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ANNY AND PAUL YANOWICZ CHAIR
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על שם אני ופול ינוביץ'

PROFESSOR EYAL BENVENISTI

פרופסור איל בנבנישתי

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LEGISLATING FOR HUMANITY: MAY STATES COMPEL FOREIGNERS TO PROMOTE GLOBAL WELFARE?

EYAL BENVENISTI

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Legislating for Humanity: May States Compel Foreigners to Promote Global Welfare?

*Eyal Benvenisti**

Abstract: This contribution discusses the legitimate scope of what it calls "legislation for humanity," namely the unilateral regulation by states of activities in and also outside the state whose goal is to prevent or remedy global public "bads" such as global warming. The chapter approaches this question from a theoretical framework which regards sovereign states as embedded in a global order of which they are parts and to which they owe certain obligations as "trustees of humanity". As such they are entitled to – indeed, in some instances they must – act unilaterally for the common good, as long as they meet rigorous conditions that ensure that the interest and opportunities of all affected stakeholders are seriously taken into account.

1 Introduction: What is "Legislation for Humanity"?

Consider the following unilateral acts of legislation: the imposition by the United States of sanctions on all actors, public and private, including foreign ones, who do not comply with the US's rules on illegal trafficking in humans;[1] the imposition by the U.S. of trade restrictions on all those engaged in the harvest of shrimp or the catch of tuna to protect endangers species around the world;[2] the demand by the U.S. Food and Drug Administration (FDA) that all non-U.S. clinical drug trials comply with FDA regulations,[3] the imposition by the European Union of an obligation on any oil tanker

* Anny and Paul Yanowicz Chair in Human Rights, Tel Aviv University Faculty of Law. Research supported by ERC Advanced Grant 323323.

[1] See Janie A. Chuang, 'The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking', 27 *Michigan Journal of International Law* (2006) 437-494;, Amanda Walker-Rodriguez and Rodney Hill, Human Sex Trafficking, FBI Law Enforcement Bulletin (Mar. 2011), http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/march_2011/human_sex_trafficking.

[2] WTO Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 12 October 1998 (*Shrimp/Turtle*); *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, 16 May 2012 (*Tuna/Dolphin II*). *See also* Chile's unilateral measures to secure the sustainable fishing of swordfish, a highly migratory species, which were challenged by the EU before the WTO: Marcos Orellana, *The Swordfish Dispute between the EU and Chile at the ITLOS and the WTO*, 71 NORDIC J. INT'L L. 55 (2002).

[3] *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 182-183 (2nd Cir. 2009).

visiting a port with the EU area, irrespective of their flag, to have a double-hull design,[4] or, most recently, the demand that non-EU air carriers landing in EU territory take part in the EU carbon emissions scheme which would apply also to those segments flown outside the EU area.[5] One could add to this list also the rendering of global law enforcement services like the extension anti-bribery legislation to the global arena,[6] or the extension of the courts' jurisdiction to foreign events, as in the case of the Alien Torts Statute (ATS).[7] While most of these acts were prescribed by developed countries, there are also similar acts by the developing South.[8] What is common to these and other unilateral regulatory efforts of this type is their aim: the unilateral attempt to prevent or remedy collective action failures that produce global public "bads."[9] A key characteristic of this type of "legislation for humanity" is the net burdens that it imposes on domestic producers and consumers in addition to the equivalent burdens it imposes on foreigners.[10] Unlike the unilateral extension of the continental shelf or exclusive

[4] Regulation (EC) No 1726/2003 of the European Parliament and of the Council of 22 July 2003 amending Regulation (EC) No 417/2002 on the accelerated phasing-in of double-hull or equivalent design requirements for single-hull oil tankers, OJ 2003 L 249/1.

[5] In Case C‑366/10 *Air Transport Association of America v. Secretary of State for Energy and Climate Change*, Judgment of 21 December 2011 (not yet reported). For analysis and criticism see Andrea Gattini, 'Between Splendid Isolation and Tentative Imperialism: The EU's Extension of its Emission Trading Scheme to International Aviation and the ECJ's Judgment in the ATA Case', 61 *International and Comparative Law Quarterly* (2012) 977-991, at 982.

[6] Securities and Exchange Commission, Final Rule on Disclosure of Payments by Resource Extraction Issuers (Aug. 22, 2012) (A rule pursuant to Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act relating to disclosure of payments by resource extraction issuers to a foreign government or the Federal Government for the purpose of the commercial development of oil, natural gas, or minerals).

[7] 28 U.S.C. § 1350.

[8] Chile issued conservation measures for the swordfish migratory stocks in the South Pacific, see Marcos Orellana, *The Swordfish Dispute between the EU and Chile at the ITLOS and the WTO*, 71 Nordic J. Int'l L.
55 (2002)

[9] This last emphasis on global public bads excludes legislation that extends extraterritorially but is designed to prevent adverse effects on the domestic jurisdiction rather than respond to global collective action failures. For example, anti-trust laws (F. Hoffmann-La Roche Ltd. v. Empagran S.A., 124 S. Ct. 2359 (2004) and security exchange regulations (Morrison v. National Australia Bank 130 S.Ct. 2869 (2010)) are not "legislation for humanity." Therefore U.S. courts rightly refused to apply them to events not related to the U.S..

[10] There is also the rarer possibility that the unilateral measure burdens only one's own nationals and state agencies. See, for example, Environmental Defense Fund v. Massey, 986 F.2d 528 (D.C. Cir., 1993) (environmental impact assessment required under U.S. Law applied to a scientific station of a U.S. Federal Agency in Antarctica, which the court regards as a "global common"), but this type of legislation does not raise the problems discussed here. Compare Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (the Defenders of Wildlife had no standing to sue the U.S. Secretary of the Interior for not complying with procedural obligations under the Endangered Species Act of 1973 when aiding the constructions of dams in Egypt and Sri Lanka).

economic zone that may also be motivated by global welfare concerns but also carry benefits to the regulating state, the above examples do not offer exclusive benefits for the regulating state. Instead, they level the playing field by demanding competitors to abide by the same or equivalent constraints.[11]

Obviously, states that regulate public goods unilaterally do so not out of purely altruistic motives. They have strong self-interest in preventing human trafficking into their borders or in reducing global warming, and they are willing to bear the associated economic and other burdens. But at the same time they wish to ensure two related goals: to ensure that the measures imposed are effective, and to limit the associated economic burdens. To achieve both ends, they aim to regulate also the activities of foreign actors *worldwide*: the more stakeholders follow suit the more successful will the regulation be; similarly, if foreign competitors also comply with the regulation, the economic burden will be shared rather than born only on by the regulating state.

Accordingly, only economies that can sustain such heavy burdens and are confident that they can elicit compliance from at least some foreigners venture to unilaterally "legislate for humanity" and enforce such laws on foreigners. Due to the limited number of such states and their relative strength, the unilateral measures that they adopt immediately raise concerns about "imperialism" and "hegemony", and are critiqued for flouting customary international law.[12] Beyond these rather simplistic worries, this type of unilateral legislation and enforcement raises various legitimacy questions. One set of questions relates to the appropriate scope of state sovereignty: Does international law on state sovereignty entail limits on the territorial scope of regulation that unilateral "legislation for humanity" oversteps? Does such regulation infringe the sovereignty of other states? Another set of questions relates to the right to democratic participation or the lack of it in such instances: Does unilateral regulation infringes the rights of foreign stakeholders to take part in decision-making affecting their opportunities and interests? Can this democratic deficit be remedied by procedural or normative obligations that the legislating state must follow to ensure that the concerns and constraints of all affected stakeholders are taken into account?

This contribution seeks to outline answers to these questions by offering a theoretical framework that grounds the authority of states to legislate for humanity, and outlines the limits of such legislation, in political and moral theory. The contribution is informed by the understanding that such a theoretical framework can clarify a fundamental

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[11] For a typology of unilateral measures in the environmental sphere see Richard Bilder, 'The Role of Unilateral State Action in Preventing International Environmental Injury', *14 Vanderbilt Journal of Transnational Law* (1981) 51-95. On this general problem see also Daniel Bodansky, 'What's So Bad about Unilateral Action to Protect the Environment?', 11 *European Journal of International Law* (2000) 339-348, and Laurence Boisson de Chazournes, 'Unilateralism and Environmental Protection: Issues of Perception and Reality of Issues', 11 *European Journal of International Law* (2000) 315-338.

[12] See references to such terms in sources cited in *supra* notes 5 and 11.

distinction that inheres in contemporary international law on state sovereignty between two competing visions of sovereignty: between a solipsistic, *Lotus*-based, vision, and an alternative which sees sovereignty as embedded in global legal order from which states derive their authority. The first, widely-shared concept of sovereignty regards the state as the source of legislative power for those under its jurisdiction and only for them. Under that view, global collective action problems should be resolved only through collective bargaining leading to international agreements. Such a concept of sovereignty is at odds with unilateral state action that affects rights and obligations of individuals outside its borders. The alternative vision that this contribution outlines challenges this approach. According to the alternative view, because sovereign states are, and should be, regarded as embedded in a global order of which they are parts and to which they owe certain obligations as "trustees of humanity". As such they are entitled to – indeed, in some instances they must – act unilaterally for the common good, as long as they meet rigorous conditions that ensure that the interest and opportunities of all affected stakeholders are seriously taken into account.

2 Why Legislation for Humanity is Legitimate: The Concept of Sovereigns as Trustees of Humanity

This Part argues that states are authorized to take global interests and the interests of foreigners seriously into account when making policy choices, and may legislate unilaterally to promote such interests – indeed, they may even be bound to do so.[13] The argument rejects the solipsist vision of sovereignty as having exclusive law-making authority within its boundaries as incompatible with the very ideas that initially granted absolute authority to sovereigns. The idea of sovereignty as exclusive authority was congruent with democratic notions as long as there was a perfect or almost perfect fit between the sovereign and the citizens – those affected by the sovereign's policies.[14] Such a vision made eminent sense when sovereigns ruled discrete economies, separated from each other by rivers, deserts and other natural barriers, making cross-border externalities, such as pollution, a relatively rare event, to be resolved on the inter-sovereign level, negotiated by emissaries, ambassadors, and later within international organizations. The solipsistic vision of sovereignty was enhanced by the notion of national self-determination that erected barriers to the demands of non-citizens to weigh in on domestic policy-making processes and shielded the domestic body politic from the obligation to internalize the rights and interests of non-citizens in their policymaking.

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[13] This Part is based on Eyal Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders', 107 *American Journal of International Law* (2013, forthcoming), *available at*: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1863228.

[14] For such a functional justification of sovereignty, see Henry Sidgwick, *The Elements of Politics* (4th edn, Macmillan and Co., 1919) at 252 ('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').

Sovereignty has become an ostensibly neutral format that explained the exclusion of "the other".

But today's reality is significantly different. Sovereigns are hardly the owners of isolated mansions. They are more analogous to owners of small apartments in one densely packed high-rise in which about two hundred families live. In our 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 routinely regulate resources that are linked in many ways with resources that belong to others. By their daily decisions on economic development, on conservation, or on health regulation, some states regularly shape the life opportunities of foreigners in faraway countries who are unable to participate meaningfully in shaping these measures either directly or by relying on their own governments to effectively protect them. The glaring misfit between the scope of the sovereign's authority and the sphere of the affected stakeholders leads to negative externalities as well as the loss of potential positive externalities imposed on the un- or under-represented stakeholders, namely outcomes that are often inefficient, undemocratic and unjust.

Instead, sovereignty should be regarded as embedded in a more encompassing global order, which is a source not only of powers and rights, but also of obligations that essentially require sovereigns to exercise their authority in ways that promote global goods while taking the interests of all affected individuals into account. Here I outline three distinct normative grounds for the authority cum obligation of sovereigns to weigh such 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.

2.1 The Argument from Self-Determination

Externally, sovereignty epitomizes the freedom of the group to pursue its interests, to further its political status and to "freely dispose of [its] natural wealth and resources".[15] In fact, since its modern genesis, the claim to sovereignty has been inherently tied to the

[15] International Covenant on Civil and Political Rights, GA Res. 2200A (XXI), 16 December 1966, in force 23 March 1976, 999 UNTS 171, Article 1. See also *ibid.*, Article 47: 'Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.' See also Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge University Press, 1997) (emphasizing not only the rights of the sovereign people but also its duties as recognized by international law).

notion of freedom: from the Church, from empires, from colonial powers.[16] There was always a strong link between the collective and the personal claims. 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".[17] Otherwise "[e]veryone is degraded, whether aware of it or not, when other people, without consulting him, take upon themselves unlimited power to regulate his destiny".[18] As Martti Koskenniemi put it, "[s]overeignty articulates the hope of experiencing the thrill of having one"s life in one's own hands".[19] Group self-determination stems from the right to *individual* self-determination, or what Joseph Raz calls individual "self-authorship".[20]

It is this internal aspect of sovereignty that is currently being challenged under contemporary global conditions. As the examples mentioned above indicate, domestic democratic processes are vulnerable to systemic failures that hamper individuals' ability to have a voice and take an actual part in government: if states legislate for humanity, the preferences of the foreign stakeholders might not count; on the other hand, if states are barred from unilaterally addressing global bads, the hold-out states which prevent a collective agreement obstruct the efforts of citizens who wish to promote human rights, reduce global warming or protect endangered species.

These examples and many others suggest that in today's world, the insular exercise of self-determination by national communities can prove to be oppressive to many – either in or outside the regulating state – and can undermine peoples' ability to have their lives in their own hands. True respect for the self-determination of the individual, and of that of many collectivities, and a real effort to ensure that individuals have their lives in their own hands must be translated into a concept of sovereignty that can minimize the systemic democratic failures that inhere in the sovereign-based system and that provides opportunities for individuals and communities to exert effective influence on policymaking that affects them, even if the decision-maker is a foreign government.

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[16] However, as new states quickly realized already in the 19th 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 *Journal of the History of International Law* (2011) 7-73.

[17] John Stewart Mill, *Considerations on Representative Government* (Barker, Son, and Bourn, 1861) at 57.

[18] *Ibid.*, Chapter 8. See also John Stuart Mill, 'On Liberty', in J. S. Mill, *On Liberty and Other Writings 59* (Stefan Collini ed., Cambridge University Press, 1989 [1859]) at 59 ('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.').

[19] Martti Koskenniemi, 'What Use for Sovereignty Today?', 1 *Asian Journal of International Law* (2011) 61-70, at 70.

[20] Joseph Raz, *The Morality of Freedom* (Clarendon, 1986) at 204 ('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.').

2.2 The Argument from Equal Moral Worth

The Universal Declaration of Human Rights envisions all of human society – "everyone" – as rights holders, entitled to "universal respect".[21] The Declaration does not allocate responsibilities among the different state parties who are the duty bearers, i.e., those who share collectively the duty to regard these obligations as "a common standard of achievement".[22] This implies that the entire system of state sovereignty is subject to the duty to respect human rights.[23] In subsequent human rights treaties, the states in turn allocated these shared responsibilities among themselves, assigning to each the prime (if not the sole) responsibility over the area under its jurisdiction. This, however, is a secondary allocation – an allocation that *itself* must be accounted for and justified and, if found wanting, corrected, because all the trustees are collectively required to protect everyone's human rights.[24] 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

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[21] Universal Declaration of Human Rights, GA Res. 217A (III), 10 December 1948, Preamble.

[22] *Ibid*.

[23] Joseph Raz, 'Human Rights in the Emerging World Order', 1 *Transnational Legal Theory* (2010) 31-47, at 42 ('human rights, as they function in the world order, set limits to sovereignty'); Institute of International Law, 'Protection of Human Rights and the Principle of Non-intervention in Internal Affairs of States', Resolution adopted at the Session of Santiago de Compostela, 13 September 1989, Article 1:

> 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, ICTY Appeals Chamber, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 97:

> [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.'

[24] Charles Beitz, *The Idea of Human Rights* (Oxford University Press, 2009) at 137 (human rights are defined as interests sufficiently important to be protected by the state, and when states fail the failure is a suitable object of international concern).

humanity".[25] It is humanity at large which assigns certain groups of citizens with the power to form national governments.

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 should therefore consider such interests in good faith. Therefore, "no nation can, without good reasons, refuse even a perpetual residence to a man driven from his country".[26] A long tradition of scholarship has viewed "the State as a unit at the service of the human beings for whom it is responsible",[27] or a social function of the global community of peoples,[28] and thus "merely a part, a branch of humanity [which as such] must recognize in the legal community of states as the political unity of humanity a higher power than itself".[29]

Accordingly, it may be possible to re-conceptualize Max Huber's famous vision of a global legal order that "divides between nations the space upon which human activities are employed",[30] and allocates to each the responsibility toward other nations for activities transpiring in its jurisdiction that violate international law, as a relationship of trusteeship governed by international law. To paraphrase Huber's viewpoint: given the precedence of 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

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[25] As Madison noted in The Federalist Papers, '[t]he federal and State governments are in fact but different agents and trustees of the people [because] the ultimate authority… resides in the people alone.' James Madison, 'The Influence of the State and Federal Governments Compared', Federalist No. 46 (29 January 1788).

[26] Emerich de Vattel, *The Law of Nations* (Joseph Chitty, trans., T. & J.W. Johnson & Co. 1883 [1758]) at paras 229, 231 ('[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.').

[27] 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* (1999) 9-438, at 95. See also Christian Tomuschat, 'Obligations Arising for States Without or Against their Will', 241 *Recueil des Cours* (1993) 195-374; Bruno Simma, 'From Bilateralism to Community Interest in International Law', 250 *Recueil des Cours* (1994) 217-384.

[28] René-Jean Dupuy, *La Communaute internationale entre le mythe et l'histoire* (Economica/UNESCO, 1986) at 169-170.

[29] Carl Kaltenborn von Stachau, *Kritik des Völkerrechts* (G. Mayer, 1847) at 260-261, cited in Jochen von Bernstorff, *The Public International Law Theory of Hans Kelsen* (Cambridge University Press, 2010) at 19. This is the monist view, carefully explored by Kelsen: see Hans Kelsen, *Pure Theory of Law* (Max Knight trans., University of California Press, 1967) at 214-215, 333-347. See also Hans Kelsen, *General Theory of Law and State* (Anders Wedberg trans., Harvard University Press, 1949) at 383-388; *Id*., *Principles of International Law* (Rinehart & Co, 1952) at 440-447. On this matter see also von Bernstorff, *id*.

[30] *Island of Palmas (Netherlands v. US)* (1928) 2 UNRIAA 829, at 839.

human beings and their interest in sustainable utilization of global resources. As trustees of this global system – to paraphrase another statement of Huber's[31] – the competency 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. Among these is the task to legislate for humanity while taking the interests of foreigners into account, and the corresponding obligation of others to respect such legislation.

2.3 The Argument from the Exclusive Power over Portions of the Earth

Those states which legislate for humanity use their economic power or their unique geographic position as leverage for others to comply. Only countries that have a large and affluent consumer society like the US can unilaterally demand foreigners to comply with their standards. Only centrally-placed entities like the EU can impose demands on foreign air carriers that need to land for refuelling en route. The very fact that some states have this unique capability to impose obligation on others suggests that the decision to leverage that unique capability requires normative justification. For no state may regard its exclusive control over a portion of global resources as given.

A long tradition in international law that dates to Grotius, Wolff and Vattel suggests that sovereignty in the sense of exclusive ownership of parts of global resources originates from a collective regulatory decision at the global level, rather than being an entitlement that inheres in sovereigns.[32] Sovereign states therefore have an obligation to humankind to use the resources under their control with an eye toward global concerns.[33]

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[31] Huber's statement in the award re *British Claims in the Spanish Zone of Morocco (Great Britain v. Spain)* (1925) 2 UNRIAA 615, at 641: 'Responsibility is the necessary corollary of rights. All international rights entail international responsibility'. See Daniel-Erasmus Khan, 'Max Huber as Arbitrator: The *Palmas (Miangas)* Case and Other Arbitrations', 18 *European Journal of International Law* (2007) 145-170, at 156.

[32] Martti Koskenniemi, 'Empire and International Law: The Real Spanish Contribution', 61 *University of Toronto Law Journal* (2011) 1-36, at 14-16 (emphasizing Vitoria's conceptualization of the prince's dominium over his commonwealth as deriving from the collective decision to delegate such authority to him).

[33] Vattel, *The Law of Nations*, *supra* note 26, at para. 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.

Although the *Lotus*-based vision of sovereignty is more explicit in contemporary international law, the law is open to the trusteeship concept. Even the most formidable ground for justifying the "sovereignty as independence" model, the right of peoples to self-determination which is an "inherent" right, to be "freely" exercised,[34] does not withstand the trusteeship concept. The right to self-determination does not free sovereign peoples from the obligation to conform to the duties international law imposes on all states. The principles of national self-determination and of national ownership of natural resources never meant supreme and unfettered authority to each people. While peoples cannot be subjected *to other peoples*, they remain subject to the constraints that apply to all.[35] The concept of trustee sovereignty respects and in fact enhances all individuals' and peoples' right to self-determination and the resulting right to maintain their culture and promote primarily the interests of their individual members.

Moreover, as I argue elsewhere,[36] the trusteeship concept of sovereignty runs through several doctrines of international law, as well as judicial and other decisions. Even if such doctrines and judgments do not explicitly embrace the trusteeship concept, this concept offers the best explanation for them. For example, the International Court of Justice was quick to find customary law obligations to allow maritime passage through straits subject to the sovereignty of the coastal state[37] and recognized the right of transit over foreign territory, subject to the territorial sovereign's limited authority to regulate such passage, [38] thereby adding at least some strength to the general claim of land-locked states to a right of transit through neighbouring states.[39] Similarly, an arbitral award 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

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See also Immanuel Kant, *Perpetual Peace: A Philosophical Essay* (M. Campbell Smith trans., Allen & Unwin, 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 the Global Community and Political Justice since Vitoria* (Ashgate, 2002).

[34] The tension between this freedom and the obligations toward others is already present in ICCPR, *supra* note 15, Article 1, 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'.

[35] *See* Alfred Verdross, 'Le fondement du droit international', 16 *Recueil des cours* (1927) 247-323, at 314 ('sa souveraineté ne désigne que le fait [que l'État souverain] est subordonné àucune *autre* puissance qu'au droit de gens' (emphasis in the original)).

[36] Benvenisti, 'Sovereigns as Trustees of Humanity', *supra* note 13.

[37] The Corfu Channel Case (merits) (UK/Albania) (1949) I.C.J. Rep. p. 22.

[38] Case concerning Right of Passage over Indian Territory (Merits), Judgment of 12 April 1960; I.C.J. Reports 1960, p. 6, at 45.

[39] Elihu Lauterpacht, 'Freedom of Transit in International Law' 44 *TRANSACTIONS GROTIUS SOC.* (1958) 313-356.

environmental concerns.[40] In another dispute, the ICJ forced an interpretation of an 1858 treaty which had assigned to Costa Rica sovereignty over a river as ensuring that Nicaraguans inhabiting the Costa Rican bank of the river "the right to use the river to the extent necessary to meet their essential requirements."[41] This attitude fits well with the ICJ's general tendency to align international law with policies that promote global welfare.[42]

3 Implications of the Trusteeship concept on Law-making for Humanity

That sovereignty is but a tool for promoting individual and collective welfare and self-authorship has mainly two implications for unilateral efforts to address global bads. The first implication concerns the authority of states to unilaterally legislate for humanity. The second implication is the concomitant obligation to take foreign interests into account.

3.1 The authority to legislate for humanity

The trusteeship concept offers a clear endorsement to democracies that wish to unilaterally promote global welfare. All three normative grounds for the trusteeship concept support this conclusion. As trustees of humanity, national decision-makers can and in fact must regard themselves as partaking in a collective effort to promote global welfare. By exercising their individual sovereignty, they promote global welfare for all to benefit from, and they ensure that the global resources under their control are utilized in ways which promote global welfare. The fact that some states fail to cooperate should not hinder those who wish to act in pursuit of improving global standards, provided that they take into account the interests of others when devising policies (or reviewing them, in the case of national courts). For the same reason, those foreigners – including foreign states – affected by such unilateral policies must consider complying with them due to their own duty to take others' interests into account and to promote global welfare.

3.2 Constraints on unilateral law-making

The second implication the trusteeship concept works in the opposite direction: states that legislate for humanity must take the interests of others and of humanity at large seriously into account. This has an institutional aspect: the legislative process must provide opportunity for foreign stakeholders to intervene in the process and shape its

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[40] Iron Rhine ("Ijzeren Rijn") Railway Case (Belg. v. Neth.), 27 R. Int'l Arb. Awards 35 (Perm. Ct. Arb. 2005).

[41] Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicar.) I.C.J. Rep. 2009, p. 213.

[42] Eyal Benvenisti, 'Customary International Law as a Judicial Tool for Promoting Efficiency,' in *The Impact of International Law on International Cooperation* (Eyal Benvenisti & Moshe Hirsch eds., 2004) 85-116.

outcomes. And there is also a substantive aspect: the adopted policy must accommodate the legitimate interests of others, especially the interests of developing countries whose economies and capacities require them to modify their order of priorities.

In general, the obligation to acknowledge and 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 the opposing claims. What it does imply as a minimum, however, is that sovereigns must give due respect to foreign stakeholders both procedurally and substantively. This is *a fortiori* the case when states justify their unilateral law-making as aimed at producing global public goods.

Among the considerations that unilateral lawmakers must weigh is the proper deference they should give to collective efforts to achieve comparable goals through collective action. Unilateralists should not pre-empt or otherwise unfairly determine such collective outcomes. Collective efforts tend to be regarded as more legitimate in the eyes of relevant stakeholders and hence are likely to be more effective. They may also reflect the greater wisdom of the larger group that participates in the decision-making and also be more equitable to the different affected groups. Therefore, unilateral legislation must not be pursued unless good faith efforts to conclude an agreement between the representatives of the relevant states have failed. For the same reasons, unilateral law-making must remain open to the resumption of such discussions.

3.3 Examples

Although not articulated in this way, the WTO Appellate Body may have been motivated by this approach. On a number of occasions it ruled on acts of "legislation for humanity". In the famous *Shrimp/Turtle* case,[43] the Appellate Body recognized the importing state's right to regulate foreign conduct that is likely to harm endangered species. It rejected the regulations that were actually chosen because they did not fulfil the second condition – respecting the interests of other stakeholders. The Appellate Body ruled that the unilateral regulation failed both for procedural and substantive reasons: the legislating state did not provide effective opportunities to foreign individuals who might have been adversely affected by such policies to voice their concerns, and the rules were not flexible enough to accommodate the interests of those foreign stakeholders. The latter consideration was also emphasized by the Appellate Body in the *Tuna/Dolphin II* case.[44]

[43] *Shrimp/Turtle*, *supra* note 2.

[44] *Tuna/Dolphin II*, *supra* note 2 (finding that the US measure 'modifies the competitive conditions in the US market to the detriment of Mexican tuna products').

The judgment of the European Court of Justice in its 2012 *Air Transport Association* case may reflect a similar legitimate motivation, although this could be read only between the lines and with great effort. Explicitly, the reasoning of the judgment is not convincing. The court refers to a rather simplistic notion of state sovereignty, emphasizing that "European Union legislation may be applied to an aircraft operator when its aircraft is in the territory of one of the Member States and, more specifically, on an aerodrome situated in such territory, since, in such a case, that aircraft is subject to the unlimited jurisdiction of that Member State and the European Union."[45] This unqualified statement which does not recognize any limits to the prescriptive jurisdiction of the European states is incompatible with basic principles of international law on state jurisdiction.[46]

However, and this is crucial from the perspective of "legislating for humanity," the court did go to a great length to emphasize that the European directives imposing the emission trading obligations on foreign air carriers remained open for adaptation to third countries' "equivalent measures" so as "to provide for optimal interaction between the Community scheme and that country's measures, after consulting with that country".[47] With these references the court acknowledges the burdens imposed on third parties and indirectly outlines the parameters of unilateral acts that legitimately seek to promote global welfare.

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[45] *Air Transport Association of America, supra* note 5, para. 124; *see also* para. 125.

[46] Gattini refers to this part of the judgment as "ubuesque." *See* Gattini, 'Between Splendid Isolation and Tentative Imperialism', supra note 5, at 980. Advocate General Kokott implies that the jurisdiction could be based on the "effects doctrine" ("It is well known that air pollution knows no boundaries and that greenhouse gases contribute towards climate change worldwide irrespective of where they are emitted; they can have effects on the environment and climate in every State and association of States, including the European Union.") (Opinion of Advocate General Kokott, Air Transport Association of America, 6 October 2011, Para. 154). For a similar argument see Jonathan Remy Nash, 'The Curious Legal Landscape of the Extraterritoriality of U.S. Environmental Laws' 50 *Va. J. Int'l L.* 997, 999 (2010) ("for global air pollutants, it seems possible to claim that every nation might potentially have jurisdiction over all worldwide emissions.")

[47] *Air Transport Association of America, supra* note 5, para. 33, citing Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, OJ 2009 L 8/ 3, Recitals 8 to 11, 14, 17 and 21 in the Preamble, which provide *inter alia* that

> [t]he Community and its Member States should continue to seek an agreement on global measures to reduce greenhouse gas emissions from aviation. The Community scheme **may** serve as a model for the use of emissions trading worldwide. The Community and its Member States should continue to be in contact with third parties during the implementation of this Directive and to encourage third countries to take equivalent measures. If a third country adopts measures, which have an environmental effect at least equivalent to that of this Directive, to reduce the climate impact of flights to the Community, the Commission should consider the options available in order to provide for optimal interaction between the Community scheme and that country's measures, after consulting with that country.

See also *Air Transport Association of America, supra* note 5, para. 38.

3.4 Reviewing Sovereigns' Discretion

What should be the standard of review that the WTO Appellate Body or other foreign and international courts adopt when reviewing unilateral "legislation for humanity"? Contemporary literature does not distinguish between the types of national regulation subject for judicial review for compliance with international legal obligations.[48] But the above discussion suggests that there is a fundamental difference between a situation where a state sets policies with respect to its own internal affairs – for example whether or not to allow the consumption within its territory of genetically modified food or how to distribute beef to domestic consumers– to a situation where the policy at stake is aimed at protecting global interests. The fundamental difference between these types of regulation calls for a different standard of review. While the reviewing court should endorse in principle unilateral measures intended to respond to global collective action failures, it should not defer to the regulating state's discretion. While at least some deference to the discretion of the regulating state is due when that state focuses on its internal affairs and realizes the preferences of its citizens,[49] such deference is not called

[48] On the general problem of 'standard of review' and the legitimate measure of deference to national measures in the context of trade and investment law see recently Caroline Henckels, 'Balancing Investment Protection and the Public Interest: The Role of the Standard of Review and the Importance of Deference in Investor-State Arbitration'4 J. Int'l Dispute Settlement (2013) (Forthcoming); Stephan W. Schill, 'Deference in Investment Treaty Arbitration: Reconceptualizing the Standard of Review through Comparative Public Law' (2012) (available at http://www.ssrn.com/link/SIEL-2012-Singapore-Conference.html); Andreas von Staden, 'The Democratic Legitimacy of Judicial Review Beyond the State: Normative Subsidiarity and Judicial Standards of Review' 10 *Int'l J. Constitutional Law* (2012), 1023–1049; Barnali Choudhury, 'Exception Provisions as a Gateway to Incorporating Human Rights Issues into International Investment Agreements' 49 Colum. J. Transnat'l L. (2010-2011) 670-716. *See also* Alan O. Sykes**, '**Domestic Regulation, Sovereignty, and Scientific Evidence Requirements: A Pessimistic View', 3 *Chicago Journal of International Law* (2002) 353-368, at 368. See also John H. Jackson, *World Trade and the Law of GATT* (1969) at 788; Robert Howse, 'Adjudicative Legitimacy and Treaty Interpretation in International Trade Law', in Joseph H. H. Weiler (ed.), *The EU, The WTO and The NAFTA: Towards a Common Law of International Trade?* (Oxford University Press, 2000) 35-70; Steven P. Croley and John H. Jackson, 'WTO Dispute Procedures, Standard of Review and Deference to National Governments', 90 *American Journal of International Law* (1996) 193-213.

[49] This adds to the complexity of the factors that determine the appropriate standard of review. In the context of trade law, for example, the Appellate Body has over the years made it clear that it would be more deferential to trade restrictions prompted by human health considerations as opposed to other motives: Petros C. Mavroidis, *Trade in Goods: An Analysis of International Trade Agreements* (2nd Ed., 2012) 331-335. See also Michael Ming Du, 'Autonomy in Setting Appropriate Level of Protection under the WTO Law: Rhetoric or Reality?', 13 *Journal of International Economic Law* (2010) 1077-1102, at 1100 ('the regulatory value protected by the disputed measure weighs heavily in the AB's judgment. If the value at stake is high, e.g. human health and safety or protection of the environment, the AB tends to respect the Member's judgment and to consider necessary very strict enforcement aimed at zero risk, even if that means a very heavy burden on imports.'); Robert Howse and Elisabeth Tuerk, 'The WTO Impact on Internal Regulations: A Case Study of the Canada–EC Asbestos Dispute', in Gráinne de Búrca and Joanne Scott (eds), *The EU and the WTO: Legal and Constitutional Issues* (2001) 283-328, at 315 ('How far a member should be expected to go in exhausting all the regulatory alternatives to find the least trade-

for when a state legislates for humanity. In this latter type of cases, the regulating state has no priority in setting global standards, while on the other hand it has certain obligations to third states and foreign citizens who are burdened by those standards. Therefore, when foreign and international courts review unilateral acts of legislation for humanity for compatibility with the state's international obligations, and when they reflect on their implementation, they should critically examine whether such legislation is indeed "necessary" to achieve a "legitimate" *collective* goal.

Similar considerations apply when a domestic court is in a position to interpret a domestic statute and apply it to foreign events, or to second-guess the legislator by limiting the extra-territorial reach of a statute and applying it only to local actors. Here it is the domestic court that is in a position to "adjudicate for humanity." A case in point is Abdullahi v. Pfizer, Inc., where Nigerian children sued in a U.S. court the pharmaceutical company for conducting experiments on sick Nigerian children without their or their guardians' knowledge or consent.[50] The majority at the U.S. Second Circuit upheld the suit under the ATS after weighing *inter alia* the negative *global* impact of such experiments. The court saw the trend of pharmaceutical companies to use poorer, developing countries as sites for the medical research for the development of new drugs in a positive light, because this trend could contribute to the reduction and the spread of diseases. But for that to be effective, the court ruled, global standards must be adhered to, lest a sub-standard experiment "fosters distrust and resistance to international drug trials, cutting edge medical innovation, and critical international public health initiatives."[51]

Obviously, the question to what extent national courts should take part in legislation for humanity raises a complex set of considerations. For example, is the adjudication process sufficiently robust and comprehensive to enable the rigorous assessments of the various interests of domestic and foreign stakeholders? Are national courts sufficiently independent to impose on their executive branch and private actors (both domestic and foreign) the burdens of serving humanity's interests? The literature on these questions is too rich to be addressed here, but the good news is that there are strong indications that national courts are capable of complying with the same set of conditions that are imposed on legislatures that legislate for humanity, and that under certain circumstances they may be willing to act in this way. Such a searching exercise of review is likely to be complex and hence slow and costly. Justice Breyer, writing for the U.S. Supreme Court in rejecting the extraterritorial applicability of U.S. antitrust laws to activities that do not affect the American market reasoned that the judicial assessment of the impact of applying U.S. law on foreign interests would entail "lengthier proceedings … to the

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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 …').

[50] *Supra* note 3.

[51] Id., at 186.

point where procedural costs and delays could themselves threaten interference with a foreign nation's ability to maintain the integrity of its own [regulatory] system."[52] The question, however, is whether such costs are nevertheless reasonable in relation to the benefit that their spending can yield.

4 Conclusion

In its recent *Air Transport Association* judgment,[53] the European Court of Justice failed to articulate a convincing legal basis for imposing the EU carbon emissions scheme on foreign air carriers flying outside the EU area.[54] As Andrea Gattini points out, the only possible basis for requiring all air carriers to comply with the EU scheme was for the EU to

> posit [itself] on a universal plane, in a supposed *civitas mundi*, but then the question inevitably pops up of why should the EU assume the role of legislator, fee collector, and lastly exclusive beneficiary of the revenues, for the sake of the entire world. … [W]ithout that strong political underpinning, the legal arguments of the Court look scant and shaky.[55]

This contribution attempted to provide such a political underpinning. According to this theory, the unilateral law-making for humanity should not be deprecated as imperialist and hegemonic. Rather, international law should be positively open to initiatives of relatively strong actors to promote global public goods unilaterally, if they have the capacity, willingness and skills to do so, and if the procedures they follow while designing and enforcing the policies they adopt take all affected interests into account.[56] A new vision of sovereignty as trusteeship of humanity may encourage more such unilateral law-making, approved and implemented in a more accountable manner which takes all affected interests into account.

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[52] F. Hoffmann-La Roche *supra* note 9, at p. [12].

[53] *Supra* note 5.

[54] Gattini, 'Between Splendid Isolation and Tentative Imperialism', *supra* note 5, at 980-983.

[55] *Ibid.*

[56] Compare Eyal Benvenisti, 'The US and the Use of Force: Double-Edged Hegemony and the Management of Global Emergencies', 15 *European Journal of International Law* (2004) 677-700 (discussing the extent the role of the US in providing global public goods by engaging with global terrorism and the legal implications that this role may entail).