUROPE'S FUTURE* 141 (2001) (“national sovereignty means above all a legitimate government that has at its disposal the formal power to choose between available alternatives, and not to pursue an alternative dictated by a foreign power”) (cited with approval by the Czech Constitutional Court, judgment no. 2008/11/26 - Pl. ÚS 19/08: Treaty of Lisbon I, para. 107, available at <http://www.concourt.cz/print/4217>).

Constitutional Court has stated, sovereignty is “freedom that is organized by international law and committed to it.”⁹⁶

This concept of trustee sovereignty, which applies to all nations equally, thus does not violate the right to self-determination. To the contrary. It respects and actually enhances the right of all individuals and peoples to self-determination and the resulting right of peoples to maintain their cultures and to give first priority to the interests of their individual members. Put differently, the principle of (individual and collective) self-determination *itself* entails limitations on the exclusive rights of sovereign peoples. States should therefore render an account to foreign interests and allow foreign participation in their decision-making processes in ways that effectively remedy the democratic deficits that inhere in the current state system.

But what are the legal implications that stem from the trusteeship concept? None of the grounds that support the trustee concept suggests that all sovereigns must treat the interests of all foreigners as being on a par to those of their own citizens, just as the recognition that property owners have duties toward others does not spell the end of capitalism. Mill’s observations regarding the optimal size of democracy strongly caution against extending suffrage to outsiders or allowing free access to collective resources, as doing so would undermine the opportunities of communities to pursue their own unique preferences and destroy their incentives to create communal goods such as public educational and health care systems.⁹⁷ Instead, the conclusion from the above discussion must be that sovereigns are obligated to provide remedies that can correct, or at least minimize, the loss to individuals of the ability to participate meaningfully in shaping their life opportunities, that allow such individuals, in certain situations, access to the territory and natural resources of other states, and that promote global welfare. Such an exercise requires attention to countervailing considerations, such as the need to ensure reciprocity or burden sharing among diverse sovereigns.

Against this background, the remainder of the article thus distinguishes between different types of other-regarding obligations according to the different level of burdens that they impose on sovereigns, and focuses mainly on what are identified as the *minimal obligations*. The goal is twofold: to articulate the legal obligations that flow from the moral imperatives identified above, and to assess the extent to which those obligations already enjoy the status of positive international law.

II. THE MINIMAL OBLIGATIONS OF SOVEREIGNS AS TRUSTEES

While the obligation to promote global welfare certainly supports the imposition of burdensome obligations on sovereigns, a key precondition applies. In particular, institutions must be in place to provide the assurance of reciprocity—namely, that these obligations apply equally to all. A state in the United States or a state member of the European Union (EU) may not, for example, raise the “NIMBY argument” vis-à-vis other member states or refuse to allow

⁹⁶ The Lisbon Treaty judgment, BVerfG June 30, 2009, 2 BvE 2/08, para. 223 (citing FERDINAND VON MARTITZ, 1 INTERNATIONALE RECHTSHILFE IN STRAFSACHEN 416 (Leipzig, H. Haessel 1888)), at http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html.

⁹⁷ 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 A. Fischel ed., 2006).

the importation of hazardous wastes from other states.⁹⁸ The obligations in question are conditioned on the availability of higher political and judicial bodies that can ensure compliance with communitywide obligations. Until such institutional guarantees of equal voice and reciprocity are more fully developed at the global level, only lesser obligations can be expected to gain legitimacy.⁹⁹

This part of the article elaborates on these minimal obligations. I argue that each of the three grounds for regarding sovereigns as trustees of humanity supports, in its own way, four modest obligations toward all affected stakeholders. These minimal obligations apply to all sovereign bodies (legislatures, executives, and courts), regardless of whether other sovereigns reciprocate, although reciprocity or the lack thereof could be a relevant consideration for sovereigns to take into account in determining how to act. Accordingly, this part presents arguments that sovereigns must (1) take the interests of foreign stakeholders into account, (2) provide voice in their decision-making processes to foreign stakeholders affected by their policies, and accommodate foreign interests (3) if doing so is costless to them or (4) in cases of catastrophe. Each section examines also to what extent these minimal obligations are reflected in contemporary international law.

The Obligation to Take Others' Interests into Account

As trustees of humanity, national decision makers have an obligation to take into account the interests of others when devising policies (or when reviewing them, in the case of national courts). All three moral grounds for the trusteeship concept support this conclusion. Although sovereigns are entitled to prioritize their citizens' needs, they must weigh the interests of other stakeholders and consider internalizing them into their balancing calculus.

The obligation to weigh the interests of foreign stakeholders does not *necessarily* imply an obligation to succumb to those interests, and does not even require full legal responsibility for ultimately preferring domestic interests in balancing various opposing claims. It does not *necessarily* imply that sovereign discretion should be subject to review by third parties such as foreign or international courts, ones that would replace the sovereign's discretion with their own. What it does imply as a minimum, however, is that sovereigns—whenever they are considering the adoption and pursuit of policies that potentially affect foreign stakeholders or, more generally, global welfare—give due respect to those foreign and global interests.

The general obligation to give “due respect”¹⁰⁰ to noncitizens affected by sovereign policies can already be found in federal systems; in such cases, the aim is to ensure that states and provinces internalize out-of-state interests. The same general obligation exists also in the EU. In both federal systems and the EU, this obligation is legally enforceable through the courts. In federal states, courts impose on political subunits (states, *Länder*, provinces) the obligation—

⁹⁸ See Case C-2/90, *Comm'n v. Belg.*, 1992 ECR I-4471, para. 28 (“[W]aste, whether recyclable or not, is to be regarded as ‘goods’ the movement of which, in accordance with Article 30 of the Treaty, must in principle not be prevented.”). To justify imposing barriers to the movement of wastes, the state must demonstrate that its need to protect both health and the environment is sufficiently compelling to prevail over the objective of the free movement of goods. See *generally* notes 90–98 and accompanying text.

⁹⁹ On preconditions for imposing additional obligations, see discussion *infra* part III.

¹⁰⁰ RAWLS, *supra* note 56, at 35 (noting that “just peoples are fully prepared to grant the very same proper respect and recognition to other peoples as equals” and that this respect should be “willingly accorded to other reasonable peoples”).

often conceptualized as deriving from principles of “fidelity,” “loyalty,” or “solidarity”—to take the interests of out-of-state stakeholders and the collective into account. The German constitutional court has invoked the unwritten concept of *Bundestreue*, or federal fidelity,¹⁰¹ which requires both the federal government and member states to “subordinate their decisional freedom to the consideration of the common welfare”; and “[w]here the effects of a legal regulation are not limited to the territory of the [regulating] *Land*, the *Land* legislator must consider the interests of the Federation and the remaining *Länder*.”¹⁰² Similar commitments can be found in EU law. The European Court of Justice has invoked the principle of “solidarity which is the basis . . . of the whole of the Community system,”¹⁰³ and the recent Lisbon Treaty is replete with references to such principles as “sincere cooperation,”¹⁰⁴ “loyalty,”¹⁰⁵ and “solidarity.”¹⁰⁶ By contrast, a more functional approach addresses the implications of member-state policies on interstate commerce. The U.S. Supreme Court has invoked the so-called Dormant Commerce Clause to prevent “an undue burden on interstate commerce,”¹⁰⁷ and the European Court of Justice has derived a similar obligation from the principle of the free movement of goods.¹⁰⁸

¹⁰¹ See Daniel Halberstam, *Of Power and Responsibility: The Political Morality of Federal Systems*, 90 VA. L. REV. 731, 739–62 (2004).

¹⁰² BVerfG Dec. 1, 1954, 4 BVerfGE 115, 140–42 (translated by Halberstam, *supra* note 101, at 760) (concerning the setting of salaries of public officials). That court later declared that the *Länder* were under an obligation of “mutual accord, consideration and cooperation” when regulating cross-border broadcasting of private television, 73 BVerfG 118, 197 (Nov. 4, 1986), and when recognizing professional qualifications, BVerfG June 28, 2005, 1 BvR 1506/04.

¹⁰³ Joined Cases 6 & 11/69, *Comm’n v. France*, 1969 ECR 523, para. 16, *discussed in* Halberstam, *supra* note 101, at 764; *see also* R. St. J. Macdonald, *Solidarity in the Practice and Discourse of Public International Law*, 8 PACE INT’L L. REV. 259, 297 (1996) (“Since the prosperity of all member states is an aim of the treaty, one state may not harm another without reason or justification. Member states may also be obliged to take positive action to harmonize their legislation and policies to conform with those of other member states.”).

¹⁰⁴ Consolidated Version of the Treaty on European Union, Art. 4(3), 2008 O.J. (C 115) 13.

¹⁰⁵ *Id.*, Art. 24(3).

¹⁰⁶ References to “solidarity” are spattered throughout the current EU treaties, including Article 24(3) of the Consolidated Version of the Treaty on European Union and Article 222, the “Solidarity Clause,” of the Consolidated Version of the Treaty on the Functioning of the European Union, 2008 O.J. (C 115) 47, which obligates member states to “act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster.”

¹⁰⁷ Under this doctrine, federal courts may strike down state policies 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 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 interstate commerce, but also to “insure national solidarity,” as the democratic processes within states tend to give precedence to local interests. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1057 (3d ed. 2000) (discussing *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522–23 (1935)); *see also id.* at 1051–52.

¹⁰⁸ *See, e.g.*, Case C/41/02, *Comm’n v. Netherlands*, 2004 ECR I-11375, para. 47; Case 302/86, *Comm’n v. Denmark*, 1988 ECR 4607, para. 10 (holding that the prohibition on selling drinks in non-reusable containers “contrary to the principle of proportionality in so far as the aim of the protection of the environment may be achieved by means less restrictive of intra-Community trade”); *see also* Simona Morettini, *Community Principles Affecting the Exercise of Discretionary Power by National Authorities in the Service Sector*, in *GLOBAL AND EUROPEAN CONSTRAINTS UPON NATIONAL RIGHT TO REGULATE: THE SERVICES SECTOR* 106, 118 (Stefano Battini & Giulio Vesperini eds., 2008) (noting that the European Court of Justice gives greater deference to states in matters of public health and safety, areas considered “closely related to national sovereignty,” as opposed to other areas such as consumer protection, an area of European Community competence with broad agreement as to the appropriate level of protection).

The obligation to take into account the effects of policies on noncitizens—albeit often with no direct legal consequences in case of breach—can also be seen in international law in specific treaty obligations and in legal doctrines related to environmental concerns. World Trade Organization law requires that when members deviate from their obligations under the General Agreement on Tariffs and Trade and impose measures “essential to the acquisition or distribution of products in general or local short supply,” they observe “the principle that all contracting parties are entitled to an equitable share of the international supply of such products.”¹⁰⁹ Likewise, the Agreement on Agriculture requires that states instituting “any new export prohibition or restriction on foodstuffs . . . shall give due consideration to the effects of such prohibition or restriction on importing Members’ food security.”¹¹⁰ This obligation is reinforced by procedural obligations to “give notice in writing, as far in advance as practicable” to the Committee on Agriculture and to “consult, upon request, with any other Member having a substantial interest as an importer with respect to any matter related to the measure in question.”¹¹¹

The International Law Commission’s draft Articles on Prevention of Transboundary Harm from Hazardous Activities¹¹² lists numerous other-regarding considerations that sovereigns must take into account:

- (a) the degree of risk of significant transboundary harm and of the availability of means of preventing such harm, or minimizing the risk thereof or repairing the harm; (b) 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; . . . (d) the 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; (e) the 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] (f) the 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.

While this list of considerations refers to potential harm specifically from hazardous activities, it is reasonable to assume that, under the concept of trustee sovereignty, such obligations would be considered relevant to most, if not all, decisions that affect foreign stakeholders.

The recognition of such accountability obligations could remain imperfect—in the sense that failing to fully comply with them would not necessarily entail legal consequences imposed by third parties through effective enforcement mechanisms. This shortfall in enforcement is appropriate for three reasons. First, from a functional perspective, an external regime that

¹⁰⁹ General Agreement on Tariffs and Trade, Oct. 30, 1947, Art. XX(j), TIAS No. 1700, 55 UNTS 194; see PETROS C. MAVROIDIS, *TRADE IN GOODS: AN ANALYSIS OF INTERNATIONAL TRADE AGREEMENTS* 355 (2d ed. 2012) (noting that “this provision was considered relevant not only for the post-war period of short supply of various goods, but also for cases of natural disaster”).

¹¹⁰ Agreement on Agriculture, Art. 12, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, in *WORLD TRADE ORGANIZATION, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS* 39 (1999), reprinted in 33 *ILM* 1167 (1994).

¹¹¹ *Id.* The article exempts “any developing country Member, unless the measure is taken by a developing country Member which is a net-food exporter of the specific foodstuff concerned.”

¹¹² International Law Commission, Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, Art. 10, UN Doc. A/56/10 (2001).

imposes sanctions on sovereigns for their exercise of discretion might be even less competent than the sovereigns in striking the right balance between domestic and foreign interests, and would thus run the risk of making judgmental errors that undermine fairness and global welfare. Second, from a normative perspective, such an enforcement regime would potentially compromise equality and reciprocity by unduly burdening certain sovereigns but not others. Third, also from a normative perspective, such a regime would potentially displace and stifle democratic processes, which are intrinsically important and instrumental for promoting global welfare and justice.

The first to have identified the problematic character of enforcement in this context was Christian Wolff, who was also, in 1749, the first to propose the concept of other-regarding duties of sovereigns.¹¹³ He asks: “Who is judge as to whether one nation can do anything for another without neglect of its duty toward itself [?]”¹¹⁴ In his response, Wolff emphasizes the third concern identified above, elaborating 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 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.¹¹⁵

Wolff then draws the conclusion that the sovereign “is not bound to give to other nations the reason for this decision, consequently they must simply abide by its will.”¹¹⁶ His position may have been appropriate for the emerging global order in eighteenth-century Europe, and certainly reflected the prevailing expectations regarding sovereigns. And for the three reasons mentioned above, his overall position retains much of its original force, despite the impressive growth of international institutions and courts that claim to have the technical capacity and the necessary impartiality to subject sovereign discretion to external review.¹¹⁷

Nevertheless, the contemporary circumstances of interdependency, resource scarcity, and democratic deficit at the state level, as well as the wide recognition of the equal moral worth of all human beings, require the recognition of a fundamental legal obligation upon sovereigns to note the interests of others when making policy choices that directly affect them.¹¹⁸ Such

¹¹³ CHRISTIAN WOLFF, 2 *JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM* §§156–89 (Joseph H. Drake trans., 1934) (1749).

¹¹⁴ *Id.* §157.

¹¹⁵ *Id.* Wolff presents the following 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.

¹¹⁶ *Id.* §188.

¹¹⁷ See further discussion *infra* part IV.

¹¹⁸ René-Jean Dupuy made the link between the changing demands on global resources and the changing nature of the international obligations already in 1986. See *supra* note 63 (“Evolution logique en un temps où la surpopulation et la menace de pénurie exigent la conservation de tous les biens de cette terre.”).

a basic requirement does not demand elaborate balancing between national and foreign interests. If you had the opportunity to weigh others' interests but did not, then the burden is on you to account for the omission. Indeed, complete disregard of the others' interests is a simple finding that courts and tribunals have been making for decades to determine state responsibility.¹¹⁹

I do not deny that recognizing an obligation to weigh other-regarding considerations opens up a host of secondary questions that must be treated with great caution: How should the scope of the affected stakeholders be defined? Should those remotely or indirectly affected be included in the calculus? How much weight should be given to the interests of others? A fully developed set of normative criteria for weighing a sovereign's other-regarding obligations would have to address the different issues at stake—for example, the different weights assigned to policies aimed at saving lives and those furthering economic development,¹²⁰ the different (decreasing?) spheres of responsibility of sovereigns (over citizens, over foreigners just outside the borders, over other foreigners in neighboring countries, and so on),¹²¹ the relative power of specific sovereigns (“common but differentiated responsibilities”),¹²² or their unique responsibilities toward foreign stakeholders due to past acts (as a former colonial power or as an occupier) or omissions (for example, the failure to control exploitation by locally registered companies that operate abroad). Obviously, each of these questions requires further detailed analysis. The accountability obligation must inform each of these debates, however, by requiring at a minimum that the acting state explain to those affected why it has disregarded them.

Minimal Deliberative Obligations

The sovereign as trustee must ensure meaningful opportunities to have the voices of affected stakeholders—both foreign governments and individuals—heard and considered, and must offer them reasons for its policy choices.¹²³ This obligation, which draws heavily on the self-determination ground for trusteeship explored above, is significantly more than an “imperfect obligation” in Wolff’s terms: it tempers the sovereign’s power by introducing the obligation to reason, potentially facilitating a dialogue on ways to promote common and, indeed, global interests. These minimal procedural obligations will inform domestic voters and decision makers, and enable them to gauge the consequences of their policies. These obligations will not deprive domestic decision makers of their right to have the final say.

International law has long recognized an obligation to inform other (usually neighboring) countries about possible hazards and planned measures, although such a general obligation is

¹¹⁹ The ICJ found Iran responsible for “fail[ing] altogether” to protect the the United States’ premises and for its “total inaction.” *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 ICJ REP 3, paras. 63–64 (May 24). Similarly, it found Albania responsible for not notifying approaching British warships about the existence of a minefield in Albanian waters (*Corfu Channel (UK & N. Ir. v. Alb.)*, 1949 ICJ REP. 4, 22 (Apr. 9)).

¹²⁰ For examples in the WTO context, see *infra* text accompanying notes 194–95.

¹²¹ For an example in the environmental context, see *infra* text accompanying notes 129–30.

¹²² See also *infra* text accompanying note 202.

¹²³ Rawls, *supra* note 56, at 56 (“[T]he ideal of the public reason of free and equal peoples is realized, or satisfied, whenever chief executives and legislators, and other government officials, as well as candidates for public office, act from and follow the principles of the Law of Peoples and explain to other peoples their reasons for pursuing or revising a people’s foreign policy and affairs of state that involve other societies.”); see also RISSE, *supra* note 56, at 335 (discussing states’ obligation to explain how they have taken into account their global justice obligations).

currently recognized only with respect to activities expected to cause “significant harm” to others.¹²⁴ Granted, providing a hearing to foreign stakeholders and complying with other procedural requirements, such as basing policies on scientific impact assessments or on international standards, is not costless. It may well burden and delay the decision-making process. But that does not necessarily mean that giving notice, granting a proper hearing to affected stakeholders, or providing additional clarifying information is detrimental even from the perspective of the deciding government. As we know from the literature on administrative law, procedural rights may actually benefit the decision makers. Such procedural guarantees enable them to obtain additional perspectives of which they would not have been aware, and thereby to obtain better and fuller information about the planned measures and their consequences. Transparency and accountability also limit the possibilities of capture by narrow interests that thrive behind closed doors. By allowing foreign stakeholders to participate effectively in the decision-making processes relevant to them and by rendering a proper account of the policies that they adopt, sovereigns do not necessarily sacrifice their resources for other peoples’ welfare.

Perhaps inspired by these considerations, several global actors expanded the scope of stakeholders entitled to be heard beyond the textual confines of the relevant treaties. Three examples will suffice. The WTO Appellate Body famously interpreted member states’ GATT obligations to include the hearing of foreign individuals who may be adversely affected from national policies that limit imports,¹²⁵ and also interpreted its own jurisdiction to allow third parties to participate in the dispute settlement process by submitting amicus briefs.¹²⁶ The International Tribunal on the Law of the Sea sought to ensure voice to individuals while they or their vessels are detained and subjected to sanctions by coastal states.¹²⁷ Finally and most conspicuously, the Aarhus Convention Compliance Committee¹²⁸ has extended the right to take part in *domestic* environmental decision making—which the convention provides to those “affected or likely to be affected by, or having an interest in, the environmental decision-making”¹²⁹—to

¹²⁴ In *Corfu Channel*, *supra* note 119, at 22, the ICJ characterized the duty to give warning as based, *inter alia*, on “elementary considerations of humanity.” *See, e.g.*, Convention on the Law of the Non-navigational Uses of International Watercourses, Art. 12, GA Res. 51/229, annex (May 21, 1997) (“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* Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, *supra* note 112, Art. 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.”).

¹²⁵ Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (adopted Nov. 6, 1998).

¹²⁶ Appellate Body Report, European Communities—Trade Description of Sardines, WT/DS231/AB/R (adopted Oct. 23, 2002).

¹²⁷ “*Juno Trader*,” *supra* note 84.

¹²⁸ A body set up in 2004 to promote and improve compliance with the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, UN Doc. ECE/CEP/43, 38 ILM 517 (1999), *available at* <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>. *See* UN Economic & Social Council, Decision I/7, Review of Compliance, UN Doc. ECE/MP.PP/2/Add.8 (Apr. 2, 2004), *at* <http://www.unece.org/fileadmin/DAM/env/pp/documents/mop1/ece.mp.pp.2.add.8.e.pdf>.

¹²⁹ Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, *supra* note 128, Art. 2(5).

foreign citizens residing outside the country. The committee further recommended that member states provide “guidance to assist Parties in identifying, notifying and involving the public concerned in decision-making on projects in border areas affecting the public in other countries.”¹³⁰ The “draft list of recommendations on public participation” issued by a task force set up to facilitate the work of the state parties does not refer to nationality as a potential barrier to access, and actually suggests the possible use of “Geographic Information Systems to determine who is the concerned public.”¹³¹ The approach is legitimately functional: the scope of the planned measure determines the affected stakeholders whose voice should be heard.

As with the previous question concerning the scope of accountability, the question of deciding upon particular “minimal” deliberative obligations raises several secondary questions. They include the extent to which states ought to involve foreign stakeholders in their decision-making processes, taking into account the costs that are involved; how to determine the circle of those regarded as stakeholders entitled to a hearing; and how much information should be made available to them during hearings or when presenting the rationale for the policies chosen. The answers to these and other questions must be sensitive to the different areas of regulation, the types of interests that are affected, and the relative wealth and capacities of the state, among other considerations.

The Obligation to Accommodate Others’ Interests When One Sustains No Loss: The Restricted Pareto Criterion

The sovereign as trustee must yield to the interests of others when such a concession is costless to itself. This obligation draws heavily on the concept of limited ownership of resources. A coastal state, for example, must allow access to a landlocked neighbor if such access entails no harm to itself (for example, a one-time emergency flight over its airspace, or even a tunnel below its territory). This result can be understood as a *restricted* Pareto outcome—namely, an outcome from which “one benefits and the other sustains no loss,” with no compensation. This situation is different from the general Pareto outcome, in which at least one of the parties is better off relative to any alternative outcome, whereas the other parties are not made worse off *or are compensated for any loss* (as when the coastal state is forced to allow access but is compensated for any losses it thereby incurred). The restricted version is a more limited imposition on sovereigns than the general version of Pareto because it entails less intrusion on sovereigns’ discretion regarding the use of their resources: it does not require them to accept compensation for use of their resources when they did not approve such use. A stronger imposition on sovereigns would limit their ability to pursue their preferences and also require a robust institutional infrastructure with reliable mechanisms that sovereigns could trust to make impartial and competent decisions on allocations among sovereigns or their citizens. Hence my choice, when exploring minimal obligations, to opt for a restricted Pareto criterion that stipulates that

¹³⁰ UN Economic & Social Council, *Findings and Recommendations with Regard to Compliance by Ukraine with the Obligations Under the Aarhus Convention in the Case of Bystre Deep-Water Navigation Canal Construction*, UN Doc. ECE/MP.PP/C.1/2005/2/Add.3 (Mar. 14, 2005), at <http://www.unece.org/fileadmin/DAM/env/documents/2005/pp/c.1/ece.mp.pp.c1.2005.2.Add.3.e.pdf>.

¹³¹ UN Economic Commission for Europe, Task Force on Public Participation in Decision-Making, *Draft List of Recommendations on Public Participation* §2.1(e) (Oct. 25–26, 2010), at http://www.unece.org/fileadmin/DAM/env/pp/ppdm/PPDM_recommendations.pdf.

the minimal other-regarding normative obligation incumbent on all sovereigns is the obligation to accommodate others' interests when they themselves "sustain no loss." In this narrower version, side payments to compensate for loss are not an option, at least in terms of determining the minimal obligations upon sovereigns.

This concept is recognized, for example, in Jewish law, which requires individual owners to weigh other-regarding interests and may even force them to yield to others.¹³² 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."¹³³ As Hanoch Dagan has observed, whether a legal system adopts this principle or not depends on its underlying self-commitment to long-term cooperation.¹³⁴ The sense of internal commitment yields an obligation to act according to the principle of "one benefits and the other sustains no loss." Any legal system that perceives itself as reflecting the common enterprise of a "human society" and that allocates shared resources among its members must endorse *at least* a restricted Pareto criterion as a principle for regulating the interactions between group members. All three grounds of the trustee sovereignty concept support the restricted Pareto criterion as a minimal obligation.

The restricted Pareto criterion was invoked by Grotius in *Mare liberum* to justify his proposed regime of freedom of navigation on the high seas.¹³⁵ He referred to it as "the law of human society":

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 share with another things which are useful to the recipient, and no loss to the giver?¹³⁶

Arguably, a similar conclusion may follow from another venerable doctrine of international law—namely, the doctrine of abuse of rights.¹³⁷ Hersch Lauterpacht lauded the doctrine as a 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."¹³⁸ But what amounts to "abuse of rights" is vague. By contrast, the restricted Pareto test is clearer and less threatening to states in terms of its interference with sovereign discretion. While the question whether a specific concession is costless or not might sometimes be subject to debate (and then left to the sovereign's discretion),¹³⁹ the answer is often obvious, as the cases below demonstrate.

¹³² *Id.* at 112–20; AARON KIRSCHENBAUM, EQUITY IN JEWISH LAW 185–97 (1991).

¹³³ KIRSCHENBAUM, *supra* note 132, at 187–91.

¹³⁴ HANOCH DAGAN, UNJUST ENRICHMENT: A STUDY OF PRIVATE LAW AND PUBLIC VALUES (1997).

¹³⁵ GROTIUS, *supra* note 74.

¹³⁶ *Id.* at 38; *see also* GROTIUS, *supra* note 69, at 196.

¹³⁷ For expansive readings of the doctrine, applying it to the reasonableness of the sovereign's policies, see HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 298 (1933), HELMUT PHILIPP AUST, COMPLICITY AND THE LAW OF STATE RESPONSIBILITY 69–81 (2011), Michael Byers, *Abuse of Rights: An Old Principle, A New Age*, 47 MCGILL L. J. 389 (2002), and G. D. S. Taylor, *The Content of the Rule Against Abuse of Rights in International Law*, 1972–73 BRIT. Y.B. INT'L L. 323.

¹³⁸ LAUTERPACHT, *supra* note 137, at 287. Similarly, Politis, *supra* note 27, at 86–93, regarded this concept as a general principle of international law that should inform its progressive development.

¹³⁹ Unless there are reliable institutions that could review this discretion. On this question see *infra* part IV.

The following paragraphs will revisit several judgments of the International Court of Justice (ICJ) and other international tribunals that, I submit, can be explained by reference to the restricted Pareto criterion. This consideration can serve as the (otherwise unarticulated)¹⁴⁰ normative ground for the ICJ's 1949 *Corfu Channel* judgment,¹⁴¹ which stipulated that an international custom existed according to which states had a right of innocent passage through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal state. The same criterion is reflected in the traditional demand of land-locked states for the right of transit through the territory of neighboring coastal states—a right that eventually was recognized in Article 125 of the UN Convention on the Law of the Sea.¹⁴² The parallel between the right of innocent passage through straits and the right of transit of land-locked states is striking, as is the fact that coastal states long refused to acknowledge this connection. During land-locked states' arduous uphill battle for the recognition of their rights, they invoked numerous arguments, including the logical corollary of the freedom of the high seas, the common heritage of mankind, and the existence of the international community and the interdependence of states.¹⁴³ Writing in 1958, Elihu Lauterpacht invoked, in effect, the restricted Pareto concept when articulating the right of transit of land-locked states based on "necessity or convenience" that "cause[s] no harm or prejudice to the transit State."¹⁴⁴

A similar concern regarding the principle of "one benefits and the other sustains no loss" can be traced in other cases related to the right to use a foreign sovereign's land. In such cases, tribunals have acknowledged the sovereign's authority to police the exercise of the right of passage and have implicitly obligated the sovereign not to weigh irrelevant considerations.¹⁴⁵ In *Right of Passage over Indian Territory*,¹⁴⁶ the ICJ examined India's refusal to allow the Portuguese passage between enclaves that 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," thereby implying that irrelevant considerations would not have justified such a restriction. In the *Iron Rhine Railway* arbitration,¹⁴⁷ 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.

¹⁴⁰ *Corfu Channel*, *supra* note 119. The Court referred to functional aspects: the channel's "geographical situation as connecting two parts of the high seas[,] . . . its being used for international navigation," and its "special importance to Greece by reason of the traffic to and from the port of Corfu." *Id.* at 28–29.

¹⁴¹ *Corfu Channel*, *supra* note 119.

¹⁴² Article 125 asserts the unequivocal right of access to the sea (although transit is recognized only as a freedom; transit states have the right to take all necessary measures to protect their legitimate interests; and the terms and modalities for the exercise of the freedom of transit are left for agreement). This article of the Convention is mostly considered not to be a mere *pactum de contrahendo*. See, e.g., ROBIN R. CHURCHILL & A. VAUGHAN LOWE, *THE LAW OF THE SEA* 327 (1988).

¹⁴³ Elihu Lauterpacht, *Freedom of Transit in International Law*, 44 *TRANSACTIONS GROTIUS SOCIETY* 313, 321 (1958); STEPHEN C. VASCIANNIE, *LAND-LOCKED AND GEOGRAPHICALLY DISADVANTAGED STATES IN THE INTERNATIONAL LAW OF THE SEA* 216–18 (1990); A. Mpazi Sinjela, *Freedom of Transit and the Right of Access for Land-Locked States: The Evolution of Principle and Law*, 12 *GA. J. INT'L & COMP. L.* 31, 40 (1982).

¹⁴⁴ Lauterpacht, *supra* note 143, at 332; see also Susan Marks, *Transit Rights to Lesotho*, 16 *COMMONWEALTH L. BULL.* 329, 342 (1990) ("There is perhaps nothing surprising. . . in a law which requires states to allow free transit across their territory where that transit is necessary to enable another state to gain access to the sea.").

¹⁴⁵ On the similarity between such analysis and administrative law adjudication, see Taylor, *supra* note 137.

¹⁴⁶ *Right of Passage over Indian Territory* (Port. v. India), 1960 *ICJ REP.* 6, 45 (Apr. 12).

¹⁴⁷ *Iron Rhine Railway* (Belg. v. Neth.), 27 *R.I.A.A.* 35 (2005).

The restricted Pareto criterion undoubtedly played a role in the 2009 ICJ judgment in *Dispute Regarding Navigational and Related Rights*, which concerned the uses of the San Juan River in an area subject to Nicaragua's sovereignty.¹⁴⁸ An 1858 treaty between Nicaragua and Costa Rica granted the latter the right of navigation for the purposes of commerce in that part of the river. The treaty was silent, however, as to the rights of Costa Rican villagers who lived on the bank of the river. Nevertheless, the Court concluded

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 . . . 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. . . . [T]he parties must be presumed . . . 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.¹⁴⁹

The Court even found, 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," that Costa Rica had a customary right to subsistence fishing by the Costa Ricans living along the river bank.¹⁵⁰ Notably, Nicaragua never argued that the Costa Rican uses of the river harmed its interests. This outcome was therefore fully justified as complying with the restricted Pareto criterion.

This criterion was probably also an influential consideration in the *Lac Lanoux* arbitration.¹⁵¹ In that case, France benefited from its diversion of a river shared with Spain, whereas Spain sustained no loss because it continued to receive the same quantity and quality of water, albeit from a different source that fed the river. Spain insisted that under its treaty with France, it had the right to approve any French intervention in the flow of the river on French territory before it crossed into Spanish territory. Spain perhaps hoped that its refusal would induce France to offer it a larger share of water or part of the electricity generated by the hydroelectric project that would use the water diverted from Lac Lanoux. In rejecting Spain's claim, the tribunal referred to international practice and to customary international law, 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 the territorial jurisdiction of another."¹⁵² Although *Lac Lanoux's* doctrinal foundations are supported more by logic than by precedent, the decision is hailed as an important milestone in the development of international freshwater law.¹⁵³

We cannot expect such global decision making bodies to be explicit about their right to undertake such inquiries. After all, treaty language does not explicitly acknowledge such responsibilities, and general international law has yet to offer explicit support for this approach.

¹⁴⁸ (Costa Rica v. Nicar.), 2009 ICJ REP. 212 (July 13).

¹⁴⁹ *Id.*, para 79. Following the same logic, the Court found 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." *Id.*, para. 84.

¹⁵⁰ *Id.*, para 141.

¹⁵¹ *Lac Lanoux Arbitration (Fr. v. Spain)*, 24 ILR 101 (1957).

¹⁵² *Id.* at 128.

¹⁵³ PHILLIPE SANDS, *PRINCIPLE OF INTERNATIONAL ENVIRONMENTAL LAW* 348–49 (1995); PATRICIA W. BIRNIE, ALLAN E. BOYLE & CATHERINE REDGWELL, *INTERNATIONAL LAW & THE ENVIRONMENT* 102–03 (2009); see also Benvenuti, *supra* note 12, at 209–10.

Nevertheless, I suggest that the best explanation for these judgments is the acknowledgment that sovereignty may not be used to violate the restricted Pareto criterion.

This criterion applies to the management not only of natural resources, but of all resources, including the technological and intellectual resources that are available in the respective states. Take, for example, the issue of technology transfers and access to life-saving drugs. In 2001, the Doha Declaration “*reaffirm[ed]* the commitment of developed-country Members to provide incentives to their enterprises and institutions to promote and encourage technology transfer to least-developed country Members” (emphasis added).¹⁵⁴ Its call for “an expeditious solution” to the difficulties that states “with insufficient or no manufacturing capacities in the pharmaceutical sector could face . . . in making effective use of compulsory licensing under the TRIPS Agreement”¹⁵⁵ was answered by the WTO General Council’s 2003 decision¹⁵⁶ enabling WTO members with “insufficient or no manufacturing capacities in the pharmaceutical sector”¹⁵⁷ to make effective use of compulsory licensing of pharmaceutical products. The EU complemented that arrangement by authorizing EU members to use their compulsory licensing authority to “address public health problems faced by least developed countries and other developing countries, and in particular to improve access to affordable medicines which are safe and effective.”¹⁵⁸ The regulation also “recognises the utmost desirability of promoting the transfer of technology and capacity-building to countries with insufficient or no manufacturing capacity in the pharmaceutical sector.”¹⁵⁹ This evolution in formal law is complemented by voluntary and informal arrangements to provide financing or medicines to developing countries, such as the Global Fund to Fight AIDS, Tuberculosis and Malaria, UNITAID, and the Clinton HIV/AIDS Initiative. Some of these initiatives invoke a sense of obligation to improve health conditions in the developing world. Several states, headed by France, impose an “international [airline ticket] solidarity levy,”¹⁶⁰ which is imposed on travelers passing through the airports of the participating countries, emphasizing that the arrangement is “no longer a system of charity but rather one of parity”¹⁶¹ and that it is “[f]air too, because given the low level of the tax, *it is absolutely painless.*”¹⁶² In other words, these arrangements epitomize other-regardingness that conforms to the restricted Pareto criterion.

¹⁵⁴ WTO Ministerial Conference, Declaration on the Trips Agreement and Public Health, Art. 7, WT/MIN(01)/DEC/2 (Nov. 20, 2001), at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm.

¹⁵⁵ *Id.*, Art. 6.

¹⁵⁶ WTO General Council, Decision on Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, WT/L/540 (Sept. 1, 2003), at http://www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm. On that decision see Duncan Matthews, *WTO Decision on Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health: A Solution to the Access to Essential Medicines Problem?*, 7 J. INT’L ECON. L. 73 (2004).

¹⁵⁷ Decision on Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, *supra* note 156, para. 2(a)(ii).

¹⁵⁸ Regulation (EC) 816/2006 of the European Parliament and of the Council of 17 May 2006 on Compulsory Licensing of Patents Relating to the Manufacture of Pharmaceutical Products for Export to Countries with Public Health Problems, 2006 O.J. (L 157) 1, 1.

¹⁵⁹ *Id.*, pmb., para. 13.

¹⁶⁰ As described on the official French governmental website France Diplomatie, the tax is a response to a situation “call[ing] for vigorous political action.” Melina Gazsi, *UNITAID: The International Solidarity Levy on Air Tickets*, at <http://www.diplomatie.gouv.fr/en/france-priorities/development-and-humanitarian/institutions-and-issues-of/innovative-ways-to-fund/unitaid-the-international>.

¹⁶¹ *Id.*

¹⁶² *Id.* (emphasis added).

This wide scope for restricted Pareto obligations may create situations of reciprocal obligation. A case in point is the confrontation between Indonesia and developed countries concerning the bird flu vaccine. Until 2006, developing countries delivered samples of new viruses to the World Health Organization but could not ensure to their own citizens that they would have access to the drugs produced from those samples. When a new strain of the bird flu virus was discovered in Indonesia in 2006, its government announced that it would not deliver samples to the WHO unless it received sufficient assurances that the vaccine developed from the samples would be available to its citizens.¹⁶³ Indonesia invoked its sovereign right: since the virus, as a biological resource, was Indonesia's property, Indonesia had no obligation to share it with others. Dependent on virus samples to produce the vaccine, the WHO and developed countries argued, in turn, that Indonesia was obligated under international law to provide information essential to prevent epidemics. A compromise that ensured both access to the virus and the availability of drugs to citizens of developing countries—reflecting the reciprocal Pareto obligations on both sides of this controversy—was reached only in 2011.¹⁶⁴ Perhaps a sincere commitment to taking other-regarding considerations seriously might have brought this conflict to an end much sooner.

Some readers might be disappointed with such a restricted obligation. They might ask: why not extend the same solution to cases where the sovereign's burden is minimal but the foreign party's gain enormous? Despite the good reasons that support this approach, it could lead to a slippery slope toward full external review of national discretion—which raises its own set of questions (to be discussed below). Note that this restricted Pareto obligation is part of a set of obligations that include the obligation to provide account. And in the case being considered—with the scales so distorted against the interests of foreigners—it would be difficult for the state authorities to offer a convincing account for their decision. This may prove to be a sufficiently effective deterrent against ignoring the interests of others.

Minimal Responses to Catastrophes

In certain aspects, positive international law has moved beyond these minimal obligations. The obvious cases involve the obligation to prevent and suppress crimes against humanity and grave breaches of the laws of war.¹⁶⁵ The emerging concept of the "responsibility to protect" belongs to these specific positive obligations.¹⁶⁶ The International Law Commission's effort to define a responsibility to seek and provide assistance in cases of natural disaster¹⁶⁷ follows the same logic.

¹⁶³ 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, S. Isfandari, T. Soendoro & S. F. Supari, *Towards Mutual Trust, Transparency and Equity in Virus Sharing Mechanism: The Avian Influenza Case of Indonesia*, 37 ANNALS ACAD. MED. SINGAPORE 482 (2008).

¹⁶⁴ See World Health Organization Assembly, *Pandemic Influenza Preparedness: Sharing of Influenza Viruses and Access to Vaccines and Other Benefits* (2011), at http://apps.who.int/gb/ebwha/pdf_files/WHA64/A64_57Draft-en.pdf.

¹⁶⁵ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bos. & Herz. v. Serb. & Mont.), 2007 ICJ REP. 40, paras. 396–407 (Feb. 26); Reisman, *supra* note 22.

¹⁶⁶ See *supra* note 9. On the contents of this obligation, see, for example, RESPONSIBILITY TO PROTECT—FROM PRINCIPLE TO PRACTICE (Julia Hoffman & André Nollkaemper eds., 2012); ANNE ORFORD, INTERNATIONAL AUTHORITY AND THE RESPONSIBILITY TO PROTECT (2011).

¹⁶⁷ See *supra* note 10 and accompanying text.

Another type of more rigorous other-regarding obligation relates to the treatment of those individuals who seek refuge in foreign countries. States have assumed some obligations concerning refugees¹⁶⁸ and are also obligated under human rights treaties to protect other foreigners who may be subject to maltreatment by foreign governments.¹⁶⁹ The extension of the right to refuge to individuals who have lost their homes and livelihoods as a result of severe climatic changes is a widely debated issue.¹⁷⁰

Finally, the obligation to ensure access to food, as recognized by the International Covenant on Economic, Social and Cultural Rights,¹⁷¹ requires “States Parties . . . , taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.”¹⁷² What this duty entails was interpreted by the Committee on Economic, Social and Cultural Rights as “tak[ing] steps to respect the enjoyment of the right to food in other countries . . . [and] refrain[ing] at all times from food embargoes or similar measures which endanger conditions for food production and access to food in other countries.”¹⁷³ According to some scholars, this obligation entails many more requirements if a serious effort is to be made to secure access to food for all.¹⁷⁴ Attention to the food security of others is also reflected in trade law.¹⁷⁵ No doubt, a growing acceptance of the logic of trusteeship should generate more explicit obligations.

III. CRITICISMS AND RESPONSES

As mentioned above, the concept of trustee sovereignty charts a middle course between cosmopolitan and parochial approaches to the regulation of global affairs. It seeks to retain sovereignty as an important locus for democratic decision making in a heterogeneous world, and it recognizes the primacy of domestic interests when balanced against the interests of foreigners. Moreover, in this article I emphasize the minimal obligations that derive from this concept, which do not depend on external disciplining mechanisms such as reciprocity or third-party enforcement. The model presented is susceptible to criticism from two opposite sides.

The criticism from the cosmopolitan side is that the model does not go far enough. Retaining sovereignty impedes the introduction of a truly inclusive and functioning global constitutional system that is able to overcome holdouts and free riders in its promotion of the collective action necessary for general welfare. Also problematic is that the voice it gives to foreign

¹⁶⁸ Convention Relating to the Status of Refugees, *supra* note 5.

¹⁶⁹ As interpreted under Article 3 of the European Convention for Protection of Human Rights and Fundamental Freedoms, ETS No. 5, Nov. 4, 1950.

¹⁷⁰ Katrina Wyman, *Sinking States*, in PROPERTY IN LAND AND OTHER RESOURCES (Daniel H. Cole & Elinor Ostrom eds., 2012); TALLY KRITZMAN-AMIR, SOCIO-ECONOMIC REFUGEES (2008) (unpublished Ph.D. dissertation, Tel Aviv Univ.) (on file with the author).

¹⁷¹ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 UNTS 3.

¹⁷² *Id.*, Art. 11(2)(b).

¹⁷³ Committee on Economic, Social and Cultural Rights, General Comment No. 12, The Right to Adequate Food (Art. 11), UN Doc. E/C.12/1999/5 (May 12, 1999); *see also* Committee on Economic, Social and Cultural Rights, General Comment No. 3, The Nature of State Parties Obligations (Art. 2, para. 1), UN Doc. E/1991/23 (Dec. 14, 1990). The General Comments are available at <http://www2.ohchr.org/english/bodies/cescr/comments.htm>.

¹⁷⁴ Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, *supra* note 21.

¹⁷⁵ *See* Agreement on Agriculture, *supra* note 110.

stakeholders is ultimately without political power: they have the right to offer their perspectives but not to participate in the actual vote.

I do not deny the promise of such inclusive global mechanisms, but they come with their own costs and risks, whose analysis is beyond the scope of this article. Until global constitutionalists demonstrate that it is possible to produce at the global level a robust system of checks and balances that ensures an equal and effective voice for all stakeholders, it is preferable to take a cautious approach and to be wary of democratic losses resulting from the hierarchical global apparatus. A system of sovereign states whose discretion is subject to a discipline designed to take other-regarding interests into account—and that is open for contestation at both the domestic and global levels—offers a necessary first step in the universalist direction.

The criticism from the traditional statist approach raises three major concerns. The first is the worry of unnecessary intervention in the global marketplace: based on the Coase theorem,¹⁷⁶ sovereigns can be expected to heed foreigners' interests if the latter are willing to pay for such cooperative behavior. The second criticism invokes the Hobbesian vision of sovereigns as those who seek only to increase their relative edge over their competitors. In such a world, acting on other-regarding considerations is likely to gratuitously harm the sovereign's own interests. The final criticism is shared by those worried about the potential abusive reliance on the trusteeship vision—that is, by those who recall how claims of humanity, human development, and progress were invoked to justify colonialism and other forms of domination. I will address each concern in turn.

Sovereigns may well be convinced by market forces to take others' interests into account, in which case the law will be redundant. Beneficial bargains should materialize without the law's prodding. But history provides several examples—some mentioned above—of sovereigns unwilling to enter into mutually beneficial bargains. Land-locked states have been particularly vulnerable to the political and economic capriciousness of their costal neighbors,¹⁷⁷ and transit rights “remained a sensitive matter for the developing land-locked countries.”¹⁷⁸ In such cases, the vision of sovereigns as trustees may serve as a useful reminder to recalcitrant governments that they have a duty to negotiate in good faith.

The Hobbesian critique evokes the concern that in the anarchic system of international politics, “relative gain is more important than absolute gain,”¹⁷⁹ and “relative capabilities . . . are the ultimate basis for state security and independence.”¹⁸⁰ Even if one accepts these observations as reflecting some, perhaps even most, states' general attitude toward international cooperation, it would be wrong to imply that taking other-regarding interests into account is necessarily harmful to one's goal of maintaining a relative edge. To the contrary: cooperation may

¹⁷⁶ Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

¹⁷⁷ Michael L. Faye, John W. McArthur, Jeffrey D. Sachs & Thomas Snow, *The Challenges Facing Landlocked Developing Countries*, 5 J. HUM. DEV. 31, 45 (2004); Marks, *supra* note 144; A. Mpaszi Sinjela, *Freedom of Transit and the Right of Access for Land-Locked States: The Evolution of Principle and Law*, 12 GA. J. INT'L & COMP. L. 31 (1982). The recurring tensions between India and Nepal in this context are especially telling. See SURYA P. SUBEDI, DYNAMICS OF FOREIGN POLICY AND LAW: A STUDY OF INDO-NEPAL RELATIONS 69 (2005); MARTIN IRA GLASSNER, TRANSIT PROBLEMS OF THREE ASIAN LAND-LOCKED COUNTRIES: AFGHANISTAN, NEPAL AND LAOS 1, 21 (1983); Amrit Sarup, *Transit Trade of Land-Locked Nepal*, 21 INT'L & COMP. L.Q. 287, 293 (1972).

¹⁷⁸ Gerhard Hafner, *Land-Locked States*, para. 12, in THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *supra* note 83.

¹⁷⁹ KENNETH WALTZ, MAN, THE STATE AND WAR: A THEORETICAL ANALYSIS 198 (1959).

¹⁸⁰ JOSEPH M. GRIECO, COOPERATION AMONG NATIONS: EUROPE, AMERICA, AND NON-TARIFF BARRIERS TO TRADE 39 (1990).

be beneficial to all without modifying the comparative balance; through cooperation, the enlarged pie could be allocated in proportion to the states' relative power positions.¹⁸¹ More importantly, with increased interdependency, as demands for resources grow and supplies dwindle, more and more states may not be able to afford the luxury of ensuring their relative edge through unilateral action. Adhering to the minimal other-regarding obligations would create processes of deliberation that could lower the costs of seeking and obtaining cooperative behavior.¹⁸²

Finally, the invocation of "humanity" by sovereigns raises worries in the developing world and elsewhere: "The concept of humanity is an especially useful ideological instrument of imperialist expansion," wrote Carl Schmitt,¹⁸³ and as we know, the notion of a "sacred trust of civilization" was invoked by the League of Nations only to justify a new form of colonialism. Moreover, imposing other-regarding obligations on new or weak states would only add to the already heavy "obligation overload" that weaker states experience,¹⁸⁴ and generate an increasing Western demand for access to raw materials situated in the developing world—resources that, following the end of colonialism, the West has sought to recast as belonging to the world at large.¹⁸⁵ But the stark question for the weaker countries is whether clinging to formal nineteenth century-type sovereignty remains in their best interest. As Martti Koskeniemi pointed out, "formal sovereignty can undoubtedly also be imperialist—this is the lesson of the colonial era from 1870 to 1960 which in retrospect seems merely a short interval between structures of informal domination by the West of everyone else."¹⁸⁶ The main promise of the trusteeship concept lies in its application to powerful countries that shape the opportunities of individuals everywhere. In this context the concept of "common but differentiated" responsibilities can be understood as shaping states' other-regarding obligations, in relation to both the decision-making process and its outcome: "With leadership comes responsibility," wrote a Chinese analyst in 2011, urging Washington political leaders to conclude their fight over the United States' borrowing limit and reminding them that "the well-being of many other countries is also in the impact zone when the donkey and the elephant fight."¹⁸⁷

IV. BEYOND MINIMAL OBLIGATIONS?

A more ambitious vision of other-regarding obligations would regard sovereigns as obligated to *promote*, and not only to *consider* promoting, global welfare and would authorize states, international decision makers, and courts to adapt the law to the demands of global

¹⁸¹ This point is implied by Stephen D. Krasner, *Global Communications and National Power, Life on the Pareto Frontier*, 43 *WORLD POL.* 336 (1991).

¹⁸² On the role of norms in facilitating cooperation in the management of shared resources, see Benvenisti, *supra* note 12, at 44–46, and GARY D. LIBECAP, *CONTRACTING FOR PROPERTY RIGHTS* (1989).

¹⁸³ CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 54 (George Schwab trans., 2007). Indeed, Vattel, *supra* note 61, §209, invoked humanity to justify colonialism, arguing that "the people of Europe, too closely pent up at home, finding land of which the savages stood in no particular need, and of which they made no actual and constant use, were lawfully entitled to take possession of it, and settle it with colonies."

¹⁸⁴ Kevin Davis & Benedict Kingsbury, *Obligation Overload: Adjusting the Obligations of Fragile or Failed States* (2010) (draft paper, on file with author).

¹⁸⁵ SUNDHYA PAHUJA, *DECOLONISING INTERNATIONAL LAW* 138–44 (2011).

¹⁸⁶ MARTTI KOSKENOEMI, *THE GENTLE CIVILIZER OF NATIONS* 177 (2001).

¹⁸⁷ Deng Yushan, *Bring Some Sense of Global Responsibility to Brinkmanship-Obsessed Washington*, XINHUA, July 28, 2011, available at http://news.xinhuanet.com/english2010/indepth/2011-07/28/c_131015312.htm.

welfare.¹⁸⁸ More generally, the trusteeship vision can, in theory, support an expansive notion of the “harm” that sovereigns must prevent—“harm” defined not simply as the reduction of utility from the previous status quo (for example, by polluting clean water) but as any act or omission that fails to move the current status quo toward an increase in global welfare (for example, the failure to resort to less wasteful irrigation practices, the failure to protect World Heritage sites from decay, or even the failure to shift to green sources of energy). Harm would be defined not by the damage caused to a neighboring state or to specific foreign individuals, but by the diminution of the resources available or potentially available to all. While such an inclusive definition of harm (and of responsibility) is perhaps beyond the doctrinal understanding of “harm” under contemporary international law, it is well in line with the definition of harm under domestic law, which takes into account all the social costs of the act in question, including the cost to the actor itself.¹⁸⁹

A rudimentary example of a development along these lines is the evolving practice of UNESCO’s World Heritage Committee, a global body, set up by the World Heritage Convention,¹⁹⁰ that is redefining states’ trusteeship obligations with respect to World Heritage sites located in their territories. Although the Convention was originally aimed at providing foreign assistance for maintaining cultural and natural sites, over time the rationale changed as the committee adopted a global perspective and began to critically review how states managed the sites located in their respective territories. Sometimes the committee would declare or threaten to declare a World Heritage site as “in danger,” overruling the view of the relevant state party.¹⁹¹ In this way, “harm” (or in this case, danger) is defined from a global perspective and is invoked to impose positive obligations on the sovereign states.

Similarly, a more ambitious program for effecting other-regardingness would require sovereigns not only to consider foreign interests, but to actually balance them against domestic ones and to accept intrusion into their decision making by foreign reviewers who would assess whether their policy choices excessively harmed foreign stakeholders. In fact, this possibility already presents itself in trade and investment disputes. As Alan Sykes observed, there is a “serious tension” in the area of trade law between the goals of open trade and respect for national

¹⁸⁸ For the argument that international tribunals use the malleable doctrine of customary international law for this purpose, see Eyal Benvenisti, *Customary International Law as a Judicial Tool for Promoting Efficiency*, in *THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION* 85 (Eyal Benvenisti & Moshe Hirsch eds., 2004), and see *infra* notes 203–06.

¹⁸⁹ In determining the extent of a person’s legal responsibility for the harm she caused, lawyers and economists measure the loss she inflicted on society, including on herself. See Robert D. Cooter & Ariel Porat, *Does Risk to Oneself Increase the Care Owed to Others? Law and Economics in Conflict*, 29 *J. LEGAL STUD.* 19 (2000) (explaining why the Learned Hand rule, which is used by lawyers to identify negligence in torts, must also include the harm that the actor’s negligent act or omission caused to herself and not only the harm she inflicted on others); see also RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 167–71 (7th ed., 2007) (in agreement).

¹⁹⁰ Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 23, 1972, 1037 UNTS 151.

¹⁹¹ The committee keeps a “World Heritage List” of sites and also an “In Danger” list. Based on information received from sources “other than the State Party concerned,” the committee can list or delist sites as it deems appropriate, even without the consent of the state in whose territory the site is found. Despite the limited set of sanctions available to it, the committee has proved surprisingly effective. Mainly through shaming, it managed to convince Russia to protect Lake Baikal (which cost Russia an additional billion dollars to reroute the East Siberia–Pacific Ocean oil pipeline), and it contributed to resolving a dispute over mining that could have threatened Yellowstone Park. See Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage, *Operational Guidelines for the Implementation of the World Heritage Convention* (1997), at <http://whc.unesco.org/archive/out/guide97.htm>; Stefano Battini, *The Procedural Side of Legal Globalization: The Case of the World Heritage Convention*, 9 *INT’L J. CONST. L.* 340 (2011).

sovereignty, which “can be irreconcilably at odds to the point that one must give way.”¹⁹² Famously, in its report on *Korea—Various Measures on Beef*,¹⁹³ the WTO Appellate Body appeared to apply a test that involved balancing domestic and foreign interests.¹⁹⁴ At the very least, the Appellate Body has demonstrated over the years that it would be more deferential to trade restrictions prompted by human health considerations than restrictions reflecting other concerns.¹⁹⁵ A similar range of issues has arisen in the context of foreign investment law, especially in relation to Argentina’s claimed “state of necessity.”¹⁹⁶

The broad definition of “harm” and the subjection of national discretion to proportionality requirements entail significant intrusion into national prerogatives by foreign judicial and quasi-judicial institutions. Not all regard such intrusion as problematic. In fact, as indicated above, several international tribunals have shown an appetite for developing and imposing other-regarding obligations on states—in particular, by developing doctrines of treaty interpretation and customary law that enhance the authority of international bodies and limit states’ discretion.¹⁹⁷ Expressing their commitment to a systemic vision of the law, these tribunals

¹⁹² 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* 788 (1969) (“The perpetual puzzle . . . of international economic institutions is . . . to give measured scope for legitimate national policy goals while preventing use of these goals to promote particular interests at the expense of the greater common welfare.”). On this question see also 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 & John H. Jackson, *WTO Dispute Procedures, Standard of Review and Deference to National Governments*, 90 AJIL 193 (1996).

¹⁹³ Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R (adopted Dec. 11, 2000).

¹⁹⁴ *Id.*, para. 164 (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 protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports”). Even more telling is its subsequent report, *United States—Measures Affecting the Cross-border Supply of Gambling and Betting Services*, WT/DS285/AB/R (adopted April 7, 2005); in paragraph 306 the Appellate Body identifies the factors that determine “necessary” to include “the restrictive impact of the measure on international commerce.”

¹⁹⁵ Mavroidis, *supra* note 109, at 331–35; see also Michael Ming Du, *Autonomy in Setting Appropriate Level of Protection Under the WTO Law: Rhetoric or Reality?*, 13 J. INT’L ECON. L. 1077, 1100 (2010) (“[T]he 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.”); Robert Howse & 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 (Gráinne de Búrca & Joanne 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 . . . , a member may be expected to act rapidly . . .”).

¹⁹⁶ For criticism of a judicially enforced balancing test suggested by Article 25 of the International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001) (which invites balancing the interests of the state against the “serious[] impair[ment of] an essential interest” of the other state), see Robert D. Sloane, *On the Use and Abuse of Necessity in the Law of State Responsibility*, 106 AJIL 447 (2012), Special Issue, *Necessity Across International Law*, 2010 NETH. Y.B. INT’L L. 3; MICHAEL WAIBEL, *SOVEREIGN DEFAULTS BEFORE INTERNATIONAL COURTS AND TRIBUNALS* (2011) (concluding, at 316, that ICSID tribunals are “unable to effectively deal with sovereign debt crises”), and Roman Boed, *State of Necessity as a Justification for Internationally Wrongful Conduct*, 3 YALE HUM. RTS. & DEV. L. J. 1 (2000).

¹⁹⁷ HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* (1958); Benvenisti & Downs, *supra* note 43. There are different assessments of the relative success and durability of this function. See Benedict Kingsbury, *International Courts: Uneven Judicialization*, in *GLOBAL ORDER* (James Crawford & Martti Koskenniemi eds., 2010) (“there are large gulfs between contemporary political

are often not shy about their self-perceived role as guardians of the international legal system rather than as resolvers of specific, bilateral interstate disputes,¹⁹⁸ even when the institutional structure is clearly bilateral (as is the case in investment arbitrations).¹⁹⁹ Many examples, and in many contexts, can be cited. In some cases, international tribunals have unilaterally decided to take into account global welfare and global justice concerns, such as environmental protection.²⁰⁰ When it has made no economic sense to give one country full sovereignty rights over what are essentially shared resources (for example, rivers or fisheries), courts have redefined the relevant property as shared despite scant treaty language to that effect.²⁰¹ The WTO Appellate Body has lowered the burden of proof for justifying preferences given to imports from developing countries, in order to “provide developing countries with increasing returns from their growing exports, which returns are critical for those countries’ economic development.”²⁰² A few national courts have also demonstrated a willingness to promote global interests by invoking universal jurisdiction in criminal law for crimes against humanity and war crimes,²⁰³ by adjudicating tort claims for serious violations of international law (whether by

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 EUR. J. INT’L L. 73, 81 (2009) (noting that international tribunals have assumed the functions of norm advancement and regime maintenance).

¹⁹⁸ See Armin von Bogdandy & Ingo Venzke, *On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority* 18–23 (2012) (Amsterdam Law School Legal Studies Research Paper No. 2012-69, Amsterdam Center for International Law No. 2012-10, and Postnational Rulemaking Working Paper No. 2012-5, 2012), at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2084079. For recent articulation, by an ICJ judge, of the role of international law as the “law for humankind,” see *Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)* ((Cambodia v. Thai.), Provisional Measures, Sep. Op. Cañado Trindade, J., paras. 114–15 (Int’l Ct. Justice July 18, 2011) (footnote omitted) (“Beyond the States, the ultimate *titulaires* of the right to the safeguard and preservation of their cultural and spiritual heritage are the collectivities of human beings concerned, or else humankind as a whole. . . . [W]e are here in the domain of superior *human values*, the protection of which is not unknown to the law of nations, although not sufficiently worked upon in international case-law and doctrine to date. It is beyond doubt that the States, as promoters of the *common good*, are under the duty of cooperation between themselves to that end of the safeguard and preservation of the cultural and spiritual heritage.”)

¹⁹⁹ Despite the discrete nature of their activity, these ad hoc panels, whose task is to interpret and apply bilateral obligations under bilateral treaties, strive to converge on common principles and to develop collectively a systemic vision of “investment law.” As recently stated in one arbitral award (among many), every panel must adopt a global vision: “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*, para. 6 (NAFTA Ch. 11 Arb. Trib. June 8, 2009).

²⁰⁰ *Southern Bluefin Tuna, Provisional Measures (N.Z. v. Japan; Austl v. Japan)*, ITLOS case Nos. 3 & 4, paras. 70, 80 (Aug. 27, 1999) (“70. *Considering* that the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment; . . . 80. *Considering* that, although the Tribunal cannot conclusively assess the scientific evidence presented by the parties, it finds that measures should be taken as a matter of urgency to preserve the rights of the parties and to avert further deterioration of the southern bluefin tuna stock[.]”). Markus Benzing, *Community Interests in the Procedure of International Courts and Tribunals*, 5 LAW & PRAC. INT’L CTS. & TRIBUNALS 369, 382 (2006); see also Thomas A. Mensah, *Provisional Measures in the International Tribunal for the Law of the Sea (ITLOS)*, 62 ZAÖRV 43, 53 (2002) (both pointing out that International Tribunal for the Law of the Sea considered this aspect of the case on its own initiative, even though it had not been raised by the parties).

²⁰¹ BENVENISTI, *supra* note 12, at 44–46; Benvenisti, *supra* note 188; Lucius Caflisch, *Règles générales du droit des cours d’eau internationaux*, 219 RECUEIL DES COURS 9, 32–33, 109–10 (1989 VII).

²⁰² Appellate Body Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, para. 106 (adopted Apr. 20, 2004).

²⁰³ In the famous *Eichmann* judgment, the Israeli Supreme Court justified the assertion of universal jurisdiction to prosecute and adjudicate crimes against humanity by reference to the role of individual states as “the ‘guardian[s]

foreign states and government officials or by domestic companies operating abroad),²⁰⁴ or by promoting uniform interpretations of international treaties.²⁰⁵ Finally, some tribunals have been incrementally enhancing their own capacity to look beyond the disputing parties to wider circles of stakeholders—in particular, by allowing nonstate actors to provide information that is not controlled by the state parties to the dispute.²⁰⁶

The intrusion of such external bodies into national policymaking nevertheless raises serious legitimacy concerns, especially regarding the impartiality of global decision makers and judges, their competence to make better judgment calls than the reviewed sovereigns, and the potentially stifling impact of their interventions on domestic democratic processes. Addressing these concerns requires a separate discussion that is beyond the scope of this article. Until the reliability and democratic legitimacy of judicial and other reviewing bodies are established, only minimal other-regarding obligations can be supported.²⁰⁷

V. CONCLUSION

In an era of intense interdependency of the globe's diverse human communities, the private vision of sovereigns gives rise to three types of challenges: to the efficient and sustainable management of global resources, to equality of access to global goods and protection from global harms, and to democracy (specifically in relation to the diminishing opportunities for individuals to participate in shaping the policies that affect their lives). This article has sought to demonstrate that sovereigns should be regarded as trustees of humanity and therefore subjected to at least some minimal normative and procedural other-regarding obligations. Some or all

of international law and agents for enforcement." *CrimA 336/61 Eichmann v. Attorney General of Israel* [1962] PD 16(3) 2033, 2066, *translated in* 36 ILR 277 (1962) (referring to *MORRIS GREENSPAN, THE MODERN LAW OF LAND WARFARE* 503 (1959)); *see also* *Regina v. Bow St. Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 3), [2000] 1 A.C. 147 (H.L.).

²⁰⁴ In the United States such claims are based on the Alien Tort Statute, 28 U.S.C. §1350. *See* *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir.1980) ("A state or nation has a legitimate interest in the orderly resolution of disputes among those within its borders, and . . . it is an expression of comity to give effect to the laws of the state where the wrong occurred[.]") subject to "universally accepted norms of the international law of human rights" (doctrine upheld in part in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004)). In other countries the same outcome can be grounded in domestic choice of law rules: The Hague district court established civil jurisdiction over Shell Nigeria, the daughter company of Royal Dutch Shell PLC (headquartered in the Netherlands) and found it liable for negligence under Nigerian law. *See* [Dutch judiciary] press release, *Decision on Oil Spills in Nigeria* (Jan. 30, 2013), at <http://www.rechtspraak.nl/Organisatie/Rechtbanken/Den-Haag/Nieuws/Pages/DutchjudgementsonliabilityShell.aspx>. The House of Lords reviewed the legality of the expropriation of Kuwaiti assets by Iraq during the military occupation of Kuwait. *Kuwait Airways Corp. v. Iraqi Airways Co.* (Nos. 4 & 5), [2002] UKHL 19, [2002] 2 AC 883, para. 145 (Lord Hope of Craighead, referring to threats emanating from global terrorism) ("[T]he judiciary cannot close their eyes to the need for a concerted, international response to . . . threats to the rule of law in a democratic society. Their primary role must always be to uphold human rights and civil liberties. But the maintenance of the rule of law is also an important social interest.").

²⁰⁵ National courts "must search, untrammelled by notions of its national legal culture, for the true autonomous and international meaning of the [1951 Geneva Convention Relating to the Status of Refugees]." *Regina v. Sec'y of State for the Home Dep't, ex parte Adan*, [2001] 1 All E.R. 593, 617 (per Hobhouse, L.J.). For more on this judicial cooperation, *see* Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AJIL 241 (2008).

²⁰⁶ *See* Benzing, *supra* note 200, at 385–86, 395–404.

²⁰⁷ These and the rest of the questions for further study identified in this article are the subject of a GlobalTrust research project undertaken at Tel Aviv Faculty of Law under a European Research Council Advanced Grant (<http://www.GlobalTrust.tau.ac.il>).

of these obligations are arguably already ingrained in several doctrines of international law that define and limit sovereign rights. The concept of sovereignty as trusteeship can explain the evolution of these doctrines and inspire the rise of new specific obligations. Finally, the concept suggests that sovereigns have an obligation to mutually explore and develop the most effective domestic and supranational institutions that can meet the challenges to efficiency, equity, and democracy that result from the system of sovereign states.