Sovereigns as Trustees of Humanity:
The Concept and its Normative Implications

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Abstract

The concept of sovereignty crystallized at a time when distances were large and self-sufficiency was the aspiration. Sovereignty coincided with notions of democracy, under the assumption of a perfect fit between the scope of sovereign authority and the affected stakeholders. This traditional view of sovereignty yields inefficient, inequitable and undemocratic consequences. This Article argues that in a densely populated and deeply integrated world, sovereignty should be conceptualized as a trusteeship not only toward a state’s own citizens, but also toward humanity at large. Accordingly, sovereigns should be required to take into account other-regarding considerations when forming national policies that may have effects beyond their national jurisdiction, even absent specific treaty obligations. After grounding the trustee sovereignty concept on three distinct bases – the sovereign’s power of exclusion, the right to democratic participation, and human rights – the Article elaborates on the general implications of the theory. It identifies the normative and procedural other-regarding obligations that arise out of this concept and suggests that certain minimal obligations are already embedded in several doctrines of international law that delimit the rights of sovereigns. The trustee sovereignty concept can explain the evolution of these doctrines, and can inspire the rise of new specific obligations.

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Introduction

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. A concept created in a world where distances were large and communities were striving for self-sufficiency assumes a new face in a densely populated, interdependent world. Today, sovereignty is no longer akin to ownership of discrete mansions, separated from each other by rivers or deserts, but more analogous to ownership of a small apartment in one densely packed high-rise in which about two hundred families live.

In our global apartment building, several pressing questions emerge: To what extent should national regulators balance other nations' or foreign nationals' interests when they set public policies? To what extent should sovereigns share their scarce national resources such as land, water, grains or rare minerals, or sacrifice their soldiers’ lives, to alleviate suffering of foreigners in need and in general to contribute to global welfare? To what extent should international regulatory bodies intervene in the exercise of discretion by the national authorities? For example, may food exporting countries limit exports of grains in times of high demand? 1 Are states required to provide samples of newly discovered strains of viruses to foreign pharmaceutical companies despite the fact that the vaccines produced will not be accessible to their citizens? 2 These fundamental questions arise in many if not most areas reserved for national policymaking, from the regulation of trade or foreign investment, through the obligation to respond to pandemics, the management of transboundary or global resources, the use of force, the rights of refugees and asylum seekers, to the protection of world heritage sites and of biodiversity.

That specific international norms and institutions limit the discretion of sovereigns when balancing their interests versus the interests of others is not a novel or disputed proposition; but such limitations are grounded on the sovereign’s prior consent and thus are the exception rather than the rule. 3 It may therefore seem radical to propose that sovereignty is inherently limited and requires sovereigns – as agents of humanity – to take other-regarding considerations seriously into account, even absent specific treaty obligations. This Article would suggest, however, that such a reconceptualization of the concept of sovereignty is morally required. It also shows that this new perspective on sovereignty better explains trends in the evolution of positive international law and can predict future developments of the law.

The dominant view of sovereigns, under both constitutional and international law, regards them as Janus-faced: public on the inside (towards their own citizens and residents) but private on the outside (vis-à-vis all others). 4 As private citizens in the global sphere, sovereigns are bound at

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2 In 2006, Indonesia refused to transfer samples of a new strain of the deadly bird virus to the World Health Organization, claiming that the data were, as a biological resource, Indonesia’s property On this case, see infra notes 71-72.
4 For recent challenges to this private face of sovereigns, see Jeremy Waldron, Are Sovereigns Entitled to the Benefit of the International Rule of Law?, 22 EUR. J. INT’L L. 315, 325 (2011) (sovereigns are “trustees for the people committed to their care”); HELMUT AUST, COMPETENCE AND THE LAW OF STATE RESPONSIBILITY (2011) (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.,
the most “not to allow knowingly [their] territory to be used for acts contrary to the rights of other states.” But this formula begs the question of what rights other states, and citizens of other states, have in relation to foreign sovereigns. Even if sovereigns were to adopt an ethics of care toward outsiders, they would hesitate to recognize a firm legal obligation to do so. Contemporary sovereigns draw their legitimacy from within, from their promise to protect their citizens and to promote their welfare, as well as from their duty to exercise their people’s inherent right to enjoy and utilize their natural wealth and resources. Other-regarding obligations might compromise their freedom to define and pursue national goals and values, leaving them at the mercy of collective bargaining processes or unaccountable and uninformed foreign bureaucrats and adjudicators. Sovereigns are therefore unlikely to voluntarily commit themselves to taking global welfare seriously into account.

As a result, contemporary international law fails to recognize states as public actors that must promote global welfare rather than national welfare only. Contemporary doctrines on state sovereignty and citizenship assume that absent a specific, voluntarily accepted commitment, sovereign governments have no obligation to respect, let alone to promote, the interests of foreigners, or to otherwise promote global welfare, even if they can achieve these aims at little or no cost. Even as they commit to free movement of goods and services, states are formally regarded as having sovereign power to balance their treaty obligations against their own national interests. State parties to trade agreements may be criticized for citing an irrelevant consideration in limiting certain imports, but not for assigning a certain relevant (other-regarding) consideration insufficient weight. International courts criticize sovereigns for improper balancing of domestic interests, but balk at explicitly criticizing them for improperly balancing domestic versus foreign interests. This hesitation is reflected in the formalistic, unclear, and even contradictory decisions of the Appellate Body of the World Trade Organization (WTO) and of foreign investment tribunals, as well as in the ongoing debate over the proper “standard of review” and “margin of appreciation” of national authorities by international tribunals.


7 E.g., in the genetically modified food litigation, the WTO Panel asserted that the precautionary principle was not a valid ground for restricting imports: Panel Report, European Communities – Measures Affecting the Approval and Marketing of Biotech Products, WT/DS291/R, WT/DS292/R, WT/DS293/) (Sept. 29, 2006).


9 Despite years of litigation, “the WTO has failed to provide clear and predictable principles to govern the standard of review. As a result Member States and panels are unable to accurately predict how cases will be treated.” (Andrew D. Guzman, Determining the Appropriate Standard of Review in WTO Disputes, 42 CORNELL INT’L L.J. 45, 75 (2009)). In the sphere of foreign investment law, the traditional obligation of states to provide “fair and equitable treatment” to foreign investors is “not fine grained enough for many of the specific questions arising in relation to foreign investment issues in the modern regulatory practice of States” (Benedict Kingsbury & Stephan Schill,
The Janus-faced vision of the sovereign is informed by the ancient perception of a perfect or almost perfect fit between the sovereign and the affected stakeholders – its citizens. Such a vision made eminent sense when sovereigns ruled their discrete mansions. It lent legitimacy to the sovereigns’ assertion of accountability to their citizens and only to their citizens, and relegated the responsibility toward others to the inter-sovereign sphere. Migrant workers, residents of a town adjacent to an international border, or children hiding during a bombardment are all expected to enlist their own governments for protection: they have no right to take part in the policy-making processes of a foreign government, and their interests need not be weighed against the interests of citizens when national regulators form or enforce policies. (In fact, under domestic law, such considerations might well be regarded as irrelevant to the exercise of domestic authority, and therefore unauthorized!) It is this perceived privateness that shields the sovereign from the requirement to internalize the rights and interests of non-citizens in its policymaking and serves as an ostensibly neutral form of exclusion.

The Janus-faced vision still conditions the contemporary thinking of many political scientists, philosophers and lawyers regarding sovereignty, citizenship, democracy and international law. Recent suggestions to regard sovereigns as public actors also on the international level remain moored to the perception that states are agents of their respective peoples, of those “committed to their care” or within their territorial borders. This is still a vision of a state-to-state, “inter-public” law. The private view of sovereigns remains entrenched in legal doctrine not only because it is influenced by the dominant theories of democracy, but obviously also because it privileges certain domestic political actors and pressure groups, domestic bureaucracies and even national courts, mainly in affluent countries, who have vested interests in retaining their positions of power. The Janus-faced vision provides these powerful actors with a reasonable explanation for why they have no obligation to share “their” resources with outsiders, as well as a justification for having the final say regarding “their” contributions to collective challenges such as global warming.

There are strong normative reasons for imposing on sovereigns the obligation to take global welfare into account when setting and implementing policies. The Janus-faced vision made ample economic, social, and political sense in an era in which the sovereign’s authority was limited in scope to the stakeholders routinely affected by its policies. Externalities from the exercise of each sovereign’s authority, such as damage to crops in a neighboring country as a result of pollution, were rare and were deemed manageable by a system based on the principle of sovereign consent and the general negative obligation to avoid harm. In our contemporary global condominium, this “technology” of global governance is no longer viable. Sovereigns regulate resources that are linked in many ways and on a daily basis with resources that belong to others. Sovereigns constantly shape the life opportunities of foreigners. States are not founded on isolated islands or disparate clouds, floating past each other but never touching. Rather, “[b]y carving out a


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

11 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).

12 Kingsbury, supra note 4. See also Buchanan, supra note 4, at 192 (international justice includes the rights and duties of states – and other global actors – to one another); ANDREW HURRELL, ON GLOBAL ORDER: POWER, VALUES, AND THE CONSTITUTION OF INTERNATIONAL SOCIETY 65-66 (2007) (states are “agents of individuals, groups and national communities that they are supposed to represent, [...] and agents or interpreters of some notion of an international public good” and core norms).
territorial jurisdiction for themselves, states withdraw part of the surface of the earth from free access to outsiders.”\textsuperscript{13} They also affect the lives of faraway communities by their daily decisions on economic development, on conservation, on health regulation. Sharing earth’s resources, sovereigns are interdependent, and together they shape the fate of humanity.

Moreover, instead of providing the catalyst for exercising their right to self-determination, in today's world sovereignty often serves as a cell that imprisons peoples and undermines their ability to interact across political boundaries to further their interests. Trapped in their solipsistic decision-making processes, most sovereigns are resigned to adapting to external demands. The reason is as simple as it is obscure: powerful global actors (such as strong states or commercial entities) have the ability to play one sovereign against the other, thereby turning most sovereigns into the proverbial prisoners in the well-known dilemma. They cannot afford to challenge the dictates of foreign investors or the demands of powerful states, and they find it hard to trust fellow sovereigns to cooperate in fending off those demands. Indeed, the strategy of divide and rule is often the only way in which a handful of fortunate nations succeed in promoting their domestic preferences at the global level. The myth that sovereignty empowers peoples is true only for a handful of contemporary sovereigns, not for the rest, the global Bantustans.

This Article lays the ground for a theory of global accountability of sovereigns as trustees of humanity, which imposes on sovereigns other-regarding obligations (Part I). It then elaborates on the general implications of such a theory and identifies the normative and procedural obligations that arise out of it (Part II). While the theory of sovereigns as trustees offers a new way to conceptualize an old and venerable political and legal institution, Part III of this Article will demonstrate that certain judgments and arbitral awards already reflect this new concept, as judges and arbitrators take the opportunity afforded them to shape the law and the outcomes of litigation in ways that impose demands on sovereigns and thereby promote global welfare, compensating, at least somewhat, for the loss of democratic participation.

I. Sovereigns as Global Trustees

A. Preliminary Concerns about sovereignty as self-determination

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

\textsuperscript{13} János Kis, \textit{The Unity of Mankind and the Plurality of States}, in \textit{The Paradoxes of Unintended Consequences} 89, 89, 96 (Dahrendorf et al., Eds., 2000).
But before elaborating on the different possible bases for the trustee sovereignty thesis, it is necessary to remove a potential obstacle that derives from the proposition that sovereignty epitomizes the right of peoples to self-determination and their “inherent right ... to enjoy and utilize fully and freely their natural wealth and resources.” From the perspective of national self-determination, arguing for trustee sovereignty and the sovereign’s other-regarding obligations is seemingly at odds with the claim of ownership that distinct peoples have over “their” natural wealth and resources and their “inherent” right to utilize the national wealth at their discretion.

Obviously, this claim applies only to those resources that are purely internal, i.e., those resources whose use by one people does not detract from the uses of other resources by other peoples. As the next section will demonstrate, few, if any, resources remain nowadays purely internal. But this is only the preliminary response to the claim regarding self-determination. The main response is to deny altogether the relevancy of the self-determination argument to the concept of trustee sovereignty: although it is clearly possible to interpret the principle of self-determination and exclusive ownership to mean that those rights inhere in the people and that therefore the people’s ownership right precedes the rights of others, and although this is how this principle has been understood by many, it is neither the only possible reading nor the appropriate one. Such a reading stands in sharp contrast to the idea – an idea embedded in current international law – that sovereignty is qualified and subject to fiduciary duties toward non-members.

But as we know from another context where rights “inhere” in sovereigns – the inherent right to self-defense – such rights are not regarded as providing their owners with unfettered freedom to decide when and how to use them, even at critical moments. Rather, they are subject to limitations, well-defined under international law. The tension between self-determination and the concept of trusteeship is ultimately only apparent and not real: the principles of national self-determination and of national ownership of natural resources can and should be understood as rejecting the idea that some peoples (and some sovereigns) are subject by international law to other nations. The right to self-determination is the right to be free from other nations, but not the right to be free from the obligations toward the collective. As the German Constitutional Court has stated, “sovereignty [is] ‘freedom that is organised by international law and committed to it’.” The vision of trustee sovereignty is applicable to all nations equally. Indeed, it respects the people's right to self-determination and the resulting right to maintain their culture and promote primarily the interests of their citizens: the principle of "charity begins at home" makes eminent sense. My point, however, is that the interests of others should also count, if only secondarily.

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14 International Covenant on Civil and Political Rights, (Art. 1, Dec. 16, 1966, 999 U.N.T.S. 171) [ICCPR]: (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 cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.”

15 ICCPR, 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.” See also NICO SCHRIJVER, SOVEREIGNTY OVER NATURAL RESOURCES: BALANCING RIGHTS AND DUTIES (1997).

16 Cf. Hurrell, supra note 12, at 66 (sovereignty as “a status that signals a capacity to engage in ... international transactions”); Buchanan, supra note 4, at 102 (“popular 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.”).

This Part develops three parallel theoretical bases to support the vision of sovereigns as global trustees. In the framework of all three, sovereignty is regarded as being embedded within a more encompassing global order, in which it is a source not only of powers and rights, but of obligations as well. These theories consider sovereigns as trustees whose powers must be exercised in ways that take democracy and global welfare into account. While sovereigns may have good reason to award priority in certain areas to the interests of their citizens, they must ultimately keep in mind the interests of others and be accountable to them.

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

B. Sovereignty and the Power of Ownership

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

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19 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).

20 Kis, supra note 13 at 111.

21 Peter Cane, An Introduction to Administrative Law 13-16 (2d ed., 1992) (discussing the scope of “public law” and emphasizing the asymmetric power as giving rise to the need to restrict governmental authority); French law: Jean Rivero & Jean Waline, Droit Administratif 22 (20th edition, 2004) (“Il nous semble que deux notions sont au coeur du droit administrative: celle de service public et celle de puissance publique.”)

should be subjected to the same scrutiny as any other exercise of public power. German constitutional law, for example, based on the concept of the state as “a democratic and social state,” stipulates that “ownership obliges. Its use shall also serve the public good.” The same rationale plays out in the global context: the private face of sovereigns masks their power over others and their responsibility for the ways in which they exercise such power. A theory of other-regarding obligations of sovereigns could therefore develop along lines similar to the theories in private law concerning the other-regarding obligations of property owners.

Ownership of parts of global resources can be conceptualized, then, as originating from a collective regulatory decision at the global level, rather than being an entitlement that inheres in sovereigns. It is, in fact, a vision with a long pedigree in international law, having been the very basis for the founding of modern international law. Notably, Grotius invoked (in fact, invented a secular version of) international law to justify open access to the high seas opposing conflicting assertions of sovereign rights. The idea that sovereignty is embedded in, and a crucial component of, a global legal order was famously phrased by Max Huber when he noted that international law “divides between nations the space upon which human activities are employed,” and allocates to each the responsibility toward other nations for activities transpiring in its jurisdiction that violate international law. It is international law that provides the criteria for recognizing entities as sovereign states that are entitled to manage the resources within their territory, and it is international law – the UN Convention on the Law of the Sea – that recognized states’ rights to extend their sovereign authority to manage certain maritime resources. From this perspective, it is not impossible to conceive of international law as imposing the obligation on sovereigns as power-wielding property owners to take other-regarding interests into account when managing the resources assigned to them. Hence, for example, coastal states that manage their Exclusive Economic Zones (EEZ) and police the activity of fishing fleets have the authority to detain foreign

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24 The position that a property regime must be complemented by a public system which supports the ownerless is widely shared among property scholars. See HANOCH DAGAN, PROPERTY: VALUES AND INSTITUTIONS, 57-75 (2011).
27 The German Basic Law asserts a general limitation on property ownership: The same logic informs the imposition of public law obligations on private individuals in general, such as the theory of Drittwirkung developed in German constitutional law (Drittwirkung der Grundrechte- literally third-party effect of fundamental rights). This doctrine suggests that the state is under an obligation to ensure that private individuals within its jurisdiction do not violate other people’s rights, from which stem obligations on individuals not to harm the constitutional rights of others. See PAUL SIEGHART, THE INTERNATIONAL LAW OF HUMAN RIGHTS 43-44 (1984). On this doctrine in the context of international law, see ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE (1993).
28 Martti Koskenniemi, Empire and International Law: The Real Spanish Contribution, 61 U. Toronto L. J., 14-16 (2011) (emphasizing Vitoria’s conceptualizing the prince’s dominium over his commonwealth as derived from the collective decision to delegate such authority to him).
29 "Mare liberum" (1609) (HUGO GROTIUS, THE FREEDOM OF THE SEAS (Ralph von Deman Magoffin trans., James Brown Scott ed., Oxford Univ. Press 1916)).
31 See also Huber’s statement in the award re British Claims in the Spanish Zone of Morocco (1923–1925): “Responsibility is the necessary corollary of rights. All international rights entail international responsibility” (Daniel-Erasmus Khan, Max Huber as Arbitrator: The Palmas (Miangas) Case and Other Arbitrations, 18 EUR. J. INT’L L. 145, 156 (2007)).
vessels to secure compliance with the coastal state’s policies. But when exercising such functions, the coastal state should not discriminate between domestic and foreign ships and crew.33

Regulation of the power of ownership must be sensitive to the different types of property. Property theory distinguishes between different types of goods for the design of property rights. The objects of ownership rights range from purely private to fully public goods.34 Private goods, such as a lake situated entirely within one country, are “fully excludable” and “rival” (to use economic jargon): the owner can prevent others from using it and the consumption of any part of that property by the user or by others detracts from the property. From a global perspective, assigning exclusive control over such property to the sovereign is efficient because the user will internalize all the costs involved in managing that resource.35

In an era of increasing interdependency, intensified by the dwindling supply of basic resources such as arable land and freshwater, there are significant externalities also to the management of internal resources. One recent example is the so-called “new scramble for Africa”: developing countries lease large swaths of their arable land to foreign governments seeking to ensure the future supply of grains to their citizens. International conflicts can be easily envisaged once the lessors realize that maintaining the leases conflicts with the demands of their own peoples for water and food and consequently decide to revoke the leases. Conflicts between domestic and foreign stakeholders may arise also in other contexts where the management of private resources is at stake, such as, for example, when sovereigns wish to restrict exports of domestic resources vital to domestic as well as foreign consumers. More generally, with increasing demands on natural resources such as land and water, even fully internal resources cannot be regarded as purely private, for their management carries immediate (if indirect) consequences for the use of shared resources. For example, an internal lake that is depleted due to local mismanagement increases the local demand for transboundary lakes and rivers and hence increases competition between domestic and foreign stakeholders. With increasing demands on dwindling supplies, few of the erstwhile purely domestic resources can be managed without impacting foreign stakeholders. Even routine land development plans or pesticide use, or the now popular practice of leasing arable land to foreign companies, can adversely affect neighbors across the border. In other words, the powers that sovereigns exercise, both in their management of their “own” internal resources and when they make rival claims on transboundary and public resources, yield a direct and indirect impact on others.

While a liberal approach to the right to exclude could in principle make sense in domestic settings, absent prohibited exclusionary grounds such as race, religion, or situations of

33 This is a question that has come before an international tribunal (the International Tribunal for the Law of the Sea (ITLOS)) and opinions have differed (see The “Juno Trader” Case, Saint Vincent and the Grenadines v. Guinea-Bissau, Application for prompt release, Judgment (2004), available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_13/judgment_181204_eng.pdf). A theory of trustee sovereignty that is based on qualified ownership can offer a clear positive answer to this question.


35 See David Miller, National Responsibility and Global Justice 214 (2008) (the right to exercise state authority over a given territory is utilitarian: everyone subject to such authority can expect to benefit from its existence).
considerable need, it is quite problematic to adopt a similar deferential approach to sovereigns as property owners in the global sphere. As Morris Cohen noted, “[i]n general, there is no reason for the law insisting that people should make the most economic use of their property. They have a motive in doing so themselves and the cost of the enforcing machinery may be a mischievous waste.”

This is not a matter of principle, but a question of tradeoffs, as Cohen himself acknowledges, when he mentions that “there may be times, such as occurred during the late war, when the state may insist that man shall cultivate the soil intensively and be otherwise engaged in socially productive work.”

There are three reasons that call for a stricter approach to exclusion by sovereigns. The first reason invokes the much more dramatic consequences of exclusion at the global level: the globe does not have a public space to accommodate those who wish or are forced to exit the country they reside in and find refuge elsewhere. For Locke, the assumption underlying and justifying the owner’s power of exclusion was that “there was still enough, and as good left.” 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, must be complemented with certain limitations on the sovereign’s right to exclude, including obligations not to deny access to migrants and refugees without taking into account the asylum-seekers’ individual concerns and without at least providing justifications for their exclusion. For the same reason, and again unlike the individual property owner, the sovereign must assume more robust positive obligations toward those who can benefit from its exercise of power (foreigners subject to persecution by their own governments) in the absence of a public authority at the global level (unless, of course, the UN Security Council decides to operate as such).

The second reason for limitations on sovereigns’ ownership claims is the worry that the policies pursued by the sovereign do not necessarily reflect the preferences of the domestic stakeholders and hence do not fully internalize the social costs, not only for outsiders but also for insiders. The assumption that generally holds for individuals, that they have a motive to make the most economic use of their property, and which justifies their exclusive authority to use their property as they deem fit, is not always and not even often valid even for democratic sovereigns, due to inherent failures in the democratic processes that will be elaborated below.

Thirdly and finally, the domestic law systems for assigning property rights retain the authority to introduce adjustments and limitations on property rights, including their confiscation when the owner’s use conflicts with social demands. No property right is absolute, and ownership remains subject to public rule. The contemporary doctrine on sovereignty recognizes no such

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37 Cohen, supra note 22, at 26.
38 Id.
39 This is the so-called Lockean Proviso: “Nor was this appropriation of any parcel of land, by improving it, any prejudice to any other man, since there was still enough, and as good left; and more than the yet unprovided could use. So that, in effect, there was never the less left for others because of his enclosure for himself” (JOHN LOCKE, *SECOND TREATISE OF CIVIL GOVERNMENT*, §. 33, at Ch. V, (C. B. Macpherson ed., Hackett Publ’g Co., Inc. 1980) (1690)).
40 See Institut de Droit international Res. on Règles internationales sur l’admission et l’expulsion des étrangers [International Principles Concerning the Admission and Expulsion of Foreigners] (Session Geneva 1892), also its Principes recommandés par l’Institut, en vue d’un projet de convention en matière d’émigration (Session Copenhagen 1897).
limitations at the global level. This doctrine posits a global regime of “anti-commons” which requires everybody’s consent to achieve socially beneficial outcomes.41

In other words, the powers that sovereigns exercise, both in their management of their ‘own’ internal resources and when they make rival claims on transboundary and public resources, yield a direct and indirect impact on others. The increasing global pressures on the available resources and the emerging recognition of moral obligations that inhibit the exercise of exclusion challenge the idea of exclusive ownership and give rise to the demand that sovereigns manage the resources under their control efficiently and sustainably, taking into account global welfare considerations.

Note that such responsibility does not necessarily mean an obligation to share the resources owned by the sovereign. Such an obligation would diminish the incentives sovereigns have to invest taxpayers’ money in developing internal public goods such as a flourishing educational system, comprehensive healthcare system, or recreational areas.42 But the right to exclude from such communal goods does not necessarily extend to the right to exclude from the basic resources that the community had been originally assigned. It is one thing to restrict access to, let's say, a state’s publicly funded schools, but another thing altogether to raise NIMBY-type arguments. I return to these considerations below.

C. Sovereignty and the Right to Democracy

The second theoretical basis for imposing other-regarding obligations on sovereigns is the democratic right of individuals to take part in decisions that shape their life opportunities.43 The effectiveness of this right is significantly undermined under contemporary conditions. There are a number of reasons for the impoverishment of the traditional rights of democratic participation. Firstly, the well-known inherent failures of domestic democratic processes – the muted voice of the ‘discrete and insular minorities’ and the special domestic interest groups that capture government – are exacerbated by the continuous lowering of the technical and legal barriers to the free movement of people, goods, services and capital across territorial boundaries. Those who benefit from the availability of this virtual or actual ‘exit’ option gain more voice in the democratic process of their countries of citizenship, at the expense of those who have limited opportunities to move.44

A second type of challenge is more fundamental. It stems from the same difficulty that we encountered with the contemporary notion of sovereignty: the lack of fit between the group that has the right to vote and the other group that is affected by the decisions made by or on behalf of the first group. The basic assumption of state democracy – that there is an overlap between the two

types of stakeholders – was perhaps correct in earlier times, when territorial boundaries defined not only the persons entitled to vote but also the limits of governmental decisions’ impact. Today, policies formed by one government affect foreign stakeholders on a regular basis, without their having the right of vote for that government. This has led scholars to acknowledge that the “geography-based constituency definition introduces an arbitrary criterion of inclusion/exclusion right at the start.” It is therefore necessary to outline a theory defining the scope of the affected stakeholders to whom decision-makers must be accountable.

A third challenge that sovereignty poses to democracy is the phenomenon of sovereigns-as-prisoners. Political boundaries make inter-sovereign cooperation difficult, and preclude many sovereigns with divergent interests from putting together a stable coalition to withstand the pressure of third parties. The space for discretion that many sovereigns (and hence voters) are left with is severely restricted. A few powerful states set up such policy venues – be they formal bodies or informal ones – not only to coordinate the interaction among themselves, but also to compel weaker states to change their behaviour. The weaker states find it difficult to bundle up their disparate preferences (developing countries in general have diverse interests, whereas developed economies are more similar in their preferences). This phenomenon is as ubiquitous as it is not fully acknowledged. A few examples will suffice: Acting through the UN Security Council and by exerting pressure on fellow governments, the U.S. has managed to overcome internal resistance by legislatures and courts in key democratic countries and set up an effective regime of “smart sanctions” and other counterterrorism measures. The growing dependence on foreign capital inflow and the demands of foreign markets has increased the economic and indeed the political leverage that foreign private actors enjoy; witness the emerging regime of bilateral investment treaties by which investment-importing countries have had to forgo sovereign control over the management of such investments. Some foreign actors use their economic leverage to support local candidates or influence domestic public opinion, thereby overcoming their lack of voting power, a phenomenon that in itself exacerbates the difficulties of the democratic process and also skews policies further against the interests of diffuse and unrepresented stakeholders. Other actors, such as retail associations and NGOs, do not attempt to shape public policies directly, but the standards that they adopt force producers in foreign countries to adapt. In practical terms, a foreign supermarket chain may be more effective in setting food safety standards in a foreign country than the local government. Even the International Olympic Committee, a private


46 There is literature that attempts to determine the sphere of the affected stakeholders. See, e.g., Nancy Fraser, SCALES OF JUSTICE: REIMAGING 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); Robert E. Goodin, Enfranchising All Affected Interests, and Its Alternatives, 35 PHIL. & PUB. AFF. 40 (2007) (elaborating on the "all affected principle" that emphasizes interdependence among stakeholders).

47 Kingsbury, supra note 4.


50 Benvenisti & Downs, supra note 48.

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

52 Jan Wouters, Axel Marx & Nicholas Hachez, Private Standards, Global Governance and Transatlantic Cooperation: The Case of Global Food Safety Governance (Leuven Centre for Global Governance Studies, Working
body, has been effective only because, as a monopoly holder of the Olympic Games, it has been able to elicit compliance by states with its privacy-invading policies lest their athletes be banned from participating in the games.  \(^{53}\)

These three fundamental challenges to the accepted thinking that state sovereignty promotes democracy weaken the legitimacy of the powerful sovereigns’ insistence on autonomous decision-making which is oblivious to foreign concerns: the powerful are estopped from invoking their sovereignty to justify the exclusion, when it is the very concept of sovereignty which impoverishes the democratic processes within most countries, undermining their ability to withstand external economic and political pressures and sustaining the power of the powerful.

The weakness of territorially based electoral democracy should not immediately mean that these states be replaced with wider circles of electorates.  \(^{54}\) Rather, territorially based democracy could at times be supplanted by shared institutions that are able to effect coordinated action by the sovereigns. Such institutions may at times have the authority to demand that the sovereigns take the interests of non-territorial constituencies into account.  \(^{55}\) In addition, international and regional tribunals have opportunities, through the setting of standards for a group of states, to enable those states to overcome their collective action problems. Those sovereigns that do manage to promote their preferences most likely succeed because they exploit the sovereign status of other sovereigns; they must therefore accept at least some limitations on their exercise of sovereign discretion.

D. Sovereignty as Trusteeship of Humankind

The last ground has the oldest pedigree. Its roots lie in early thinking about international law as based on divine authority  \(^{56}\) or natural law, but it is also nurtured by contemporary visions concerning human rights. According to this theory, the global resources – air and water, fisheries and the high seas, mineral deposits and agricultural lands – are humanity’s resources and sovereigns only have management rights in them as the trustees of humanity. This approach informs the concept of the “common heritage of mankind,” which is regarded in treaties and declarations as the titleholder of the natural resources located beyond national boundaries such as the deep seabed or outer space.  \(^{57}\) Unlike previous approaches that presupposed ownership by

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54 On possible modalities to extend suffrage for aliens, see Cristina M. Rodríguez, Noncitizen Voting and the Extraconstitutional Construction of the Polity, 8 ICON 30 (2010).


56 As stated in Psalms 115:16 (New International Version), “The highest heavens belong to the LORD, but the earth he has given to mankind”

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

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

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

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

In his view,

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

Therefore, sovereigns are obliged toward humankind to use the resources under their control efficiently and sustainably. It would be wrong to impute to Vattel a purely cosmopolitan vision.

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58 EMERICH DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW (1758).
59 “But it is questioned whether a nation can, by the bare act of taking possession, appropriate to itself countries which it does not really occupy, and thus engross a much greater extent of territory than it is able to people or cultivate.” Id. at Book I, Chapter 18, § 208.
60 Id.
61 Id. § 203.
He views nations as collective entities responsible for their acts and omissions and authorized to promote their collective goals. But with human beings as the core justification for sovereign power, sovereigns have an obligation to accommodate the interests of foreign stakeholders or at least to consider those interests in good faith.63

While Vattel may have been the most direct and elaborate, other philosophers shared the basic premise that, in Kant’s words “all men are originally in common possession of the land of the entire earth.”64 Contemporary philosophers reach the same outcome by recognizing the primacy of individuals’ human rights over state interests.65 This vision has informed the writing of prominent international lawyers who have viewed “the State as a unit at the service of the human beings for whom it is responsible,”66 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.”67 Humanity therefore exercises its eminent domain authority not only over shared resources but also over the state’s internal resources, thereby affirming the transformation of sovereignty as a social function of the global community of peoples.68

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

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

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

64 IMMANUEL KANT, THE METAPHYSICS OF MORALS 6:267 (Mary Gregor ed., 1996); see also Kant’s Perpetual Peace (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”). Grotius states that "In the existing state of affairs, it has come to pass, in accordance with the design of Divine Justice, that one nation supplies the needs of another, so that in this way whatever has been produced in any region is regarded as a product native to all regions." (HUGO GROTIIUS, DE JURE Praedae 218 (1869)). See GEORG CAVALLLAR, THE RIGHTS OF STRANGERS THE GLOBAL COMMUNITY AND POLITICAL JUSTICE SINCE VITORIA (2002).


67 C. KALTENBORN VON STACHAU, KRITIK DES VÖLKERRECHTS 260-261 (1847) (in JOCHEN VON BERNSTORFF, THE PUBLIC INTERNATIONAL LAW THEORY OF HANS KELSEN 19 (2010)). This is the monist view, carefully explored by Kelsen (HANS KELSEN, PURE THEORY OF LAW 214-215, 333-347 (Max Knight trans., 1967)). See also HANS KELSEN, GENERAL THEORY OF LAW AND STATE 383-388 (Anders Wedberg trans., 1949); Id. PRINCIPLES OF INTERNATIONAL LAW 440-447 (1952). See also Bernstorff, id.

among the trustees who are collectively required to protect everyone’s rights. Even this secondary allocation has an important exception: when it comes to key economic and social rights, such as the right to food, the 1966 International Covenant on Economic Social and Cultural Rights (ICESCR) stipulates a general obligation of international cooperation in ensuring the availability of life-sustaining resources to all. The ICESCR emphasizes specifically the obligation of “States Parties … [t]aking 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.”

Finally, the lack of public space that would accommodate those who wish to or must exit their countries obviously also carries a human rights dimension. Indeed, to be fully effective, the right of exit of individuals from their countries must include also a right of at least temporary entrance, namely a duty owed by sovereigns toward foreigners.

E. The Interplay between the three grounds

Each of the three different grounds can serve as the basis for recasting sovereigns as public actors that are accountable to foreign stakeholders and are bound to promote global welfare equitably and sustainably. This clearly flows from the “humanity” ground, but it can also be derived from the “ownership as power” ground. This suggests that at times the different grounds are mutually reinforcing. However, they may produce claims that differ in their scope and intensity. The “humanity” ground is much weaker than the other two, because individuals that are affected by a specific sovereign policy that harms their specific interests have a stronger claim to taking part in policymaking than the rest of humanity, who are not directly or even indirectly affected. Moreover, there may also be tensions between the grounds that derive from their different foci: while the “ownership” ground addresses primarily the supply side of the effort to increase the pie of global resources, the “humanity” ground and especially the “democracy” ground contribute to our understanding of who the affected stakeholders are that must take part in the national decisions on allocation. Therefore, the different grounds, in tension with each other, may produce conflicting

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69 Charles Beitz (CHARLES BEITZ, THE IDEA OF HUMAN RIGHTS (2009)) suggests a schema that identifies human rights as interests sufficiently important to be protected by the state, and determines that when states fail to provide that protection, the failure is a suitable object of international concern (p. 137). This is a two-level model of human rights (108).


71 Article 2(1) (“Each State Party […] undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant…” (my emphasis). The lack of reference to the spatial scope of the obligation, and the duty to cooperate internationally, have been invoked by the Committee on Economic, Social and Cultural Rights (CESCR) which interpreted that the ICESCR imposed obligations extending beyond the member states’ territories. See General Comment 3 (1990) “The Nature of States Parties Obligations” available at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/94bdbaf59b43a424c12563ed0052b664?OpenElement

72 ICESCR, id., Article 11(2)(b). In its General Comment 12 (1999) on Article 11, the CESCR states that States parties should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required. States parties should, in international agreements whenever relevant, ensure that the right to adequate food is given due attention and consider the development of further international legal instruments to that end. States parties should refrain at all times from food embargoes or similar measures which endanger conditions for food production and access to food in other countries. Food should never be used as an instrument of political and economic pressure.


claims. In an interesting way, however, these contradictions may interact to create a productive outcome.

A case in point is the negotiations over the access to a new strain of the deadly bird flu that was discovered in Indonesia in 2006. As opposed to its previous practice, this time Indonesia announced that it would not deliver samples of the new virus to the World Health Organization unless it received sufficient assurances that the vaccine developed from the samples would be available to its citizens. Due to the small quantities produced and their selling price, Influenza vaccines had been accessible only to a small portion of the world's population, mostly in the developed North. Dependent on virus samples to produce the vaccine, the World Health Organization and developed countries sharply criticized Indonesia, arguing that Indonesia owed a duty under international law to provide information essential to prevent epidemics. But Indonesia invoked its sovereign right: the virus, as a biological resource, was Indonesia’s property. International law did not oblige it to share this property with others. In the summer of 2011 the conflict between Indonesia, the drug producing countries and the WHO ended in a compromise that ensures the availability of drugs to citizens from developing countries. This story highlights the dynamics where the North’s claim for a stake in the South’s resources is met by the South’s claim for a stake in the North’s allocation policies. If sovereigns endorse the vision of trusteeship, and negotiate from this premise, they may well reach compromises that improve global welfare. And if not, perhaps courts will step in and demand that they comply.

II. Normative Implications

This Part elaborates on the normative and institutional requirements that derive from the reconceptualization of sovereigns as other-regarding. It discusses two main normative themes: the obligation to contribute to global welfare (section (a)) and the obligation to integrate the preferences of all affected stakeholders in their decision-making processes (section (b)). The discussion of these obligations will reveal certain difficulties in their implementation. Therefore section (c) examines the institutional difficulties that call for a more restricted set of other-regarding obligations, and explores the minimal requirements that are incumbent on sovereigns. Section (d) ultimately examines the role of third parties, primarily international tribunals that are called upon to review sovereign discretion. While sections (a) and (b) offer an ideal vision, one which other-regarding sovereigns should aspire to promote, section (c) posits their minimal obligations under contemporary conditions, and section (d) outlines the role that the other-regarding concept assigns to international reviewing institutions.

A. The obligation to contribute to global welfare

Because sovereigns are trustees of humanity, they must use the resources available to them in a way that does no harm, and even contributes, to global welfare. Although they may prioritize their

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74 On this dispute, see Andrew Lakoff, Two Regimes of Global Health, 1 HUMANITY 59 (2010) (available at http://muse.jhu.edu/journals/hum/summary/v001/1.1_lakoff.html); Endang R Sedyaningsih et al., Towards Mutual Trust, Transparency and Equity in Virus Sharing Mechanism: The Avian Influenza Case of Indonesia, 37 ANN. ACAD. MED. SING. 482 (2008).

citizens’ needs, they cannot be oblivious to other peoples’ wants. In principle, any diminution of global welfare constitutes harm. Hence, in an ideal world a sovereign would be responsible for having violated its other-regarding obligations when it dries up its internal lakes in pursuance of a short-sighted and unsustainable irrigation project, when it destroys world heritage sights or lets them decay, or even when it fails to take measures to promote the use of renewable sources of energy. Harm is 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 humanity.

While this 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 that caused the harm. This definition of responsibility would suggest that the reigning principle should be the Pareto criterion, namely an outcome in which at least one of the parties is better off relative to any alternative outcome, while the other parties are not worse off.

This principle means that a country has no right to use its sovereignty claim to block proposed uses of collective resources that are clearly more efficient than current uses, thereby impeding an increase in global welfare. In fact, the very claim of sovereignty might be influenced by the same argument. Hence, it was correct to deny Portugal’s claim of sovereignty over the high seas: Portugal contributed nothing to the management of the high seas and its ownership claim would have burdened maritime commerce. Similarly, sovereignty does not grant states the right to use their control over parts of a shared river to restrict shipping across the river. An obligation to contribute to global welfare would limit a sovereign’s use of its own “private” property: it would not be able to refuse to allow a neighboring country to drill a tunnel beneath its territory to shorten travel between two parts of its land, if such a tunnel does not detract from the sovereign’s use of the land. If the state is indifferent in regard to several locations where a noisy and ugly plant might be built, it should defer to the interests of the residents of a bordering town in another state and build it in a place that is the farthest removed from the border.

The application of this principle will become much more problematic if it is invoked to impose affirmative duties on states: Is Panama, for example, obliged under this principle to allow foreign countries to dig a tunnel across its territory? Is China required to export its rare earths and minerals to foreign consumers rather than benefit from its monopolistic market position? Are states estopped from making NIMBY arguments, e.g., can they refuse to allow foreign waste into their territories? While the obligation to promote global welfare certainly supports positive responses to these and similar questions, there is a key precondition to their assertion: the availability of institutions that can ensure that the voices of the Panamas of the world and their interests are equally taken into account by other sovereigns and by the reviewing bodies. A state in the U.S. or a state member of the European Union may not raise the NIMBY argument, but this

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76 Economists and lawyers determine a person’s legal responsibility for the harm she caused by measuring 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 Hand Rule which is used by lawyers to identify negligence in torts must include also the harm caused by the actor’s negligent act or omission to herself, and not only the harm she inflicted on others). See also RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 167-171 (7th ed., 2007) (in agreement).
77 Hugo Grotius, supra note 29.
80 See case C-300/90, Comm'n v. Kingdom of Belg., 1992 E.C.R I-305 para. 29 (“wastes, recyclable or not, must be considered as products the movement of which, in conformance with Article 30 of the Treaty, cannot in
is due to the availability of political and judicial bodies that promise general compliance with communal obligations. To the extent that such institutional guarantees of equal voice and general compliance are not fully developed at the global level, only lesser obligations can be expected at this stage. It may be the case, for example, that China would be required to share with others a rare life-saving medicine that can be found only in China, or even to allow export of foodstuffs to a neighboring country under severe stress, but would not be required to sell rare earths to foreign manufacturers of smartphones. While a fuller assessment of the institutional perspectives must await another article, it is nevertheless possible to identify some minimal obligations that need not rely on assurances of reciprocity. These are explored below.

B. Integrating the preferences of all affected stakeholders

To address the challenges to democratic decision-making explored above, it is necessary to develop procedures and mechanisms that compensate for individuals' loss of capacity to promote their preferences. Sovereigns must adhere to procedures that give voice to foreign stakeholders who are potentially affected by national policies, and be accountable to them. Among these are procedural obligations to give reasons for the action, to inquire into the potential impact of policies on foreigners, to add procedural guarantees to ensure that foreigners' interests are indeed taken into account, to invest resources to ensure a more transparent decision-making process, and to subject all such procedural guarantees to international monitoring and review.

The Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998) provides a contemporary example of the emerging awareness of the obligation to provide voice to out-of-state stakeholders and of the need to develop modalities to facilitate their involvement. This convention seeks to ensure "the right of every person of present and future generations to live in an environment adequate to his or her health and well-being" by "each [state] Party [guaranteeing] the rights of access to information, public participation in decision-making, and access to justice in environmental matters" to "the public concerned." This public is defined as "the public affected principle be prevented." To justify the imposition of barriers to the movement of wastes, the state must demonstrate imperative requirements of environmental protection as well as to the objective of the protection of health which prevails over the objective of the free movement of goods.). And see in general infra notes 89-90.

According to the 1994 Agreement on Agriculture (which is part of the Agreement Establishing the World Trade Organization of April 15, 1994), Article 12, Members 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;” and “before any Member institutes an export prohibition or restriction, it shall give notice in writing, as far in advance as practicable, to the Committee on Agriculture comprising such information as the nature and the duration of such measure, and shall 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. The Member instituting such export prohibition or restriction shall provide, upon request, such a Member with necessary information.” The Article recognizes an exception for “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.” (the text of the Agreement is available at http://www.wto.org/english/docs_e/legal_e/legal_e.htm#ag).

Cf. The WTO Panel decision in WT/DS394/R, China – Measures Related to the Exportation of Various Raw Materials 5 July 2011 (holding that by joining the WTO China agreed to restrict its sovereign rights over its natural resources and as a result was precluded from restricting the export of certain raw materials for industrial processes abroad; the Panel did not distinguish between the different uses of the raw materials).


Id. Art. 1.
or likely to be affected by, or having an interest in, the environmental decision-making. The Aarhus Convention Compliance Committee (ACCC), a body set up in 2004 to promote and improve compliance with the Convention, has struggled with this definition of affected public. In its effort to identify the scope of affected stakeholders, it extended the definition to include also foreign citizens residing in a neighboring country, and recommended that the member states provide further "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." 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 in fact suggests "examining the possibility to use Geographic Information Systems (GIS) [i.e., in disregard of political boundaries] to determine who is the public concerned." The approach is – appropriately – decidedly functional: the scope of the planned measure determines the affected stakeholders whose voice should be heard.

Such democracy-enhancing mechanisms have the additional benefit of potentially promoting global welfare. Despite the costs associated with enhanced accountability and voice for affected stakeholders, the underlying assumption is that such requirements would promote better-informed decisions, and hence decisions that are better able to maximize global welfare.

Another way to promote democratic decision-making applies to the situations of sovereigns trapped as prisoners in their sovereign cells. Unable to communicate or to ensure cooperation, these sovereigns might find support in entrepreneurial international and national courts and other institutional actors who would act as their agents and impose collective standards, thereby creating a common front to withstand economic or political pressure coming from a powerful state or commercial entity. Obviously, the recognition of the democratic deficit that inheres in sovereignty enhances the role of reviewing institutions such as international and national courts. In particular, the various courts – not just international and regional courts, but also national courts acting in unison – can resolve prisoner dilemmas that sovereigns face by acting in their name vis-à-vis the powerful actor.

C. The limits of the other-regarding position absent reciprocity

There are significant difficulties with developing the entire range of implications that such a vision of sovereignty as trusteeship calls for. Other-regarding obligations include in principle several normative obligations, ranging from the obligation simply to ‘note’ foreigners’ interests and accommodate such interests only if this does not entail any adverse impact on domestic interests, through the obligations to give ‘some’ weight to foreigners’ interests in the balancing process, to identify certain internal considerations (such as reducing domestic unemployment) as irrelevant or

85 Id. Art. 2(5).
insufficient,\textsuperscript{89} to inquire whether a given measure was necessary, or even narrowly tailored to achieve a legitimate goal, to the obligation finally to subject the selected policy to a rigorous proportionality analysis, which questions the appropriateness of even the narrowly tailored measure (proportionality in the narrow sense). A fully developed set of normative criteria for weighing the other-regarding obligations of a sovereign will have to address the different issues at stake: for example, the different weights assigned to policies aimed at saving lives and those seeking economic development, and defining the different spheres of impact that sovereigns have (over citizens, over foreigners just outside the borders, over other foreigners in neighboring countries, etc.) that can be translated into decreasing levels of responsibility. Factors such as the relative power of specific sovereigns, their unique responsibility towards foreign stakeholders due to past acts (as a former colonial power, or as an occupier) or omissions (e.g., the failure to control exploitation by nationally registered companies), should also be taken into account.

Obviously, burden-sharing among different sovereigns as well as a graduated set of responsibilities that distinguish between affected stakeholders are important facets of the normative assessment of entitlements and responsibilities. None of the grounds that support the trustee concept suggests that all sovereigns must treat the interests of all foreigners like those of their own citizens, just as the recognition of duties that property owners have toward others does not spell the end of capitalism. Trustee sovereignty does not amount to cosmopolitanism, and sovereigns are not expected to give foreigners the same access to their resources and their democratic processes, as this would undermine the opportunities of communities to promote their own unique preferences and destroy their incentives to invest in promoting their communal goods.\textsuperscript{90} Sovereigns are not merely instruments to promote global welfare, but also institutions that enable distinct societies to secure their preferences, their culture and group identity.

A system that imposes other-regarding obligations on sovereigns must not compromise the rights and interests of these sovereigns and their citizens. The analogy to property owners is pertinent here, too: a system of taxation is just only if it is imposed under strict conditions that take the owners’ preferences into account and ensures equal treatment for all stakeholders. A system that subjects sovereign discretion to external scrutiny must provide it with some minimal guarantees. For example, institutions must be accountable to all those affected (either positively or negatively) by their intervention; they must provide opportunities for effective participation in shaping the policies they adopt; and the institutional policies must be equally and effectively implemented.\textsuperscript{91}

\textsuperscript{89} For example, already in 1892 the Institut de Droit international’s resolution on international principles concerning the admission and expulsion of foreigners (Règles internationales sur l’admission et l’expulsion des étrangers, Session Geneva 1892) stipulated that the protection of the domestic labor market is not a sufficient reason for non-admission (Art. 7: “La protection du travail national n’est pas, à elle seule, un motif suffisant de non-admission.”).

\textsuperscript{90} See, e.g., Miller, supra note 35 at 224 (positing that each political community should be able to determine the balance it wishes to strike between economic growth and environmental values).

\textsuperscript{91} See Thomas Nagel’s famous objection to the application and implementation of standards of justice at the global level: “Current international rules and institutions […] lack something that according to the political conception is crucial for the application and implementation of standards of justice: They are not collectively enacted and coercively imposed in the name of all the individuals whose lives they affect; and they do not ask for the kind of authorization by individuals that carries with it a responsibility to treat all those individuals in some sense equally.” Thomas Nagel, The Problem of Global Justice, 33 PHIL. & PUB. AFF. 113 (2005). See also Henry Sigerist, The Elements of Politics 299-300 (4th ed., 1919); Jack L. Goldsmith, Liberal Democracy and Cosmopolitan Duty, 55 Stan. L. Rev. 1667, 1673 (2003); Eric A. Posner, International Law: A Welfarist Approach, 73 U. Chi. L. Rev. 487 (2006), Miller, supra note 35, at 274-275. On the moral obligation to set up global institutions to regulate national regulators, see Simon Caney, Justice Beyond Borders, Ch. 5 (2005).
This is not to suggest that such institutions are beyond human imagination. In fact, they exist in federal systems that seek to ensure that states and provinces internalize out-of-state interests, and they exist also in the European Union. But further discussion on the minimal preconditions necessary to legitimize such modalities for external review of sovereigns’ other-regarding considerations and whether these preconditions already exist in some institutions will have to await further elaboration. For the purposes of this Article, suffice it to underline the concept of trustee sovereignty by exploring the most basic demands that can be expected from the other-regarding sovereign. With respect to the host of potential modalities for promoting inter-sovereign cooperation, it will be adequate at this point to suggest that trustee sovereigns have an obligation to explore and develop the most effective supranational institutions that could respond to the challenges to efficiency, equity and democracy that result from the system of sovereign states.

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

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92 Federal courts in federal states review the policies of the sub-units like states and provinces to ensure that they do not undermine collective welfare by harming out-of-state stakeholders. In the U.S., federal courts have developed their capacity to ensure that competition between states does not detract from common welfare at the federal level, or that states do not disregard the interests of out-of-state residents. These interventions were based on the Dormant Commerce Clause, which stipulates that courts have the authority to monitor policymaking by states that disregarded the interests of out-of-state actors. If state regulation causes “an undue burden on interstate commerce” it can be struck down only if “the burden imposed on such commerce is clearly excessive in relation to the putative local benefits,” Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) This so-called Pike test requires the court to review the validity of the state rule by balancing between its costs to interstate commerce and its benefits, and only when the benefits outweigh the costs will the regulation be regarded as consistent with the Dormant Commerce Clause. According to Laurence Tribe, the justification for this rigorous examination is not only to ensure economic efficiency through open interstate commerce, but also to “ensure national solidarity” as the democratic processes within states tend to give precedence to local interests: LAWRENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW 1057 (3rd ed., 2000) (discussing Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 522-23 (1935)). See also Tribe 1051-1052. The rigorous tests adopted by the U.S. Supreme Court with respect to the Dormant Commerce Clause reflects the court’s implicit recognition that state lawmakers protect and promote the interests of their own constituents, inevitably at the expense of citizens of other states. In such cases, an external judicial examination is more conducive to promoting the general goal than deferring to the state institutions.

93 Similarly, the European Court of Justice invoked the principle of the free movement of goods between member states as the “fundamental principle” from which it derived a similar burden on national regulation by EU members, under the proportionality test. See e.g., case C-41/02 Comm’n v. Neth., 2004 E.C.R I-11375 ¶ 47: to comply with EC law, “the national authorities [must] show […] in the light of national nutritional habits and in the light of the results of international scientific research, that their rules are necessary to give effective protection to the interests referred to in [the treaty] and, in particular, that the marketing of the products in question poses a real risk for public health”; Case 302/86 Comm’n v. Den., 1988 E.C.R 4607 ¶ 10: 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.”). The court differentiates between the goals the state wishes to pursue; see Simona Morettini, Community Principles Affecting the Exercise of Discretionary Power by National Authorities in the Service Sector, 106, 118 in GLOBAL AND EUROPEAN CONSTRAINTS UPON NATIONAL RIGHT TO REGULATE: THE SERVICES SECTOR (Stefano Battini, Giulio Vesperini Eds., 2008) (“For example, in the cases of restrictions justified by the protection of domestic public health and safety, the review is less searching, insofar as these areas are closely related to national sovereignty and there is not always unanimity between the States as to the adequate level of protection. In the case of consumer protection, by contrast, the Community court is able to carry out a more penetrating review, insofar as this is an area of Community competence and there is agreement among the Member States as to the appropriate level of protection.”). Compare Kis, supra note 13 at 121.

94 II CHRISTIAN WOLLFF, JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM 84-95 (1749) (Joseph H. Drake trans., 1934) (1749).
toward itself”? In his response, he elaborates on what he terms the “imperfect obligations” that the sovereign owes to its fellow sovereigns:

[S]ince ... every nation is free and by virtue of natural liberty it must be allowed to abide by its own judgement in determining its action, every nation must be allowed to stand by its judgement, as to whether 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.96

Wolff even suggests that the sovereign “is not bound to give to other nations the reason for this decision, consequently they must simply abide by its will.”97

This position might have been apt for the emerging global order in eighteenth century Europe, and certainly reflected the prevailing expectations of and from sovereigns. But this position is less than convincing under contemporary circumstances of interdependency, resource scarcity, and democratic deficiency even at the national level.98 In its place, this section will develop a restricted version of an other-regarding set of obligations that all states are bound by regardless of any assurance of reciprocity or promise of impartial and effective global institutions. That version is opposed to Wolff’s last contention. It argues that the right to participate in public decisions affecting one’s life, which forms the basis for democracy, must now manifest itself through access to national arenas of policymaking and through the right to demand that the sovereign consider, if not internalize, the interests of foreigners. This global right to be heard, extended to all those potentially affected by a national regulatory decision, is the least that may be expected of sovereigns in regard to those who are trapped in their sovereignties/cells. Paying respect to this right can yield more efficient and just outcomes from a global perspective.

1. **Minimal Deliberative Obligations**

The sovereign as trustee must offer reasons for its policies to affected stakeholders. This minimal deliberative obligation and the others explored in this section do not necessarily require sovereigns to accept the jurisdiction of third parties to pass judgment on their own assessment of their normative and procedural obligations under the restricted Pareto test. Ultimately, sovereigns are entitled to have their final say. But they must, at the very least, be accountable to foreign stakeholders by providing them with effective opportunities to voice their concerns, and they must also explain their reasons for imposing burdens on the foreigners or for not benefiting them.99 This is much more than an “imperfect obligation” in Wolff’s terms: it transforms the power of the sovereigns into an obligation to reason, it invites to a dialogue on ways to promote common interests and on competing conceptions of global justice, and it opens up a process of internalizing the general concept of sovereigns as trustees of humanity.

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

97 Id. § 188 at para. 99 (“Who decides whether commerce is possible”).

98 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 67, id (“Evolution logique en un temps où la surpopulation et la menace de pénurie exigent la conservation de tous les biens de cette terre.”).

99 Cf. the obligations to consider others’ interests and give account to them under Article 12 of the WTO Agreement on Agriculture, supra note 81.
International law has long recognized an obligation to inform other (usually neighboring) countries about possible hazards and about planned measures, although such a general obligation is currently recognized only with respect to activities expected to cause “significant harm” to others.\textsuperscript{100} 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 the decision-making process. But this does not necessarily mean that providing notice, granting a proper hearing to affected stakeholders and any other potential acts involved is detrimental for the planning state. As we know from the literature on administrative law, procedural rights entail significant benefits for the hearing agencies. Such procedural guarantees enable them to obtain a fuller view of the consequences of adopting the contemplated policies. They also limit the possibilities of capture by narrow interests. So by allowing foreign stakeholders to participate effectively in the decision-making processes relevant to them and giving a proper account of the policies they adopt, sovereigns do not necessarily sacrifice their resources for other people's welfare.

The provision of notice and comment to foreign stakeholders would provide the sovereign with pertinent information allowing it to weigh the relevant other-regarding considerations when forming the policies that could potentially affect those others. Among the pertinent other-regarding considerations would be the degree of risk (to others) and the availability of means of preventing it, as well as

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

While this list of considerations is taken from the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (2001),\textsuperscript{101} the conception of trustee sovereignty suggests that there is no reason to limit those considerations to a particular definition of “hazardous activities.”

\textsuperscript{100} In the Corfu Channel case, supra note 5, the ICJ characterized the duty to give warning as based inter alia on “elementary considerations of humanity” (p. 22). See, e.g., Convention on the Law of the Non-navigational Uses of International Watercourses, Art. 12, May 21, 1997 (G.A. A/RES/51/229) (“Notification concerning planned measures with possible adverse effects”): “Before a watercourse State implements or permits the implementation of planned measures which may have a significant adverse effect upon other watercourse States, it shall provide those States with timely notification thereof. Such notification shall be accompanied by available technical data and information, including the results of any environmental impact assessment, in order to enable the notified States to evaluate the possible effects of the planned measures.” See also 2001 draft Articles on Prevention of Transboundary Harm from Hazardous Activities, Yearbook of the International Law Commission, 2001, vol. II, Part Two (Article 8, “Notification and information”): “1. If the assessment referred to in article 7 indicates a risk of causing significant transboundary harm, the State of origin shall provide the State likely to be affected with timely notification of the risk and the assessment and shall transmit to it the available technical and all other relevant information on which the assessment is based.”

\textsuperscript{101} Supra note 99.
2. The obligation to accommodate others’ interests when one sustains no loss: the restricted Pareto test

A Pareto superior outcome is one in which at least one of the parties is better off relative to any alternative outcome, while the other parties are not made worse off (or are made not worse off by compensating them). The restricted Pareto outcome is one in which “one benefits and the other sustains no loss” without the option of compensation. The restricted version is a more limited imposition on sovereigns than the regular Pareto superiority criterion because it entails less intrusion on sovereigns’ discretion regarding their use of their resources: it does not require them to accept compensation for use of their land which they did not approve of. To legitimize a stronger imposition on sovereigns would require, first, a theory of global justice that expects sovereigns to accept tradeoffs and even to contribute to others. Second, it would depend on a sufficiently robust institutional infrastructure with reliable mechanisms that sovereigns could trust to make impartial and skilful decisions on allocations among sovereigns and/or their citizens. While it is not impossible to envisage such institutional mechanisms, my attempt here is to focus on a minimal version of sovereigns’ other-regarding obligations before delving into examining the further institutional preconditions and the possibilities for their realization. Hence my choice of a “restricted Pareto criterion” that stipulates that the minimal other-regarding normative obligation incumbent on all sovereigns is the obligation to accommodate others’ interests when they “sustain no loss.” In this stricter version, side payments to compensate for loss are not an option.

Any legal system that perceives itself as reflecting a common enterprise of a “human society” must endorse at least a restricted Pareto superiority criterion as a principle that regulates the interaction between the members of the group. As Hanoch Dagan has observed, whether a legal system adopts this principle or not depends on the underlying self-commitment of the relevant society to long-term cooperation.102 Jewish law, for example, requires individual owners to weigh other-regarding interests, and might even force them to act accordingly.103 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.”104 The sense of collective responsibility yields an obligation to act according to the principle known as “one benefits and the other sustains no loss.” All three grounds of the trustee sovereignty concept support the restricted Pareto criterion as a minimal obligation.

Invoking this principle marks the start of a dialogue between states, nudging them toward a more efficient use of resources and thereby reducing the adverse effects of the excluding power that sovereignty entails (ground 1, the power of ownership). It at least minimally corrects the democratic deficit from the perspective of outsiders (ground 2, democracy): had the outsiders participated in the process, in all likelihood they would have prevailed on the insiders to agree to grant them the benefits that accrue from access to resources which are useless to the insiders. Finally, the restricted Pareto criterion pays tribute to human equality and the commitment to human flourishing (ground 3, human rights).

This restricted vision of efficiency was invoked also by the text that founded modern international law. In his first treatise, to justify his proposed regime of freedom of navigation on the high seas,105 Hugo Grotius referred to it as “the law of human society”:

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103 Id., 112-120; AARON KIRSCHENBAUM, EQUITY IN JEWISH LAW 185-197 (1991).
104 Kirschenbaum, supra note 103, at 188-191.
105 GROTUIS, supra note 29
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?106

Arguably, a similar result can be reached by invoking another doctrine of international law, namely the general doctrine of abuse of rights. This doctrine, as Hersch Lauterpacht noted, depends on the view that

rights are conferred by the community, and the community must see to it that the rights are not exercised in an anti-social manner. To deny this in regard to international law is to maintain that in the international sphere rights are faculties whose source lies not in the objective law created by the community, but in the will and the power of the State.107

Lauterpacht lauded the doctrine as the way for international tribunals to respond to the lack of “legislative machinery adapting the law to changed conditions” by “the judicial creation of new torts.”108 He was aware of the doctrine's dangerously open-ended scope,109 but due to his reliance on international tribunals to set the proper balance between state sovereignty and “unscrupulous appeals to legal rights endangering the peace of the community,”110 he was unable to convince governments to forward more disputes to judicial settlement.111 By contrast, the restricted Pareto test is much more deferential to states in terms of its interference with sovereign discretion.

3. Specific Obligations

In specific contexts, the minimal requirements of states as trustees of humanity may well extend beyond the restricted Pareto superiority criterion. There are recognized instances where sovereigns are required to invest resources in the effort to protect humanity’s concerns. The obvious cases involve the prevention and repression of crimes against humanity and grave breaches of the laws of war.112 Indeed, it is noteworthy that in the famous Eichmann judgment, the Israeli Supreme Court justified the assertion of universal jurisdiction to prosecute and adjudicate crimes against humanity by reference to the role of individual states as “the ‘guardians of international law’ and its enforcers.”113 The emerging concept of the “Responsibility to Protect” belongs to these specific positive obligations.114

106 Id., at 30.
107 HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 298 (1933).
108 Id., at 287.
109 Id., at 304.
110 Id., at 306.
113 CrimA 336/61 Eichmann v. Attorney General, 16 PD 2033, 2066 [1962] (Isr.). The court relied (on p. 2064) on Greenspan’s book (“Since each sovereign power stands in the position of a guardian of international law, and is equally interested in upholding it, any State has the legal right to try war crimes, even though the crimes have been committed against the nationals of another power and in a conflict to which that State is not a party.”) (MORRIS GREENSPAN’S THE MODERN LAW OF LAND WARFARE 503 (1959)).
114 On this see ANNE ORFORD, INTERNATIONAL AUTHORITY AND THE RESPONSIBILITY TO PROTECT (2011).
Another type of more rigorous other-regarding obligations relates to the treatment of those individuals who seek refuge in foreign countries. States have assumed strict obligations concerning refugees and are also obliged under human rights treaties to protect other foreigners who may be subjected to maltreatment by foreign governments.

Finally, the obligation to ensure access to food, as recognized by the ICESCR, would require states to “refrain at all times from food embargoes or similar measures which endanger conditions for food production and access to food in other countries.”

D. The role of international reviewing institutions

Obviously, the recognition of sovereigns’ other-regarding obligations enhances the role of reviewing institutions such as international and national courts. Such institutions are in a position to balance sovereign versus non-sovereign interests and thereby ensure respect for others’ interests. The more consistent and impartial the operation of such bodies the more they can legitimately impose other-regarding demands on reluctant sovereigns. This is particularly the case with regional and international bodies that can act as the agent of a diverse set of sovereign-prisoners that are unable to act collectively. In particular, the various courts – not just international and regional courts, but also national courts acting in unison – can resolve prisoner dilemmas that sovereigns face by acting in their name vis-à-vis the powerful actor.

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

III. Contemporary International Law and the Other-regarding Obligations of Sovereigns

The minimalist requirements of trustee sovereigns explored above do not necessarily reflect a thoroughly progressive move for international law. They are actually modest relative to the freedom some global regulators and tribunals have taken in imposing other-regarding obligations on sovereigns. International courts and tribunals and global regulatory bodies increasingly signal their willingness to challenge the solipsistic position of states and regard them as public bodies that are expected to promote collective interests. They are also nudging them toward more

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117 Supra note 71.
118 CESCR General Comment, supra note 72.
119 Benvenisti, supra note 49.
120 See supra note 93.
efficient Nash equilibria. To assert such a role, they are developing the necessary tools. The growing reliance on global regulatory systems leads their members – judges and bureaucrats – to seize the opportunities available to them and promote – albeit only intermittently – global interests. National regulators, and increasingly also national courts, are participating in this process of negotiating the interface between the national and the global perspectives. National courts increasingly find themselves involved in regulating global policies in diverse areas such as migration, environmental protection and counterterrorism. The move from ad hoc dispute resolution by tribunals and courts to judicially enforced global governance therefore heralds the potential rise of the concept of the trustee sovereign and increases the promise of its effective implementation.

Scholars of private law will not be surprised to hear that national and international courts and other decision-makers increasingly act as global regulators (even if they themselves are not fully conscious of their newly assumed role). In domestic law, the traditional tools for regulating externalities have been and still are property law and tort law. Both fields of law define private and public entitlements and protect against externalities. In both spheres, societies have assigned to courts an important role in regulating private conduct that affects private entitlements. When these courts undertake this regulatory role they do not only take into account the interests of the immediate litigants, but also address the general interests of society. Through the agency of the court, the private dispute is “publicized,” as the judgments and policies take global welfare into account and not only the immediate interests of the litigants. Socially inefficient outcomes would be litigated over and over again until corrected. By contrast, when parties agree instead to have an arbitrator settle their dispute, the latter is authorized to consider only the parties’ interests. Arbitrators may be tempted, however, to seize the opportunity and take other considerations into account, and as more and more stable international forums are established, their opportunities to act like global regulators are increasing.

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


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

123 Benvenisti, supra note 49.

The outlook adopted by adjudicators when they settle disputes and make law is important for the purposes of our discussion. If adjudicators take into account only the perspectives of the litigants before them, they are reinforcing the bilateral nature of the dispute and ignoring systemic and global concerns. But adjudicators often, although not always and not even in most cases, also take into account systemic concerns, since they consider it their role to promote global interests. This latter role, if played consistently over time by the variety of international tribunals that have mushroomed in recent years, can meaningfully chip away at the concept of the Janus-faced sovereign and encourage a different one.

International tribunals have developed several doctrines and approaches that reflect their willingness and capability to act as global regulators that promote global interests. First, international tribunals are not always shy about asserting their self-perception of their role. Although they stop short of explicitly referring to themselves as global regulators, there have been several expressions of commitment to a systemic vision of the law and to their role as guardians of the international legal system rather than resolvers of specific, bilateral inter-state disputes. Informed by the vision of international law as a legal system, international tribunals have developed several doctrines allowing them to expand international law beyond the intention of governments as expressed in the language of specific treaties. Whereas governments tend to prefer rules on treaty interpretation that look back to the historical intention of the negotiators, thereby maximizing their influence on the outcomes of the interpretation process, international tribunals have developed alternative interpretative approaches, including for example “evolutionary interpretation,” that are inspired by systemic goals such as coherence and efficiency. Recourse to the imprecise doctrine of customary international law allows global regulators to assert globally binding norms and raise the costs of individual states that wish to be excluded from the newly declared custom. Collective concepts cannot be explained without the underlying premise of a global vision that legitimately imposes restrictions on sovereigns. This includes concepts such as jus cogens obligations that may not be derogated from, erga omnes obligations that all states have standing to ensure respect with, and finally the concept of “the international community” and the obligations sovereigns owe “towards the international community as a whole,” including the obligation to take effective action to end violations by

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125 Benvenisti, supra note 120.
126 Benvenisti and Downs, supra note 48.
127 Mainly in separate opinions appended to ICI judgments.
129 Vienna Convention of the Law on Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S 331 [VCLT] (emphasis on “the ordinary meaning to be given to the terms of the treaty in their context”); id. art. 32 (reference to the preparatory work of the treaty and the circumstances of its conclusion).
130 For this type of interpretation, see The see Gabcikovo-Nagymaros Project (Hungary/Slovakia) Judgment, I.C.J. Reports 7 (1997); 37 ILM 167 (1998). On the WTO Appellate Body’s preference for contemporary concerns over the historic intergovernmental agreements, see Richard H. Steinberg, Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints, 98 AM. J. INT’L L. 247 (2004) (suggesting, for example, that, in its Shrimp/Turtle decision, the Appellate Body invoked "contemporary concerns of the community of nations about the protection and conservation of the environment" in its interpretation of the particular treaty by referring to "the secondary rank attributed to this criterion by the Vienna Convention, the lack of reliable records, and the ambiguities resulting from the presence of contradictory statements of the negotiating parties," despite the availability of records of the negotiations).
131 For coherence as a concern in interpretation, see the growing use of Article 31(3)(c) of the VCLT, for example, in the Iron Rhine (Ijzeren Rijn) Railway (Belg. v. Neth.) (award of May 24, 2005), available at http://www.pca-cpa.org/upload/files/BE-NL%20Award%20240505.pdf (last visited Jan. 10, 2012).
other states. These doctrines allow judges wide discretion to make new law while couching it in existing practices or fundamental norms.

Second, international tribunals are incrementally refining their own tools to obtain information and to provide redress for violations and enhancing their authority, essentially by opening their doors to complaints by non-state actors who would have standing to initiate review, as well as by allowing NGOs and other third parties to provide information that is not controlled by state executives, for example through amicus briefs. Markus Benzing has pointed out that in cases involving “community interests” such as the protection of the environment and shared water resources, “international courts have made more extensive use of their fact-finding powers.” The Appellate Body of the WTO 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.”

Third, international tribunals have interpreted relevant treaties to include procedural requirements that national regulators must conform to as they exercise their discretionary power. Although state parties seek to retain their right to be the ultimate arbiter of the delicate balancing between national interests and commitment to collective goals such as free trade or environmental protection, several international tribunals have intervened and subjected this discretion to an external assessment that gives weight, if not precedence, to global welfare considerations. As Alan Sykes observed, in the area of trade law “a serious tension indeed arises, and [...] the goals of open trade and respect for national sovereignty can be irreconcilably at odds to the point that one must give way.” Famously, in its Korea—Beef decision, the Appellate Body of the WTO elaborated on how the test of necessity required restrictions on trade to be justified. While “[i]t is

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133 Legal Consequences of the construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion 2004 I.C.J.136, para. 159 (July 9): “It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment [resulting from the violation – in that case the construction of the wall and thereby the violation of the exercise by the Palestinian people of its right to self-determination] is brought to an end.”

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


136 Benzing, id. At 385-6.

137 European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246/AB/R 7 April 2004), para. 106

138 Croley & Jackson, supra note 6

139 Venzke, supra note 6; Howse, supra note 6.

140 Alan O. Sykes, Domestic Regulation, Sovereignty, and Scientific Evidence Requirements: A Pessimistic View, 3 CHI.J. INT’L L. 353, 368 (2002). See also JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT (1969) 788: “The perpetual puzzle … of international economic institution is … to give measured scope of legitimate national policy goals while preventing the use of these goals to promote particular interests at the expense of the greater common welfare.”
not open to doubt that Members of the WTO have the right to determine for themselves the level of enforcement of their WTO-consistent laws and regulations,\textsuperscript{141} it asserted, the determination of ‘necessary’ . . . involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.\textsuperscript{142}

Reviews of the AB’s decision on this subject found that:

the regulatory value protected by the disputed measure weighs heavily in the AB’s judgment. If the value at stake is high, e.g. human health and safety or protection of the environment, the AB tends to respect the Member’s judgment and to consider necessary very strict enforcement aimed at zero risk, even if that means a very heavy burden on imports.\textsuperscript{143}

The jurisprudence of the International Tribunal for the Law of the Seas (ITLOS) demonstrates a similar inclination to introduce global interests. Markus Benzing noted that in the Southern Bluefin Tuna case\textsuperscript{144} the ITLOS raised environmental concerns of its own motion.\textsuperscript{145}

Fourth, international tribunals have developed a number of substantive norms that redefine the rights of sovereigns to the resources under their control. While global regulators have neither the mandate nor the tools to pursue a global redistribution of assets and resources, they do have


\textsuperscript{142} Id. at para. 164.

\textsuperscript{143} Michael Ming Du, \textit{Autonomy in Setting Appropriate Level of Protection under the WTO Law: Rhetoric or Reality?}, 13 J. INT’L ECON. L., 1077, 1100 (2010). See also Robert Howse & Elisabeth Tuerk, \textit{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 (Gra’inne de Bu’rca & 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 (as we will argue, this is exactly the case with asbestos), a member may be expected to act rapidly, rely on the scientific \textit{acquis} to a large extent, tending towards the more obviously effective and enforceable kinds of regulatory tools, as opposed to the more sophisticated and speculative ones.”) Michael M Du, \textit{Standard of Review under the SPS Agreement after EC- Hormones II}, 59 INT’L & COMP. L. Q. 441, 448 (2010) (“Although the AB explicitly rejected the de novo review as a proper standard to be applied by WTO panels, I concur with several other commentators who note that it is this standard of review which panels are close to applying under the SPS Agreement.”); Gisele Kapterian, \textit{A Critique of the WTO Jurisprudence on ‘Necessity’}, 59 INT’L & COMP. L. Q. 89, 91 (2010) (“the meaning of necessity as interpreted by the adjudicating bodies has, until recently, demonstrated increasing divergence from the language of the treaty text, and needlessly curtailed the domestic regulatory freedom afforded to Members under the treaty. […] the balancing test expands the jurisdiction of the adjudicating bodies, demonstrating a disconcerting dependence on their discretion for the survival of domestic regulatory choices. The jurisprudence reveals a strong tendency to judge the value of the policy goal using the adjudicating bodies’ own value system and opaque reasoning on how the elements of the balancing test interact when applied to the particular circumstances of the case. Substantial cross-fertilization of the necessity tests appearing in different agreements has further promoted the creation of a GATT necessity test at odds with the language of the text.”)

\textsuperscript{144} The Southern Bluefin Tuna cases (New Zealand V. Japan; Australia V. Japan,) (request for provisional measures, 27 August 1999) available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_3_4/Order.27.08.99.E.pdf, at paras. 70 and 80: (“Considering that the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment; […] 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.”).

\textsuperscript{145} Benzing, supra note 135, at 82; See also Thomas A. Mensah, \textit{Provisional Measures in the International Tribunal for the Law of the Sea (ITLOS) 62 ZAORV}, 43, 53 (2002) (“ITLOS considered this aspect of the case on its own initiative, even though it had not been raised by either of the parties.”).
opportunities to participate in shaping and reshaping property rights. When they seize these opportunities they promote global interests. For example, by invoking customary international law, courts have the opportunity to correct global market failures that result from sovereigns’ unilateral action. Inventing customary international law is a tool for changing existing inefficient Nash equilibria into more efficient ones. In the Trail Smelter case, for example, the tribunal found Canada in violation of a duty to prevent activities within its territory from causing injury in or to the territory of another state. Absent clear pronouncements of this principle by other international tribunals, the tribunal was following “by analogy” in the footsteps of three decisions handed down by the U.S. Supreme Court. Although it did not rely explicitly on the efficiency argument, the tribunal did point to the saliency of this factor as part of its reasoning. Despite meager evidence of state practice to support the decision, the norm prescribed was never questioned. It has since become a cornerstone of international environmental law.

Another illustration of a global body that is redefining property rights can be found in the approach adopted by UNESCO’s World Heritage Committee toward the protection of world heritage sites. The Convention Concerning the Protection of World Cultural and Natural Heritage (“World Heritage Convention”) of 1972 was established with the aim of helping states maintain sites located in their respective territories. To this end, the World Heritage Committee keeps the World Heritage List of sites as well as an “In Danger” list, and it can list or de-list sites as it deems appropriate. Strikingly, while initially the idea behind the convention was to provide outside assistance to states in protecting their cultural and natural sites, over time the rationale changed as the Committee started to review the way sites are managed by local institutions. In the Operational Guidelines for the Implementation of the World Heritage Convention, the Committee introduced two innovations to that effect. It set up a system of “Reactive Monitoring” which allows treaty bodies and sources “other than the State Party concerned” to advise the Committee regarding the state of conservation of specific properties “under threat.” Second, the Committee interpreted its mandate to put sites on the “in Danger” list even without the consent of the interested state. Despite the limited set of sanctions available to it, the Committee proved quite effective. Mainly through shaming, it managed to convince Russia to protect Lake Baikal (which cost Russia an additional billion dollars to re-route the East Siberia-Pacific Ocean oil pipeline), and it contributed to resolving a dispute over mining that could have threatened Yellowstone Park.

Fifth and finally, courts in specific disputes promote global welfare when they interpret international law or specific treaties as mandating such an approach. When it makes no economic sense to assign full sovereignty rights to one country, courts would do well to redefine the relevant property as shared. Take, for example, the issue of freedom of navigation on international rivers. The judgment handed down by the Permanent Court of International Justice (PCIJ) in the Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder provided an efficient solution by redefining the rights of sovereigns over an international river. This case involved a dispute over the scope of authority assigned in the Versailles Treaty to an international commission established to administer international navigation on the River Oder. Poland, the upstream state, refused to recognize the commission’s jurisdiction over the tributaries of the river situated wholly within its territory. The PCIJ had to interpret the relevant treaty provision with little guidance from the text or from state practice. The Court opted for the efficient outcome, invoking the desire to allow international access to all navigable parts of the river, and explaining that such an outcome was mandated by “the requirements of justice and

146 Benvenisti, supra note 120.
the considerations of utility.” Most probably, the judges were concerned with the possibility that riparians would hold out and impose exorbitant costs on other riparians or on third parties – costs that would operate like barriers to trade. This decision has since been resorted to, with no hesitation, as proof of the existence of a duty to allow free navigation on international watercourses, and even as a basis for the rather radical assertion that international rivers are shared resources (a concept vehemently opposed by states until very recently).

The restricted Pareto superiority criterion was no doubt also a guiding principle in the 2009 case concerning the dispute over the uses of the San Juan River in an area subject to Nicaragua’s sovereignty. A treaty from 1858 between Nicaragua and Costa Rica granted Costa Rica the right of navigation for the purposes of commerce in that part of the river. The ICJ had to interpret whether the term “commerce” included also the transport of tourists. The court rejected the claim that provisions restricting sovereignty should be interpreted narrowly, and opted for the more comprehensive reading of the term, which reflects contemporary conditions. But what about non-commercial navigation of the indigenous Costa Rican population that resides along the bank of the river? Here the court clearly resorts to the Pareto superior principle:

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

The ICJ also found, following the same logic, that the treaty allowed for “certain Costa Rican official vessels which in specific situations are used solely for the purpose of providing that population with what it needs in order to meet the necessities of daily life” (para. 84). Finally the Court, based on “the failure of Nicaragua to deny the existence of a right arising from the practice which had continued undisturbed and unquestioned over a very long period,” concluded that Costa Rica had a customary right to subsistence fishing by the Costa Ricans living along the bank of the river.

148 Id., at 27.
150 See the Gabčíkovo-Nagymaros Project *supra* note 130, at p 54.
152 Id., at para. 48: “the Court is not convinced by Nicaragua’s argument that Costa Rica’s right of free navigation should be interpreted narrowly because it represents a limitation of the sovereignty over the river. […] While it is certainly true that limitations of the sovereignty of a State over its territory are not to be presumed, this does not mean that treaty provisions establishing such limitations, such as those that are in issue in the present case, should for this reason be interpreted *a priori* in a restrictive way.”
153 Id. at para 71: “Accordingly, the Court finds that the right of free navigation in question applies to the transport of persons as well as the transport of goods, as the activity of transporting persons can be commercial in nature nowadays.”
154 Id. at para 79.
Nicaraguan river. Nicaragua never argued that the Costa Rican uses of the river harmed its interests.

One can trace a similar concern with the principle of “one benefits and the other sustains no loss” in other cases related to the right of use of a foreign sovereign’s territory. In such cases, the tribunals acknowledge the authority of the sovereign to police the exercise of the right of passage and implicitly oblige the sovereign not to weigh irrelevant considerations, just as an administrative court would do. In *Case concerning Right of Passage over Indian Territory (Merits)*, the ICJ examined India’s refusal to allow passage by the Portuguese between enclaves they controlled on Indian territory and satisfied itself that India’s refusal to allow passage was “covered by its power of regulation and control of the right of passage of Portugal,” implicitly accepting that irrelevant considerations would not have justified such a restriction. In the Arbitration regarding The Iron Rhine (“Ijzeren Rijn”) Railway, 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.

The restricted Pareto superiority criterion was probably also an influential consideration in resolving the dispute concerning Lac Lanoux. This was a case where France benefited from its diversion of a river shared with Spain, while Spain sustained no loss because it continued to receive the same quantity and quality of water, albeit from a different river. Spain insisted that under its treaty with France it had the right to approve any changes, however slight, that France would want to make in the flow of a shared river before it entered Spanish territory. The relevant treaty that defined the parties’ respective rights imposed a reservation on the principle of territorial sovereignty (“except for the modifications agreed upon between the two Governments”), upon which Spain based its claim for a right of veto. Spain perhaps hoped that its refusal would lead France to offer it a larger share of water or part of the electricity generated by the hydroelectric project that used the diverted water from Lac Lanoux. In rejecting Spain’s claim, the tribunal did refer 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 territorial jurisdiction of another.” Although its doctrinal foundations are supported more by logic than by precedent, the Lac Lanoux decision is hailed as an important milestone in the development of international freshwater law.

Together, these approaches and interpretations, and the demands they make on sovereigns, demonstrate that international adjudicators can and often do depart from the intentions of state executives, venturing to impose global interests on state parties. This goes significantly beyond the minimal requirements defended in the latter part of this Article. This surreptitious judicial activism has already shaped international law in ways that restrict sovereigns’ exclusive claims and thereby contribute to global welfare.

**Conclusion**

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155 Id. at para 141.
156 On the similarity between such analysis and administrative law adjudication, see Taylor, *supra* note 101.
158 (Belg. v. Neth.) 2005.
My general claim in this Article is that because sovereigns must be regarded as trustees of humanity, any harm to global welfare or failure to contribute to it must be subject to external accountability review that gives space for democratic deliberation of all affected stakeholders. However, a fuller development and implementation of such a vision necessitates sufficiently competent and impartial institutions. We can envision binding regimes under which sovereigns would be expected to accommodate foreigners’ interests by accepting compensation (the general Pareto test), or even regimes that require sovereigns to share certain resources with others or that monitor and assess the sovereign’s discretion and strike down as illegal any policies that are regarded as improperly balancing domestic versus foreign interests. All of these steps require normative grounds for such demands, a reliable institutional infrastructure, and other prerequisites discussed above. Exploring these conditions in theory and practice is beyond the scope of this Article.

In an era of intense interdependency between human communities around the globe, the Janus-faced vision of sovereigns gives rise to three types of challenges: a challenge to the efficient and sustainable management of global resources, a challenge to equality as regards the nonegalitarian consequences of partisan action of sovereigns, and a challenge to democracy due to the diminishing opportunities for many individuals to participate in shaping the policies that affect their lives. This Article has sought to demonstrate the plausibility of the claim that sovereigns should be regarded as trustees of humanity and therefore be subjected to at least some minimal normative and procedural other-regarding obligations. The Article explored the restricted Pareto superiority criterion not only as a requirement that should shape sovereigns’ discretion, but also as an obligation that arguably is already ingrained in several doctrines of international law that define sovereign rights. The concept of sovereignty as trusteeship can explain the evolution of these doctrines, and can also inspire the rise of new specific obligations. Arguably, a general articulation of this principle grounded in the normative expectations from sovereigns as trustees of humanity could add support for invoking it. Take, for example, Uruguay’s decision to build a large paper mill on its bank of the Uruguay River, causing enormous aesthetic damage and significant losses to the Argentinean tourist industry on the other bank of the shared river. While aesthetic harm is not yet a recognized tort in international law, the concept of trusteeship could have been used to recognize an obligation upon Uruguay to at least consider situating the mill further down the course of the river, where it cannot be seen from the Argentinean side. Finally, the trustee sovereignty concept suggests that sovereigns have the obligation to explore and develop the most effective supranational institutions that could respond to the challenges to efficiency, equity and democracy that result from the system of sovereign states.

It is not necessary to rely on third parties to reach a Pareto superior outcome that allocates the benefits between sovereigns equitably. As in the happy ending to the Indonesian virus row, states will often be able to reach a compromise that offers global gains. But the vision of sovereigns as trustees is likely to promote such compromises. If sovereigns agree to view themselves as such trustees, and negotiate from this premise, they may be more inclined to reach compromises that improve global welfare.

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