Sovereigns as Trustees of Humanity

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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 right to democratic participation, human rights, and the sovereign’s power of exclusion – the Article identifies the minimal normative and procedural other-regarding obligations that arise from this concept and suggests that they 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 inspire the advent of new specific obligations.
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On the Accountability of States to Foreign Stakeholders

Eyal Benvenisti*

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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. Unlike the conception of sovereignty that predominated in past decades of the ownership of a large estate separated from other properties by rivers or deserts, today’s reality is more analogous to the ownership of a small apartments one densely packed high-rise in which about two hundred families live. The sense of interdependency is heightened when we recognize that there is no alternative to this shared home, no exit from this global high-rise. The privilege of bygone days of opting out, of retreating into splendid isolation, of adopting mercantilist policies or erecting iron curtains, is no longer realistically available.

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

These new realities play out in an intellectual, political and legal environment still rooted in the vision of sovereignty as the ultimate source of authority. True, in many ways sovereignty is not what it used to be in the nineteenth century. Most notably, the sovereign-king has been “dethroned” ¹ by the people, whose will is now “the basis of the authority of the government.” ² Increasingly, sovereign rule is regarded as conditioned upon its respect for its

² Article 21(3) of the Universal Declaration of Human Rights, GA Res. 217A (III), UN Doc. A/810, at 71 (1948): “the will of the people is the basis of the authority of the government.”
own people, for those “committed to their care”\(^3\) or found within its territorial borders,\(^4\) and international law no longer regards the relationships between the state and its citizens as a purely domestic affair.

Surprisingly, such changes have had relatively little impact on the relationships among sovereigns or the way national and global regulation is formulated and executed. States continue to assert their freedom of action as the default rule. In most areas of law, limitations on state sovereignty must still be grounded on the sovereign’s prior consent. While the major actors are no longer kings and princes, their assertion of authority is as strong as in the past because it is now typically rephrased in terms of self-determination: they are the trustees of their people and have fiduciary duties to them and only to them. Precisely because sovereignty inheres in the people, the primary responsibility of its agents is held to be that of protecting and promoting their citizens’ interests rather than heed others’ concerns. By acknowledging general obligations toward strangers, they might compromise their people’s right to exclusively define and pursue national goals and values, and expose them to exploitation by other peoples free-riding on their good-faith contributions. Sovereigns are therefore unlikely to voluntarily commit to taking strangers’ concerns and global welfare seriously into account. Their answer to the above set of questions is brief: we are bound to take other-regarding interests into account only when and to the extent that we explicitly and formally commit to doing so; nothing more may be assumed.

Despite nominal references to the reality of interconnectedness and shared destinies, contemporary sovereigns still begrudgingly retain their commitment to only their own nationals. They may agree to a few specific commitments toward others, such as the accommodation of refugees\(^5\) or the obligation to allow the export of food to countries in need.\(^6\) But they are typically reluctant to assume other obligations, such as the obligation under trade law to allow the export of raw materials,\(^7\) and they resist any general limitation on their

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\(^6\) See infra notes 96-97 and 138-140 and accompanying text.

\(^7\) See 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
discretion. Although the concepts of "sovereignty as responsibility" and the "responsibility to protect" have been recognized by states, most states resist the expansion of such responsibilities to encompass the obligation to assist in cases of natural disaster, as was demonstrated by the cold responses to the International Law Commission’s recent suggestions in this respect. Indeed, this last faceoff testifies to the extent to which governments continue to shy away from assuming other-regarding obligations.

Given this history it may therefore seem utopian to propose reinterpreting sovereignty and the “inherent” rights of peoples to self-determination as requiring the assumption of certain obligations toward strangers, and that states to take other peoples’ interests seriously into account even absent specific treaty obligations. This Article argues, however, that such a reconceptualization of sovereignty is morally required, and that at least some other-regarding obligations are already reflected – even if not explicitly acknowledged – in state practice or judicial decisions.


9 Fifth report on the protection of persons in the event of disasters (A/CN.4/652) (9 April 2012), available at http://untreaty.un.org/ilc/documentation/english/a_cn4_652.pdf, at p. 6 (“Delegations endorsed the commission’s view ... that the concept of “responsibility to protect” ... applied only to four specific crimes: genocide, war crimes, ethnic cleansing and crimes against humanity.”) and p. 9 (“a number of States opposed the idea that the affected State was placed under a legal obligation to seek external assistance in cases where a disaster exceeded its national response capacity. In their view, the imposition of such a duty constituted infringement of the sovereignty of States as well as of international cooperation and solidarity and had no basis in existing international law, customary law or State practice”). Cf. Institute of International Law (Bruges Session – 2003) Resolution on Humanitarian Assistance III:3. “Whenever the affected State is unable to provide sufficient humanitarian assistance to the victims placed under its jurisdiction or de facto control, it shall seek assistance from competent international organizations and/or from third States.”
The vision of sovereignty as the ultimate source of authority has survived due to the perception of a perfect or almost perfect fit between the sovereign and the affected stakeholders – its citizens. Such a vision made eminent sense when sovereigns ruled their discrete mansions. It was the most effective way to overcome collective-action problems in the production of public goods, such as maintaining local security and ensuring food security or public health. Inter-state matters were effectively handled in the inter-sovereign sphere, negotiated by emissaries, ambassadors, and later by international organizations. It was this perceived discrete, private sovereign sphere where each people is entitled to self-determination that shielded states from the requirement to fully internalize the rights and interests of non-citizens in their policymaking and offered an ostensibly neutral format that excluded “the other.”

But in our contemporary global condominium, the “technology” of global governance that operates through discrete sovereign entities no longer fits. What had previously been the solution to global collective action problems has now become part of the problem of global governance. Sovereigns regulate resources that are linked in many ways and on a daily basis with resources that belong to others. Some states regularly shape the life opportunities of foreigners in faraway countries by their daily decisions on economic development, on conservation, or on health regulation, while the latter are unable to participate meaningfully in shaping these measures either directly or by relying on their own governments to effectively protect them. The opposite also occurs, as citizens may find their own governments subject to capture by affluent foreigners who intervene in domestic decision-making. Moreover, the fragmented global space makes it difficult for disparate sovereign states to overcome their differences and collectively resist powerful third parties, either states or business enterprises. As a result, these sovereigns lose their discretionary space and are driven into submission by “divide and rule” strategies. The postcolonial promise of national self-determination remains for them partly, if not largely, unfulfilled.

The private vision of state sovereignty is also challenged by the intensifying interdependency on shared resources. States rely more and have greater influence on the availability and quality of shared resources such as air, water and fisheries. They use resources that are not fully theirs. States are not founded on isolated islands or disparate clouds, floating past each other but never touching. Rather, “[b]y carving out a territorial jurisdiction for themselves, states withdraw part of the surface of the earth from free access to outsiders.”

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

11 János Kis, The Unity of Mankind and the Plurality of States, in THE PARADOXES OF UNINTENDED CONSEQUENCES 89, 89, 96 (Dahrendorf et al., Eds., 2000).
The problematic juxtaposition of pressing contemporary demands on an increasingly obsolete and inadequate nineteenth century conception of sovereignty has led several moral and political philosophers, as well as legal scholars, to search for more contemporarily relevant normative concepts and institutional reforms, often too quickly heralding the demise of sovereignty. These responses range from the most ambitious suggestions for a systemic reorganization of global institutions and even the creation of a world government,\(^\text{12}\) through cosmopolitan perspectives on the redistribution of global resources under various schemes of global justice,\(^\text{13}\) articulations of general “solidarity” obligations,\(^\text{14}\) the envisioning of a variety of global constitutional paradigms that assign limited authority to states,\(^\text{15}\) invocation of overarching international rule of law obligations,\(^\text{16}\) or the definition of procedural duties that local and global decision-makers owe to affected stakeholders,\(^\text{17}\) the articulation of arguments for the spatial extension of general human rights obligations\(^\text{18}\) or specific obligations to ensure


\(^\text{13}\) Some of the leading books include CHARLES BEITZ, THE IDEA OF HUMAN RIGHTS (2009); DAVID MILLER, NATIONAL RESPONSIBILITY AND GLOBAL JUSTICE (2008); THOMAS POGGE, WORLD POVERTY AND HUMAN RIGHTS: COSMOPOLITAN RESPONSIBILITIES AND REFORMS (2nd ed., 2008); ALLEN BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATION FOR INTERNATIONAL LAW (2004).

\(^\text{14}\) The mutual sense of “solidarity” that presumably unites all individuals and must guide states was developed by GEORGES SCELLE, PRÉCIS DE DROIT DES GENS: DEUXIEME PARTIE, DROIT CONSTITUTIONNEL EN DROIT DES GENS 1 (1934). On solidarity in international law and politics, see SOLIDARITY: A STRUCTURAL PRINCIPLE OF INTERNATIONAL LAW (Rüdiger Wolfrum, Chie Kojima eds., 2010); ANDREW HURRELL, ON GLOBAL ORDER: POWER, VALUES, AND THE CONSTITUTION OF INTERNATIONAL SOCIETY, 65-67 (2007); Rüdiger Wolfrum, Solidarity amongst States: An Emerging Structural Principle of International Law, in VÖLKERRECHT ALS WERTORDNUNG 1087 (Pierre-Marie Dupuy et al. eds., 2006).


\(^\text{16}\) WALDRON, supra note 3; HELMUT AUST, COMPILICITY 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., 2009); David Dyzenhaus, The Rule of (Administrative) Law in International Law, 68 LAW & CONTEMP. PROBS. 127 (2005);

\(^\text{17}\) On Global Administrative Law, see: Kingsbury, Krisch and Stewart, the Emergence of Global Administrative Law, 68 LAW & CONTEMP. PROBS. 15 (2005); on the focus on international public authority, see A. v. Bogdandy, P. Dann & M. Goldmann, Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities, 9 GERMAN LAW JOURNAL (2008) 1375; ARMIN VON BOGDANDY ET AL., THE EXERCISE OF PUBLIC AUTHORITY BY INTERNATIONAL INSTITUTIONS. ADVANCING INTERNATIONAL INSTITUTIONAL LAW (2010),

\(^\text{18}\) MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES 106-17 (2011) (setting “universal” as the baseline which “requires at least a rational justification for a wholesale denial of rights” by states).
economic and social rights beyond national boundaries, to the most minimalistic and specific state obligations, such as the “responsibility to protect” against genocide or similar manmade calamities. Each of these approaches has important merits, but limitations as well: Global federalism or constitutionalism raises questions regarding the appropriate “architectural design” of political institutions and the allocation of competences between the different layers of governance; global justice debates spark disagreements about outcomes and about how to operationalize redistribution; the “solidarity” school requires the assumption of an existing “international community” with shared expectations, which not everybody shares; and the Global Administrative Law school, which consciously seeks to avoid all these normative and structural questions, has yet to articulate a theory as to why sovereigns (and international organizations established by them) owe any procedural obligations toward foreign stakeholders, and how conflicts between citizens and foreigners should be resolved.

This Article follows the latter, administrative law-based tradition, which takes decision-making processes seriously. This tradition puts faith in the power of voice of affected stakeholders and in the discipline of accountability of decision-makers. The belief is that public participation and accountability are not only valuable in and of themselves, but actually contribute to better informed, more efficient and egalitarian outcomes. My argument is therefore that other-regarding sovereigns can indirectly promote global welfare as well as global justice.

This Article seeks to confront the challenges of global governance by adapting the concept of sovereignty to the realities and needs of our shrinking global high-rise and to our conceptions of democracy and justice, outlining the responsibilities that sovereigns have toward foreign stakeholders in addition to their obligations to their own citizens. My suggestion is to recast sovereigns as inherently bound by certain fundamental obligations that are prior to their consent and which they cannot contract out of: sovereigns – as agents of humanity – are obliged to take other-regarding considerations seriously into account in formulating and implementing policies, even absent specific treaty obligations. This reading of sovereignty pursues a middle course between the expansive and minimalistic approaches outlined above, in two senses. At the normative level, this reinterpretation of sovereignty retains sovereignty as an important democratic venue for the exercise of personal and communal self-determination,


while at the same time imposing on those decision-making processes certain obligations toward others. Hence there is no monism, but rather other-regarding dualism. This vision of trusteeship respects the people's right to self-determination due to both the value of self-government and the belief that the people know best what is good for them and how best to obtain public goods such as security, health and education. The emphasis is on decision-making, not on outcomes, out of the conviction that inclusive and informed democratic deliberation is a valuable institution worthy of respect, and the equally strong conviction that well-informed democratic processes are likely to promote welfare and, in this context, also global welfare and even global justice. It is necessary to ensure that deliberation— and no doubt, disagreement— among sovereigns about collective policies, and about what global justice actually means, continues because nobody has a monopoly on truth and because contestation is a healthy antidote to despotism.

The reading of sovereign obligations that this Article offers steers a middle course also in another dimension. By demanding that sovereigns—namely national legislatures, regulators and courts—take strangers’ interests into account in devising and implementing policies, it is not suggesting that sovereigns necessarily have an obligation to sacrifice the interests of their own citizens when balancing them against the interests of foreigners. Sovereigns are entitled to award priority to the interests and values of their citizens. The assertion that a state’s “first duty is to itself” is still good law, and the principle of "charity begins at home" still makes eminent sense. Absent strong reciprocal commitments and other institutional assurances, sovereigns are subject only to certain minimal obligations that do not impose substantial burdens on them and may actually assist them in adopting optimal policies. This Article therefore urges that sovereignty not be disparaged, but rather its crucial role in the evolving global architecture of governance be recognized. The retention of national discretion— albeit somewhat limited—can promote rather than stifle worldwide deliberation and experimentation. Sovereignty must not be condemned but rather celebrated, as long as it accepts some responsibilities toward the rest of humanity. Realistically speaking, this is the most that national actors are willing to tolerate.

The Article begins by outlining three moral arguments, which support the interpretation of contemporary sovereignty as trusteeship that entails other-regarding obligations for sovereigns (Part I). It then elaborates on the general implications of such an interpretation and identifies the minimal normative and procedural obligations arising from it (Part II). Part III examines

21 French Company of Venezuelan Railroads Case, French-Venezuelan Mixed Claims Commission, UN Reports of International Arbitral Awards VOLUME X 285, at 353 (1905): “[The Government’s] first duty was to itself. Its own preservation was paramount.”
possible criticisms and Part IV sketches the possible extension of the obligations beyond the minimal level and the necessary conditions for this to occur. Part V concludes.

I. The Normative Bases for Considering Sovereigns as Global Trustees

This Part proposes three distinct normative bases for grounding the obligation of sovereigns to take other-regarding interests into account. These grounds are informed by the assessment, explored below, that the private concept of sovereignty is less compelling than it was in the past as a result of the glaring misfit between the scope of the sovereign’s authority and the sphere of the affected stakeholders, which results in negative externalities as well as the loss of potential positive externalities imposed on the un- or underrepresented stakeholders (and often also on even represented ones), namely outcomes that are often inefficient, undemocratic and unjust.

The concept of the trustee sovereign represents an attempt to provide a normative basis for responding to these challenges. In the framework of all three theoretical bases, sovereignty is regarded as being embedded within a more encompassing global order, which is a source not only of powers and rights, but also of obligations that essentially require sovereigns to exercise their authority in ways that take the right of all individuals to democracy and to equality into account, and to also bear in mind the goal of promoting global welfare. While sovereigns may have good reason to prioritize in response to the interests of their citizens, they must nonetheless ultimately keep in mind the interests of others and to some non-negligible degree be accountable to them.

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

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23 See, e.g., Hermann Mosler, The International Society as a Legal Community, 140 RECUEIL DES COURS 1, 17, at issue. IV (1974) (1976) (discussing the psychological element required by the concept of the international legal community: a conviction shared by independent societies that they are partners and mutually bound by reciprocal rules). Hurrell, supra note 14 at 65-66, refers to a solitary vision according to which 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. On the concept of the international community and its evolution, see MEHRDAD PAYANDEH, INTERNATIONALES GEMEINSCHAFTSRECHT (2010); ANDREAS L. PAULUS, DIE INTERNATIONALE GEMEINSCHAFT IM VÖLKERRECHT (2001); Martti Koskenniemi, “International Community” from Dante to Vattel, in VATTEL’S INTERNATIONAL LAW FROM A XXI CENTURY PERSPECTIVE 49 (Vincent Chetail & Peter Hagenmacher Eds., 2011).
A. Trusteeship as Enabling Self-Determination

The main justification for sovereignty is self-determination. Externally, sovereignty epitomizes the freedom of the group to pursue its interests, further its political status and "freely dispose of [its] natural wealth and resources." In fact, since its modern genesis, the claim to sovereignty has been inherently tied to the notion of freedom: from the Church, from empires, from colonial powers. As Martti Koskenniemi put it, "[s]overeignty articulates the hope of experiencing the thrill of having one’s life in one’s own hands."

But self-determination means first and foremost the right to individual self-determination, or "self-authorship" in the words of Joseph Raz. Mill noted that all citizens are entitled to have "a voice in the exercise of that ultimate sovereignty [and] to take an actual part in the government." As many have acknowledged, however, domestic democratic processes are vulnerable to systemic failures that prevent individuals from actually experiencing the thrill of having their lives in their own hands. This was true in a world of separate democratic mansions; it is even truer and more acute in today's shared high-rise. In today's world the insulated exercise of self-determination exclusively by national communities can prove oppressive to many, and it can actually undermine people's ability to have their lives in their own hands. Self-determination can all too easily metamorphose into a form that means exclusion for the politically weaker individuals and communities, and domination by the politically or economically stronger powers. Therefore, true respect for the self-determination of the individual, and of many collectivities, and a real effort to ensure that people have their lives in their own hands must be translated into appropriate institutional mechanisms that can

24 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 co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence." See also 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) (emphasizing not only the rights of the sovereign people but also its duties as recognized by international law).

25 However, as new states quickly realized already in the 19th century, sovereignty conferred much less autonomy and equality than they had anticipated: Arnulf Becker Lorca, Sovereignty beyond the West: The End of Classical International Law 13 J. HISTORY OF INT’L L. 7 (2011).


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

28 JOHN STEWART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT (1861) (Gateway edition 1962) at p. 57.

29 See, e.g., RONALD DWORKIN, SOVEREIGN VIRTUE 202 (2000): "an adequate political process must strive, against formidable obstacles... to... insure a degree of political leverage for each citizen.”
correct, or at least minimize, the systemic democratic failures that inhere in the sovereign-based system. This proposition is grounded not only in the inherent moral worth of the individual, but in utilitarian considerations as well. Again quoting Mill: “the rights and interests of every or any person are only secure from being disregarded when the person interested is himself able, and habitually disposed to stand up for them [and] the general prosperity attains a greater height, and is more widely diffused, in proportion to the amount and variety of the personal energies enlisted in promoting it.”

Under current global interdependencies, the allocation of portions of global resources to individual sovereigns even further strains the ability of individuals and collectives to stand up for themselves. There are three main reasons for the impoverishment of the traditional rights that promote personal and group self-determination. First, 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 thrive on asymmetric information involved with national policymaking – are exacerbated by globalization, namely 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. Domestic deliberative processes are either captured by these mobile interests or depleted by the transfer of authority to transnational private companies. 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.

30 Mill, supra note 28 at p. 58.
34 On the influences of foreign lobbies, see David Schneiderman, Investing in Democracy? Political Process and International Investment Law, 60 U. Toronto L. J. 909, 913-940 (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).
A second, more fundamental type of challenge stems from 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 the world of separate mansions, when territorial boundaries defined not only the persons entitled to vote, but also the community affected by those choices. Exclusive state sovereignty was both efficient and democratically just. Today, the policies of one government affect foreign stakeholders on a regular basis, without their having the right of vote for that government or otherwise being able to influence its decisions. Scholars have accordingly acknowledged that the “geography-based constituency definition introduces an arbitrary criterion of inclusion/exclusion right at the start,” and have sought 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 fact that political boundaries make it difficult, indeed impossible, for a discrete group of sovereigns or voters to unite against a common external rival who practices “divide and rule” strategies while seeking, for example, the best terms for its investments. A handful of powerful states have set up such policy venues, be they formal or informal, not only to coordinate the interaction among themselves, but also to compel weaker states – which find it difficult to bundle up their disparate preferences – to submit. As a result, the space for discretion that many sovereigns (and hence voters) are left with is severely restricted. Moreover, the growing dependence on foreign capital inflow and the demands of markets in developed economies has increased the economic and accompanying political leverage that powerful states, global lending institutions and multinational companies and distribution chains 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, or the subsidized loans given by

- 36 There is a literature that attempts to determine the sphere of the affected stakeholders. See, e.g., Nancy Fraser, Scales of Justice: Reimagining Political Space in a Globalizing World 65-66 (2009) (suggesting the "all subjected principle," which includes all those subjected to a structure of governance that sets the ground rules that govern their interaction); Goodin, supra note 12 (arguing for the "all possibly affected principle," "affected" including "anything that might possibly happen as a result of the decision"). On the definition of affected stakeholders adopted by the Aarhus Convention Compliance Committee, see infra, text to note 111.
- 37 In general, developed economies have similar preferences whereas developing countries are more diverse and hence more vulnerable to divide and rule strategies: see Eyal Benvenisti & George W. Downs, The Empire’s New Clothes: Political Economy and the Fragmentation of International Law, 60 STAN. L. REV. 595 (2007).
- 38 Kingsbury, supra note 16.
- 39 Benvenisti & Downs, supra note 37 at p. 609-11.
the IMF and the IBRD to incumbent governments to help them win elections.\textsuperscript{40} 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 country than the local government.\textsuperscript{41} Even the International Olympic Committee, a private 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.\textsuperscript{42} The promise of “sovereignty as freedom” has not materialized for many countries, which experience their traditional or hard-won formal freedom as having erected new types of walls that separate them from each other and from the actual venue of deliberation and decision-making.

These three sources of democratic deficits within states challenge the basic assumption that sovereignty promotes the individual’s and the collective’s ability to shape their life opportunities. They necessitate fresh thinking about possible modalities that could remedy the inherent democratic failures that the current state system suffers from, and provide opportunities for individuals and communities to exert effective influence on policymaking that affects them, even if the decision-maker is a foreign government.

Positive international law does not rule out limits on national discretion. Although the right of peoples to self-determination is an “inherent” right, to be “freely” exercised,\textsuperscript{43} it does not precede obligations toward others. 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, such rights are inherently subject to well-defined limitations under international law. The principles of national self-determination and of national ownership of natural resources never meant supreme and unfettered authority to each people. They only

\textsuperscript{40} Axel Dreher and Roland Vaubel, \textit{Do IMF and IBRD Cause Moral Hazard and Political Business Cycles? Evidence from Panel Data} 15 \textit{OPEN ECONOMIES REVIEW} 1 (2004).


\textsuperscript{43} The tension between this freedom and the obligations toward others is already present in Article 1 of the ICCPR, as the freedom is “without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law” (\textit{supra} note 24).
meant that peoples cannot be subjected to other nations; however, they are not free of constraints that apply to all. The right to self-determination is the right to be free from other nations, but not 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.’”

Hence the concept of trustee sovereignty, which applies to all nations equally, does not violate the right to self-determination. To the contrary: it respects and in fact enhances all individuals’ and peoples’ right to self-determination and the resulting right to maintain their culture and promote primarily the interests of their individual members. Put differently, the principle of (individual and collective) self-determination itself entails limitations on the exclusive rights of territorial sovereigns. The sovereigns should render an account to foreign interests and allow foreign participation in their decision-making processes in ways that effectively remedy the democratic deficits that inhere in the current state system.

B. Trusteeship as Agency

As opposed to the conception of sovereignty as a venue for public deliberation, another venerable way of looking at sovereignty is as an agency relationship. State authorities derive their authority from their citizens. As Madison noted in The Federalist Papers, “[t]he federal and State governments are in fact but different agents and trustees of the people [because] the ultimate authority... resides in the people alone.” Or, as Mill put it, “sovereignty, or supreme controlling power in the last resort, is vested in the entire aggregate of the community.” To what extent is such a Principal-Agent model appropriate to the global high-rise, the different peoples or communities themselves being envisioned as agents of a wider circle of principals?

Cf. Alfred Verdross, Le fondement du droit international, 16 Recueil des cours 1927- I (1928) 249, at p. 314 (“sa souveraineté ne désigne que le fait [que l’État souverain] est subordonné à aucune autre puissance qu’au droit de gens.” (emphasis in the original)). Cf. also Buchanan, supra note 13, 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.”); DAVID P. CALLEO, RETHINKING EUROPE’S FUTURE, 141, (2001): “national sovereignty means above all a legitimate government that has at its disposal the formal power to choose between available alternatives, and not to pursue an alternative dictated by a foreign power.” (Cited with approval by the Czech Constitutional Court, judgment no. 2008/11/26 - Pl. ÚS 19/08: Treaty of Lisbon I, para. 107, available at http://www.concourt.cz/print/4217.


The Federalist Papers No. 46 (Madison).

Mill, supra note 28 at p. 57.
Mill was aware of the need to justify the exclusion of nonmembers from the community’s deliberations. He explained that democracy could thrive only within specific communities:

A PORTION of mankind may be said to constitute a nationality if they are united among themselves by common sympathies which do not exist between them and any others—which make them co-operate with each other more willingly than with other people, desire to be under the same government, and desire that it should be government by themselves, or a portion of themselves, exclusively. [...] Free institutions are next to impossible in a country made up of different nationalities. Among a people without fellow-feeling, especially if they read and speak different languages, the united public opinion necessary to the working of representative government can not exist.48

These considerations remain valid to this day: there is an optimal size for a nation determined by the heterogeneity of the population.49 But is it enough to justify exclusion by “common sympathies,” or even by assertions of a people’s right to self-determination? Mill recognizes that these communities – each “a portion of mankind” – are not alien to each other, and he devotes much attention to explaining why the idea of representative government is inapplicable to England’s overseas dependencies and colonies, which constitutes a “small amount of inequality” and the lesser evil. That Mill devotes three detailed chapters to these questions likely reflects his sense of a moral obligation of communities to render an account to others as to why they are excluded. The burden of convincing the other rests clearly on the excluding community,50 which is precluded from asserting the moral inferiority of the other. As Bruce Ackerman points out, “[t]he liberal state is not a private club” and it therefore must justify its power to exclude non-citizens in “a public dialogue by which each person can gain social recognition of his standing as a free and rational being.”51

Mill’s implicit recognition of the equal moral worth of all human beings as a relevant consideration for nations is now, of course, widely shared. 52 It is deeply ingrained in the

48 Id., Chapter XVI, pp. 303
50 Cf. Michael Walzer, Spheres of Justice 40 (1983) (presenting this question as requiring only internal debate within the excluding community).
52 Contemporary philosophers reach the same outcome by recognizing the primacy of individuals’ human rights over state sovereignty: JÖHN RAWLS, LAW OF PEOPLES, 79 (1999); Beitz, supra note 13 at 128-31; Mathias Risse,
contemporary concept of universal human rights. The Universal Declaration of Human Rights envisions all of human society—“everyone”—as right holders, entitled to “universal respect.” The Declaration does not allocate responsibilities among the different state parties who are the duty bearers, i.e., share collectively the duty to regard these obligations as “a common standard of achievement.” This implies that the entire system of state sovereignty is subject to the duty to respect human rights. In subsequent human rights treaties, the states in turn allocated these shared responsibilities among themselves, assigning to each the prime responsibility over the area under its jurisdiction. This, however, is a secondary allocation—an allocation that itself must be accounted for and justified and, if found wanting, corrected, because all the trustees are collectively required to protect everyone’s human rights. This inclusive vision can be best interpreted as a collective assignment of authority to sovereigns, on behalf of all human beings. To paraphrase Madison, then, “state governments are in fact but different agents and trustees of all human beings because the ultimate, residual, authority resides in humanity.”

This vision is reflected also in the writing of Vattel, who maintained that sovereigns have an obligation to accommodate the absolutely necessary interests of every man, and should therefore consider such interests in good faith. Therefore, “no nation can, without good reasons, refuse even a perpetual residence to a man driven from his country.” A long tradition

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53 UDHR preamble, supra note 2.

54 Id., id.

55 Cf. Institute of International Law (Session of Santiago de Compostela – 1989) Resolution on the Protection of Human Rights and the Principle of Non-intervention in Internal Affairs of States, Article 1 (“Human rights are a direct expression of the dignity of the human person. The obligation of States to ensure their observance derives from the recognition of this dignity as proclaimed in the Charter of the United Nations and in the Universal Declaration of Human Rights. This international obligation, as expressed by the International Court of Justice, is erga omnes; it is incumbent upon every State in relation to the international community as a whole, and every State has a legal interest in the protection of human rights. The obligation further implies a duty of solidarity among all States to ensure as rapidly as possible the effective protection of human rights throughout the world.”); ICTY, Prosecutor v. Tadic (decision on the defense motion for interlocutory appeal on jurisdiction) (1995), para. 97: “the impetuous development and propagation in the international community of human rights doctrines, particularly after the adoption of the Universal Declaration of Human Rights in 1948, has brought about significant changes in international law [...]. A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law hominum causa omne jus constitutum est (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well.”

56 Beitz, supra note 13 at 137 (human rights are defined as interests sufficiently important to be protected by the state, and when states fail the failure is a suitable object of international concern).

57 EMERICH DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW (1758), at §§ 229, 231. (“[N]ature, or rather ... its Author, ... has destined the earth for the habitation of mankind; and the introduction of property cannot have
of scholarship has viewed “the State as a unit at the service of the human beings for whom it is responsible,” or a social function of the global community of peoples, 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.”

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

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

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.”


60  C. KALTERNBORN 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.


62 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)).
C. Trusteeship and the Power to Exclude

Sovereignty is similar to property in the sense that both carve out valuable space for their exclusive use:63 “Whatever amount of resources one country has, it is withdrawn from the inhabitants of other countries.”64 Concerns for the disregarded stakeholders that are left out are therefore raised in property law theory,65 and that discussion offers yet another outlook for grounding an obligation on sovereigns as property owners to take others’ interests into account even when managing their “own” internal resources.66 Property legal scholarship recognizes that private ownership is not only “dominion over things,” but “also imperium over our fellow human beings.”67 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.”68 Therefore, the assignment of property rights and the delineation of their contents must be regarded as a mode of public regulation of human life. This approach is reflected in domestic legal systems. German constitutional law, for example, stipulates that “ownership obliges. Its use shall also serve the public good.”69

This raises questions about the appropriate level of public scrutiny of private ownership and other remedial institutions, and about the scope of the affected public for whom such

63 Sidgwick, supra note 10, at 255: “I do not think that the right of any particular community to the exclusive enjoyment of the utilities derived from any portion of the earth’s surface can be admitted without limit or qualification, any more than the absolute right of a private owner can be admitted.”
64 Kis, supra note 13 at 111.
66 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).
68 Id., at 26. For Locke, the assumption underlying and justifying the owner’s power of exclusion was that “there was still enough, and as good left” for others (JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT, § 33, at Ch. V, (C. B. Macpherson ed., 1980) (1690)).
institutions are set up.\textsuperscript{70} The position that a property regime must be complemented by a public system that supports the ownerless is widely shared among property scholars.\textsuperscript{71} Juxtaposing this debate to the global order, this debate exposes the acute deficiencies of the traditional concept of sovereignty as allocating the power to exclude without proper public system that can regulate the exercise of that power. While a permissive approach to the right to exclude may in principle make sense in domestic settings, adopting a similar deferential approach to sovereigns as property owners in the global sphere would be quite problematic. There are three compelling reasons for more onerous other-regarding obligations on sovereigns as owners. The first concerns the much more dramatic consequences of exclusion at the global level: Our shared high-rise does not have public spaces to accommodate those who wish or are forced to exit the country they reside in and find refuge elsewhere. At the global level, the lack of an equivalent of open spaces, emergency shelters and public property that the government can allocate to the needy has to be redressed with certain limitations on the sovereign’s right to exclude, including an obligation not to deny access to migrants and refugees without taking into account the asylum-seekers’ individual concerns and without at least providing justification for their exclusion.\textsuperscript{72} 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 (e.g., foreigners subject to persecution by their own governments), in the absence of a public authority at the global level which operates as such.

The second reason for imposing stricter 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,\textsuperscript{73} is not always and not even often valid even for democratic sovereigns, due to inherent failures in the democratic processes that were explored above.

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

\textsuperscript{70} Absent prohibited exclusionary grounds such as race, religion, or situations of considerable need Jeremy Waldron, \textit{Property, Justification and Need}, 6 CANAD. J. L. & JUR. 185 (1993) (on the necessity of developing a theory to justify the exclusion that inheres in private property).

\textsuperscript{71} See Dagan, \textit{supra} note 65, \textit{id}.

\textsuperscript{72} See Institut de Droit international, \textit{Règles internationales sur l'admission et l'expulsion des étrangers} (Session Geneva 1892), also its \textit{Principes recommandés par l'Institut, en vue d'un projet de convention en matière d'émigration} (Session Copenhagen 1897); also Scelle, \textit{supra} note 14 at 79.

\textsuperscript{73} Cohen, \textit{supra} note 67, at 26.
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 limitations at the global level. It posits a potentially immobilizing “anti-commons” regime which requires everybody’s consent to achieve socially beneficial outcomes.74

Ownership of parts of global resources can be conceptualized as originating from a collective regulatory decision at the global level, rather than being an entitlement that inheres in sovereigns. This vision has a long pedigree in international law, having been the very basis for the founding of modern international law.75 Grotius invoked it to reject claims for exclusive entitlements to portions of the oceans and to justify open access to the high seas.76 For Emerich de Vattel, sovereignty had a cosmopolitan, underlying purpose. He therefore argued that

nature, which, having destined the whole earth to supply the wants of mankind in general, gives no nation a right to appropriate to itself a country, except for the purpose of making use of it, and not of hindering others from deriving advantage from it.77

In Vattel’s view,

The earth belongs to mankind in general; destined by the Creator to be their common habitation, and to supply them with food, they all possess a natural right to inhabit it, and derive from it whatever is necessary for their subsistence, and suitable to their wants.78

Sovereigns are therefore obliged toward humankind to use the resources under their control efficiently and sustainably.79 While Vattel may have stated it most directly and elaborately,

75 Martti Koskenniemi, Empire and International Law: The Real Spanish Contribution, 61 U. TORONTO L. J., 14-16 (2011) (emphasizing Vitoria’s conceptualization of the prince’s dominium over his commonwealth as deriving from the collective decision to delegate such authority to him).
77 Supra note 57, at § 208.
78 Id. at § 203.
79 “The cultivation of the soil deserves the attention of the government, not only on account of the invaluable advantages that flow from it, but from its being an obligation imposed by nature on mankind. The whole earth is destined to feed its inhabitants; but this it would be incapable of doing if it were uncultivated. Every nation is then obliged by the law of nature to cultivate the land that has fallen to its share,” id. at § 81.
other philosophers have shared the basic premise that, in Kant’s words “all men are originally in common possession of the land of the entire earth.”

It is international law which 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. 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. From this perspective, it is not impossible to conceive of international law as imposing the obligation on sovereigns as power-wielding property owners to take other-regarding interests into account when managing the resources assigned to them, and thereby increase global welfare. Hence, for example, coastal states that manage their Exclusive Economic Zones (EEZ) and police the activity of fishing fleets have the authority to detain foreign vessels to secure compliance with the coastal state’s policies. But when exercising such functions, the coastal state must not discriminate between domestic and foreign ships and crew, and must give all voice before the detaining institutions. Such discrimination is harmful both to the crew and to healthy competition among fishing fleets.

To conclude, 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

80 IMMANUEL KANT, THE METAPHYSICS OF MORALS 6:267 (Mary Gregor ed., 1996); see also IMMANUEL KANT, PERPETUAL PEACE: A PHILOSOPHICAL ESSAY (M. Campbell Smith trans., 1917) (1795), (referring to the “common right to the face of the earth, which belongs to human beings generally”). 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 GROTIUS, DE JURE PRAEDAE 218 (1869)). See GEORG CAVALLAR, THE RIGHTS OF STRANGERS THE GLOBAL COMMUNITY AND POLITICAL JUSTICE SINCE VITORIA (2002).


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.

**D. Translating the Moral Grounds to Legal Obligations**

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. Mill's observations regarding the optimal size of democracy strongly caution against extending suffrage to outsiders or free access to collective resources, as this would undermine the opportunities of communities to pursue their own unique preferences and destroy their incentives to create communal goods such as public educational and healthcare systems.\(^{84}\) Instead, the conclusion from the above discussion must be that sovereigns are collectively obliged to provide remedies that can correct, or at least minimize, the loss to individuals of the ability to participate meaningfully in shaping their life opportunities, and can promote global welfare. Such an exercise requires attention to countervailing considerations, such as the need to ensure reciprocity or burden-sharing among the different sovereigns. In the subsequent Parts, this Article therefore distinguishes between different types of other-regarding obligations according to the different level of burdens they impose on sovereigns, and focuses mainly on the minimal obligations.

**II. The Minimal Obligations of the Trustees**

While the obligation to promote global welfare certainly supports the imposition of burdensome obligations on sovereigns, there is a key precondition to their assertion: the availability of institutions that can provide an assurance of reciprocity, namely that these obligations apply equally to all. For example, a state in the U.S. or a state member of the European Union may not raise the “NIMBY argument” vis-à-vis other member states and refuse, for example, to allow the importation of hazardous wastes from the other state.\(^{85}\) But

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\(^{85}\) 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 principle be prevented.”) To justify the imposition of barriers to the movement of wastes, the state must demonstrate
such a duty is conditioned on the availability of higher political and judicial bodies that can ensure compliance with community-wide obligations. Until such institutional guarantees of equal voice and reciprocity are more fully developed at the global level, only lesser obligations can be legitimately expected.86

This Part elaborates on these minimal obligations. I argue that each of the three different grounds for regarding sovereigns as trustees of humanity supports, in its own way, four more modest obligations toward all affected stakeholders. These minimal obligations apply to all sovereign bodies (legislatures, executives and courts), regardless whether other sovereigns reciprocate, although reciprocity or the lack thereof could be a relevant consideration for sovereigns to take. Accordingly, this Part examines the argument that sovereigns must take the interests of foreign stakeholders into account (section A), must provide voice in their decision-making processes to foreign stakeholders affected by their policies (section B), and must accommodate foreign interests if doing so is costless to them (section C), or in cases of catastrophe (Section D).

A. The obligation to take others’ interests into account

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

The obligation to weigh the interests of foreign stakeholders does not necessarily imply an obligation to succumb to those interests, and does not even require full legal responsibility for ultimately preferring domestic interests in balancing the opposing claims. It does not necessarily imply that sovereign discretion should be subject to review by third parties such as foreign or international courts that would replace the sovereign’s discretion with their own. What it does imply as a minimum, however, is that sovereigns must give due respect whenever the policies they adopt and pursue impact foreign stakeholders or otherwise fail to promote global welfare.

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86 See discussion infra Part V on preconditions for imposing additional obligations.
The general obligation to give “due respect”\(^{87}\) to non-citizens affected by sovereign policies can be found in federal systems, where its aim is to ensure that states and provinces internalize out-of-state interests. The same general obligation exists also in the European Union. In federal systems (and the EU) this obligation is also legally enforceable through the courts. Courts in federal states impose on political sub-units (states, länder, provinces) the obligation – often conceptualized as deriving from principles of “fidelity,” “loyalty” or “solidarity” – to take the interests of out-of-state stakeholders and of the collective into account. The German constitutional court has invoked the unwritten concept of Bundestreue (“federal fidelity”),\(^{88}\) which requires both the Federal government and the member states to “subordinate their decisional freedom to the consideration of the common welfare, [and] where the effects of a legal regulation are not limited to the territory of the [regulating] Land, the Land legislator must consider the interests of the Federation and the remaining Länder.”\(^{89}\) Similar commitments can be found in the law of the European Union. The European Court of Justice has invoked the principle of “solidarity which is the basis . . . of the whole of the Community system.”\(^{90}\) The recent Lisbon Treaty is replete with references to such principles as “sincere cooperation,”\(^{91}\) “loyalty”\(^{92}\) and “solidarity.”\(^{93}\) A more functional approach addresses the implications of member-state policies on interstate commerce. The U.S. Supreme Court has invoked the so-called Dormant Commerce Clause to prevent “an undue burden on interstate commerce,”\(^{94}\)

\(^{87}\) Rawls, supra note 52 at 35 (referring to “just peoples are fully prepared to grant the very same proper respect and recognition to other peoples as equals” and a “reasonable sense of due respect, willingly accorded to other reasonable people”).


\(^{89}\) German Constitutional Court, f BVerfGE 4 (1954), 115, 140-42 (136) (translated by Halberstam, id., at 760).


\(^{92}\) Article 24(3) TEU

\(^{93}\) Id., and peppered in several other places throughout the TEU, as well as a general Solidarity Clause (Article 122 TEU) “[s]hould a Member State be the object of a terrorist attack or the victim of a natural or man-made disaster.”

\(^{94}\) Under this doctrine, federal courts may strike down state policies if “the burden imposed on such commerce is clearly excessive in relation to the putative local benefits,” Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). This so-called Pike test requires the court to review the validity of the state rule by balancing 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.
and the European Court of Justice has derived a similar obligation from the principle of the free movement of goods.95

The obligation to take into account the effects of policies on non-citizens – albeit with no direct legal consequences in case of breach – can also be traced in international law in specific treaty obligations and in legal doctrines related to environmental concerns. According to the 1994 Agreement on Agriculture, states instituting “any new export prohibition or restriction on foodstuffs [...] shall give due consideration to the effects of such prohibition or restriction on importing Members’ food security.”96 This obligation is reinforced by procedural obligations to “give notice in writing, as far in advance as practicable,” to the Committee on Agriculture and to “consult, upon request, with any other Member having a substantial interest as an importer with respect to any matter related to the measure in question.”97

The ILC’s Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (2001)98 lists several other-regarding considerations that sovereigns must take, including 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.

95 See e.g., case C-41/02 Comm’n v. Neth., 2004 E.C.R I-11375 ¶ 47; 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.”). 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) (noting that the court gives greater deference to states in matters of public health and safety, areas considered “closely related to national sovereignty,” as opposed to other areas such as consumer protection, an area of Community competence where there is broad agreement as to the appropriate level of protection).

96 Article 12, which is part of the Agreement Establishing the World Trade Organization of April 15, 1994). (the text of the Agreement is available at http://www.wto.org/english/docs_e/legal_e/legal_e.htm#ag)

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

While this list of considerations refers to potential harm from hazardous activities, the conception of trustee sovereignty suggests that there is no reason not to regard such obligations as relevant to most if not all decisions that affect foreign stakeholders.

The recognition of such accountability obligations could remain imperfect, in the sense that failing to comply with them to the fullest extent would not necessarily entail legal consequences imposed by third parties through effective enforcement mechanisms. The reason for the hesitation is threefold. First there is the functional concern, that an external regime that imposes sanctions on sovereigns for their exercise of discretion might be even less competent than the sovereign in striking the right balance between domestic and foreign interests, and would thus run the risk of making judgmental errors that undermine fairness and global welfare. Second, there is the normative concern about equality and reciprocity, namely that such a regime would unduly burden certain sovereigns, but not others. Third, there is the normative concern about democracy, namely that such a regime would replace and stifle the democratic processes, which are intrinsically important and instrumental for promoting global welfare and justice.

The first to have identified this problematic aspect was Christian Wolff, who was also the first to propose the concept of other-regarding duties of sovereigns in 1749.99 He asked: “Who is judge as to whether one nation can do anything for another without neglect of its duty toward itself”? In his response, he emphasizes the third concern identified above, elaborating on what he terms the “imperfect obligations” that the sovereign owes to its fellow sovereigns:

[S]ince ... every nation is free and by virtue of natural liberty it must be allowed to abide by its own judgement in determining its action, every nation must be allowed to stand by its judgement, as to whether it can do anything for another without neglect of its duty toward itself; consequently if that which is sought is refused, it must be endured, and the right of nations to those things which other nations owe them by nature, is an imperfect right.100

But this brings Wolff to the conclusion that the sovereign “is not bound to give to other nations the reason for this decision, consequently they must simply abide by its will.”101 His position may have been apt for the emerging global order in eighteenth-century Europe, and certainly

99 II CHRISTIAN WOLFF, JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM 84-95 (1749) (Joseph H. Drake trans., 1934).
100 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.”
101 Id. § 188 at para. 99.
reflected the prevailing expectations of and from sovereigns. For the reasons mentioned above, this position retains much of its merit, despite the impressive growth of international institutions and courts that claim to have the technical capacity and the necessary impartiality to subject sovereign discretion to external review.102

Nevertheless, the contemporary circumstances of interdependency, resource scarcity, and democratic deficit at the state level, as well as the wide recognition of the equal moral worth of all human beings, justify the recognition of at least the most basic legal obligation on sovereigns, which is to simply note the interests of others when making policy choices that directly affect them.103 Such a basic test does not require elaborate balancing between national and foreign interests: If you had the opportunity to weigh others’ interests but did not, then the burden is on you to account for the omission. Complete disregard of the others’ interests is a rather simple finding that courts and tribunals have been making to determine state responsibility.104

I will not deny that the recognition of the duty to weigh other-regarding considerations opens up a host of secondary questions that must be treated with great caution: How should the scope of the affected stakeholders be defined? Should those remotely or indirectly affected be included in the calculus? How much weight should be given to other-regardingness? A fully developed set of normative criteria for weighing the other-regarding obligations of a sovereign would have to address the different issues at stake: for example, the different weights assigned to policies aimed at saving lives and those furthering economic development, the different (decreasing?) spheres of responsibility of sovereigns (over citizens, over foreigners just outside the borders, over other foreigners in neighboring countries, etc.), the relative power of specific sovereigns (“common but differentiated responsibilities”), 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). Obviously, each of these questions requires further detailed analysis. However, the accountability obligation disciplines such debates, at least to a certain extent, by requiring the acting state to render an account to the affected for disregarding them.

102 See further discussion infra Part V.
103 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 59, id (“Evolution logique en un temps où la surpopulation et la menace de pénurie exigent la conservation de tous les biens de cette terre.”).
104 The ICJ found, for example, Iran responsible for “fail[ing] altogether” to protect the US’ premises and of “total inaction” (United States Diplomatic and Consular Staff in Tehran (Iran v US), ICJ Rep. 1980 p.3, at p. 31, paras. 63-64. Similarly, it found Albania responsible for not notifying approaching British warships about the existence of a minefield in Albanian waters (The Corfu Channel Case (merits) (UK/Albania) (1949) p. 22).
B. Minimal deliberative obligations

The sovereign as trustee must ensure meaningful opportunities to have the voices of affected stakeholders heard and considered, and must offer them reasons for its policy choices. This obligation, which draws heavily on the self-determination ground for trusteeship explored above, is significantly more than an “imperfect obligation” in Wolff’s terms: it tempers the power of the sovereign by introducing the obligation to reason, potentially facilitating a dialogue on ways to promote common and, indeed, global interests. These minimal procedural obligations do not deprive sovereigns of their entitlement to have their final say.

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

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105 Rawls, supra note 52, at 56: “the ideal of public reason of free and equal peoples is realized, or satisfied, whenever chief executives and legislators, and other government officials, as well as candidates for public office, act from and follow the principles of the Law of Peoples and explain to other peoples their reasons for pursuing or revising a people’s foreign policy and affairs of state that involve other societies.”

106 In the Corfu Channel case, supra note 105, 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, supra note 98 (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.”
of the policies they adopt, sovereigns do not necessarily sacrifice their resources for other peoples' welfare.

The Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998)\(^{107}\) is a contemporary example of the emerging awareness of the need to provide a 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."\(^{108}\) for "the public concerned." This public is defined as "the public affected or likely to be affected by, or having an interest in, the environmental decision-making."\(^{109}\) The Aarhus Convention Compliance Committee\(^{110}\) 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."\(^{111}\) 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 the possible use of “Geographic Information Systems” to determine who the concerned public is.”\(^{112}\) The approach is – appropriately – decidedly functional: the scope of the planned measure determines the affected stakeholders whose voice should be heard.

Just like the previous question concerning the scope of accountability, the question as to what the “minimal” deliberative obligations are raises several secondary questions. They include the extent to which states ought to involve foreign stakeholders in their decision-making processes taking into account the costs that are involved; how to determine the circle of those regarded


\(^{108}\) Id. Art. 1.

\(^{109}\) Id. Art. 2(5).


as stakeholders entitled to a hearing; how much information they should be exposed to during hearings or when rendering an account for the chosen policies, etc. The answers to these and other questions must be sensitive to the different areas of regulation, the types of interests that are affected, and the relative wealth and capacities of the state, among other considerations. The complexity of the issues that arise should encourage serious debate.

C. The obligation to accommodate others’ interests when one sustains no loss: the restricted Pareto test

The sovereign as trustee must yield to the interests of others when such a concession is costless to itself. This obligation draws heavily on the concept of limited ownership of resources. A coastal state, for example, must allow access to a landlocked neighbor if such access entails no harm to itself (for example, a one-time emergency flight over its airspace, or even a tunnel below its territory). This is a “restricted Pareto outcome,” namely an outcome from which “one benefits and the other sustains no loss” without resort to compensation. This is different from the general Pareto outcome, in which at least one of the parties is better off or are compensated for any loss (the coastal state is forced to allow access, but is compensated for any losses it incurred). The restricted version is a more limited imposition on sovereigns than the general version of Pareto because it entails less intrusion on sovereigns’ discretion regarding the use of their resources: it does not require them to accept compensation for use of their resources which they did not approve of. A stronger imposition on sovereigns would limit their ability to pursue their preferences and also require a robust institutional infrastructure with reliable mechanisms that sovereigns could trust to make impartial and competent decisions on allocations among sovereigns and/or their citizens. Hence my choice, when exploring minimal obligations, to opt for 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.

Jewish law, for example, recognizes this concept. It requires individual owners to weigh other-regarding interests, and may even force them to yield to others.\(^{113}\) 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.”\(^{114}\) As Hanoch Dagan has observed, whether a legal system adopts

\(^{113}\) Id., 112-120; AARON KIRSCHENBAUM, EQUITY IN JEWISH LAW 185-197 (1991).
\(^{114}\) Kirschenbaum, supra note 114, at 188-191.
this principle or not depends on its underlying self-commitment to long-term cooperation.\textsuperscript{115} The sense of internal commitment yields an obligation to act according to the principle known as “one benefits and the other sustains no loss.” Any legal system that perceives itself as reflecting the common enterprise of a “human society” that allocates shared resources among its members must endorse \textit{at least} a restricted Pareto criterion as a principle for regulating the interaction between the members of the group. All three grounds of the trustee sovereignty concept support the restricted Pareto criterion as a minimal obligation.

The restricted Pareto criterion was invoked by Grotius in \textit{Mare liberum} to justify his proposed regime of freedom of navigation on the high seas.\textsuperscript{116} He referred to it as “the law of human society”:

\begin{quote}
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?\textsuperscript{117}
\end{quote}

Arguably, a similar conclusion may follow from another venerable doctrine of international law, namely the doctrine of abuse of rights.\textsuperscript{118} Hersch Lauterpacht lauded the doctrine as a way for international tribunals to respond to the lack of “legislative machinery adapting the law to changed conditions” by “the judicial creation of new torts.”\textsuperscript{119} But what amounts to “abuse of rights” is rather vague. By contrast, the restricted Pareto test is clearer and less threatening to states in terms of its interference with sovereign discretion. While the question whether a specific concession is costless or not might at times be subject to debate (and then left to the sovereign’s discretion),\textsuperscript{120} the answer is often obvious, as the cases below demonstrate.

The restricted Pareto criterion no doubt played a role in the 2009 dispute concerning the uses of the San Juan River in an area subject to Nicaragua’s sovereignty.\textsuperscript{121} A treaty from 1858 between Nicaragua and Costa Rica granted Costa Rica the right of navigation for the purposes

\textsuperscript{116} Grotius, \textit{supra} note 76.
\textsuperscript{117} Id., at 30.
\textsuperscript{119} Lauterpacht, \textit{supra} note 119, at 287.
\textsuperscript{120} Unless there are reliable institutions that could review this discretion. On this question, see Part V \textit{infra}.
of commerce in that part of the river. But the treaty was silent with respect to the rights of Costa Rican villagers who lived on the bank of the Nicaraguan river. Nevertheless the Court arrived at

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... 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. [...] the parties must be presumed ... to have intended to preserve for the Costa Ricans living on that bank a minimal right of navigation for the purposes of continuing to live a normal life in the villages along the river.122

The ICJ even found, based on “the failure of Nicaragua to deny the existence of a right arising from the practice which had continued undisturbed and unquestioned over a very long period,” that Costa Rica had a customary right to subsistence fishing by the Costa Ricans living along the bank of the San Juan.123 Notably, Nicaragua never argued that the Costa Rican uses of the river harmed its interests. This outcome was therefore fully justified as complying with the restricted Pareto test.

A similar concern regarding the principle of “one benefits and the other sustains no loss” can be traced in other cases related to the right of use of a foreign sovereign’s land. In such cases, the tribunals have acknowledged 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.124 In Case concerning Right of Passage over Indian Territory (Merits),125 the ICJ examined India’s refusal to allow the Portuguese passage 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,126 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.

122 Id. at para 79. Following the same logic, the court found that the treaty allowed for “certain Costa Rican official vessels which in specific situations are used solely for the purpose of providing that population with what it needs in order to meet the necessities of daily life” (para. 84).
123 Id. at para 141.
124 On the similarity between such analysis and administrative law adjudication, see Taylor, supra note 119.
125 Judgment of 12 April 1960; I.C.J. Reports 1960, p. 6, at 45.
126 (Belg. v. Neth.) 2005.
The restricted Pareto criterion was probably also an influential consideration in resolving the dispute concerning Lac Lanoux. 127 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 French intervention in the flow of the river on French territory before crossing to Spanish territory. Spain perhaps hoped that its refusal would induce France to offer it a larger share of water or part of the electricity generated by the hydroelectric project that would use the diverted water from Lac Lanoux. In rejecting Spain’s claim, the tribunal referred to international practice and to customary international law, yet it did not provide any example of such practice to support its findings. Instead, it emphasized the inefficiency of Spain’s assertion of what the tribunal regarded as “a ‘right of veto’, which at the discretion of one State paralyses the exercise of territorial jurisdiction of another.” 128 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. 129

We cannot expect such global decision-making bodies 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 has yet to offer explicit support for this approach. Nevertheless, I suggest that the best explanation for these judgments is the acknowledgment that sovereignty may not be used to violate the restricted Pareto criterion.

Some readers will be disappointed with such a restricted obligation. They might ask: why not extend the same solution to cases where the burden on the sovereign is minimal, but enormous for the foreign party? There are good reasons to support this approach, although there is also the worry of a slippery slope toward full external review of national discretion, which raises its own set of questions mentioned below. Note that this restricted test is part of a set of obligations. With the scales so distorted, it will be difficult for state authorities to offer a convincing account for their decision. This may prove to be a sufficiently effective deterrent.

D. Minimal responses to catastrophes

In certain aspects, positive international law has moved beyond these minimal obligations. The obvious cases involve the obligation to prevent and suppress crimes against humanity and

128 Id. at 128.
grave breaches of the laws of war.130 The emerging concept of the "responsibility to protect" belongs to these specific positive obligations.131 The ILC effort to define a responsibility to seek and provide assistance in cases of natural disaster132 follows the same logic.

Another type of more rigorous other-regarding obligations relates to the treatment of those individuals who seek refuge in foreign countries. States have assumed some obligations concerning refugees133 and are also obliged under human rights treaties to protect other foreigners who may be subject to maltreatment by foreign governments.134 The extension of such rights to climate or economic refugees is a widely debated issue.135

Finally, the obligation to ensure access to food, as recognized by the International Covenant on Economic, Cultural and Social Rights,136 requires “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.”137 What this duty entails was interpreted by the Committee on Economic, Social and Cultural Rights as "tak[ing] steps to respect the enjoyment of the right to food in other countries ... [and] refrain at all times from food embargoes or similar measures which endanger conditions for food production and access to food in other countries."138 According to some scholars, this obligation entails many more requirements if a serious effort is to be made to secure access to food for all.139

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131 See supra note 8. On the contents of this obligation, see, e.g., RESPONSIBILITY TO PROTECT – FROM PRINCIPLE TO PRACTICE (Julia Hoffman and André Nollkaemper Eds., 2012); ANNE ORFORD, INTERNATIONAL AUTHORITY AND THE RESPONSIBILITY TO PROTECT (2011).
132 See supra note 9 and accompanying text.
133 Convention relating to the Status of Refugees, supra note 5.
134 As interpreted under Article 3 of the European Convention for Protection of Human Rights and Fundamental Freedoms, art. 3, Nov. 4, 1950.
137 Article 11(2)(b).
139 Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, supra note 19.
food security of others is also reflected in trade law.\textsuperscript{140} No doubt, a growing acceptance of the logic of trusteeship should generate more explicit obligations.

\textbf{III. Criticisms and Responses}

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

The criticism from the cosmopolitan side is that the model does not go far enough. Retaining sovereignty impedes the introduction of a truly inclusive and functioning global constitutional system that is able to overcome holdouts and free-riders in its promotion of collective action necessary for general welfare. I do not deny the promise of such global mechanisms, but they do not come without their costs and risks. One difficulty with global constitutionalism is the preference for functionalism over contestation and doubt. A system of sovereign states provides contestation both at the domestic level and in the global sphere. Until global constitutionalists demonstrate that a robust system of checks and balances can be reproduced at the global level and ensure an equal and effective voice for all stakeholders, a precautionary approach that is wary of democratic losses resulting from the hierarchical global apparatus seems preferable.

The criticism from the traditional statist approach raises three major concerns. The first is the worry of unnecessary intervention in global markets: preferences are reflected in the price people pay for certain resources and, based on the Coase theorem, there is good reason to believe that sovereigns will heed foreigners’ interests if the latter pay for them. The second criticism invokes the Hobbesian vision of sovereigns seeking only to increase their relative edge over their competitors: in such a world, any respect for one sovereign’s interests weakens the other. The final criticism is shared by those who recall how claims of humanity, human development and progress were invoked to justify colonialism and other forms of domination.

Sovereigns may well be convinced by market forces to take others’ interests into account, in which case the law will be redundant. There is good reason to believe that many if not most transactions will reflect this Coasean logic. But in other contexts – some of them mentioned

\textsuperscript{140} See Agreement on Agriculture, supra note 96.
above – we may find reluctant sovereigns, those who ignore their diffuse domestic constituencies, or those too weak to offer anything in return. The vision of sovereigns as trustees will not affect market transactions, but may be of assistance in the latter type of cases. 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. Frustrated by the cost of vaccines, 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.\footnote{On this dispute, see Andrew Lakoff, \textit{Two Regimes of Global Health}, 1 \textit{HUMANITY} 59 (2010) (available at \url{http://muse.jhu.edu/journals/hum/summary/v001/1.1.lakoff.html}); Endang R Sedyaningsih et al., \textit{Towards Mutual Trust, Transparency and Equity in Virus Sharing Mechanism: The Avian Influenza Case of Indonesia}, 37 \textit{ANN. ACAD. MED. SING.} 482 (2008).} Dependent on virus samples to produce the vaccine, the World Health Organization and developed countries sharply criticized Indonesia, arguing that the country had 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, and hence it had no obligation to share it 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 of developing countries.\footnote{See the Pandemic Influenza Preparedness: Sharing of Influenza Viruses and Access to Vaccines and other Benefits (http://apps.who.int/gb/ebwha/pdf_files/WHA64/A64_57Draft-en.pdf) adopted by the World Health Organization’ Assembly May 2011 (www.who.int/mediacentre/news/releases/2011/world_health_assembly_20110524/en/).} For Indonesia, invoking the traditional concept of sovereignty was empowering. It is not clear, though, how many other countries would be able to mount a similar opposition and how their citizens would be protected. And, no doubt, a sense of shared commitment to take other-regarding considerations into account would have prodded both sides to the negotiation table earlier, and may have resolved the dispute sooner.

The Hobbesian critique reminds us that in the anarchic system of international politics “relative gain is more important than absolute gain,”\footnote{Kenneth Waltz, \textit{Man, The State and War: A Theoretical Analysis} (New York, Columbia University Press, 1959), p. 198.} and “relative capabilities [...] are the ultimate basis for state security and independence.”\footnote{Joseph M. Grieco, \textit{Cooperation Among Nations: Europe, America, And Non-Tariff Barriers To Trade} (Ithaca, NY, Cornell University Press, 1990), p.39.} Even if one accepts this observation as reflecting some, perhaps even most states’ general attitude toward international cooperation, this does not mean that taking other-regarding interests into account is harmful to one’s goal of maintaining a relative edge. To the contrary: cooperation may be beneficial to all without modifying the relativity balance (the enlarged pie achieved through cooperation could be
allocated in proportion to the states' relative power positions). More importantly, with increased interdependency, as demands for resources grow and supplies dwindle, more and more states may not be able to afford the luxury of ensuring their relative edge through unilateral action. Adhering to the minimal other-regarding obligations would create processes of deliberation that could lower the costs of prompting cooperative behavior.

Finally, the invocation of “humanity” by sovereigns raises worries in the developing world and elsewhere: “The concept of humanity is an especially useful ideological instrument of imperialist expansion,” wrote Carl Schmitt, and we know that the notion of a “sacred trust of civilization” was invoked by the League of Nations only to justify a new form of colonialism. Imposing other-regarding obligations on new or weak states would only add to the already heavy “obligation overload” that weaker states experience, especially when it comes to raw materials that the West has sought since the end of colonialism to recast as belonging to the world at large. But the stark question for the weaker countries is whether clinging to formal nineteenth century-type sovereignty remains in their best interest. As Martti Koskenniemi pointed out, “formal sovereignty can undoubtedly also be imperialist – this is the lesson of the colonial era from 1870 to 1960 which in retrospect seems merely a short interval between structures of informal domination by the West of everyone else.” The main promise of the trusteeship concept lies in its application to powerful countries that shape the opportunities of citizens of poor countries. The concept of “common but differentiated” responsibilities should also be relevant in the case of other-regarding obligations, in terms of both the decision-making process and its outcome.

IV. Beyond Minimal Obligations?

A more ambitious vision of other-regarding obligations would regard sovereigns as obliged to promote (and not only to consider the promotion of) global welfare. Put differently, trusteeship could in theory imply an expansive notion of “harm” that sovereigns must prevent: “harm” would be defined not simply as a decrease from the previous status quo (e.g., pollution of clean

145 This point is implied by Stephen D. Krasner, Global Communications and National Power, Life on the Pareto Frontier 43 WORLD POLITICS 336 (1991).
146 On the role of norms in facilitating cooperation in the management of shared resources, see EYAL BENVENISTI, SHARING TRANSBOUNDARY RESOURCES, 44-46 (2002), GARY D. LIBECAP, CONTRACTING FOR PROPERTY RIGHTS (1989).
148 Kevin Davis and Benedict Kingsbury, Obligation Overload: Adjusting the Obligations of Fragile or Failed States (2010) (draft paper, on file with author).
water), but as any act or omission that fails to increase global welfare (e.g., failure to resort to less wasteful irrigation practices, failure to protect a world heritage site from decay, or even failure to promote the use of “green” sources of energy). Harm would be defined not by the damage caused to a neighboring state or to specific foreign individuals, but by the diminution of the resources available or potentially available to all. While such an inclusive definition of harm (and of responsibility) is perhaps beyond the doctrinal understanding of “harm” under contemporary international law, it is well in line with the definition of harm under domestic law, which takes into account all the social costs of the act that caused the harm, including the cost to the actor itself.\textsuperscript{151}

A rudimentary example of a development in this vein is the evolving practice of UNESCO’s World Heritage Committee, a global body, set up by the World Heritage Convention,\textsuperscript{152} which is redefining states’ trusteeship obligations with respect to world heritage sites located in their territories. While the convention was aimed at providing foreign assistance for the maintenance of cultural and natural sites, over time the rationale changed as the Committee adopted a global perspective and began to critically review how states managed the sites located in their respective territories. Sometimes the Committee would declare or threaten to declare a world heritage site as “in danger” overruling the view of the relevant state party.\textsuperscript{153} “Harm” – in this case, danger – is defined from a global perspective.

Similarly, a more ambitious program for effecting other-regardingness would require sovereigns not only to consider foreign interests, but to actually balance them against domestic ones and be responsible for making policy choices that unnecessarily harm foreign stakeholders. In fact, this possibility already presents itself in trade and investment disputes. As Alan Sykes observed, there is a “serious tension” in the area of trade law between the goals of open trade and respect for national sovereignty, which “can be irreconcilably at odds to the point that one

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\textsuperscript{151} 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, \textit{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). \textit{See also} Richard Posner, \textit{Economic Analysis of Law} 167-171 (7th ed., 2007) (in agreement).

\textsuperscript{152} Convention Concerning the Protection of the World Cultural and Natural Heritage, concluded on Nov. 23, 1972, 1037 U.N.T.S. 151.

\textsuperscript{153} The Committee keeps a “World Heritage List” of sites as well as an “In Danger” list, and it can list or de-list sites as it deems appropriate, based on information received from sources “other than the State Party concerned,” even without the consent of the state in whose territory the site is found. Despite the limited set of sanctions available to it, the Committee has proved quite effective. Mainly through shaming, it managed to convince Russia to protect Lake Baikal (which cost Russia an additional billion dollars to reroute the East Siberia-Pacific Ocean oil pipeline), and it contributed to resolving a dispute over mining that could have threatened Yellowstone Park. See Stefano Battini, \textit{The Procedural Side of Legal Globalization: The Case of the World Heritage Convention}, 9 I•CON 340 (2011).
must give way.” Famously, in its Korea—Beef decision, the Appellate Body of the WTO appeared to balance domestic versus foreign interests, opening a debate among scholars as to whether such intervention in the discretion of national regulators is appropriate under trade law. A similar debate ensued in the context of foreign investment law, especially with respect to Argentina’s claimed “state of necessity.”

154 Alan O. Sykes, Domestic Regulation, Sovereignty, and Scientific Evidence Requirements: A Pessimistic View, 3 CHI. INT’L L. 353, 368 (2002). See also JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 788 (1969): “The perpetual puzzle . . . of international economic institutions is … to give measured scope of legitimate national policy goals while preventing the use of these goals to promote particular interests at the expense of the greater common welfare.”

155 WTO Appellate Body Report, Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef (Korea – Beef WT/DS/161/AB/R, (Dec. 11, 2000), para. 164: “the determination of ‘necessary’ . . . involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.”

156 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.” Michael Ming Du, Autonomy in Setting Appropriate Level of Protection under the WTO Law: Rhetoric or Reality?, 13 J. INT’L ECON. L., 1077, 1100 (2010). See also Robert Howse & Elisabeth Tuerk, The WTO Impact on Internal Regulations—A Case Study of the Canada–EC Asbestos Dispute, in THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES 283, 315 (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 acquis to a large extent, tending towards the more obviously effective and enforceable kinds of regulatory tools, as opposed to the more sophisticated and speculative ones.”) Michael M Du, Standard of Review under the SPS Agreement after EC- Hormones II, 59 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, 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.”) See also Ingo Venzke, Making General Exceptions: The Spell of Precedents in Developing Article XX GATT into Standards for Domestic Regulatory Policy German Law Journal (2011); Robert Howse, Adjudicative Legitimacy and Treaty Interpretation in International Trade Law, in: The EU, The WTO and The NAFTA: Towards a Common Law of International Trade?, 35 (Joseph H. H. Weiler ed., 2000); Steven P. Croley and
Obviously, such interventions into national discretion involve review by international monitoring bodies and courts. Many of these bodies have shown an appetite for developing and imposing other-regarding obligations. They have developed several doctrines of treaty and customary law that reflect their willingness and self-perceived capability to act as global regulators promoting global interests beyond the intention of governments as expressed in the language of specific treaties, and despite the intentional bilateral structure of some of them (in particular, investment arbitrations). Expressing their commitment to a systemic vision of the law, they are often not shy about their self-perceived role as guardians of the international legal system rather than resolvers of specific, bilateral interstate disputes. In


For criticism of a judicially enforced balancing test suggested by the ILC’s Article 25 of the draft Articles on State Responsibility, which invites balancing between the interests of the state and the “serious impair[ment of] an essential interest” of the other state, see Robert D. Sloane, On the Use and Abuse of Necessity in the Law of State Responsibility (forthcoming AJIL#); Special Issue: Necessity Across International Law, in 41 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 3-218 (2010); Michael Waibel, Sovereign Defaults before International Courts and Tribunals (2011) (concluding (p. 316) that ICSID tribunals are “unable to effectively deal with sovereign debt crises”); Roman Boed, State of Necessity as a Justification for Internationally Wrongful Conduct, 3 YALE J. HUM. RTS. & DEV. L.J. 1 (2000).

Benvenisti and Downs, supra note 37. 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) (“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).

Hersch Lauterpacht, The Development of International Law by the International Court (1958).

Despite the discrete nature of their activity, these ad hoc panels, whose task is to interpret and apply bilateral obligations under bilateral treaties, strive to converge on common principles and collectively develop a systemic vision of “investment law.” As recently stated in one arbitral award (among many), every panel must adopt a global vision: “A case-specific mandate is not license to ignore systemic implications. To the contrary, it arguably makes it all the more important that each tribunal renders its case-specific decision with sensitivity to the position of future tribunals and an awareness of other systemic implications.” (Glamis Gold Ltd. V. United States of America), 2009 N.A.F.T.A. Arb.Trib p. 2 para. 6 (June 8).

See Armin von Bogdandy and Ingo Venzke, On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority 1, 18-23 (2012) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2084079#. For a recent articulation of the role of international law as the “law for humankind” by an ICJ judge see ICJ, Request for interpretation of the Judgment of 15 June 1962 in the case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand), Separate Opinion of Judge Cançado Trindade, paras. 114-115 (“Beyond the States, the ultimate titulaires of the right to the safeguard and preservation of their cultural and spiritual heritage are the collectivities of human beings concerned, or else humankind as a whole. [...] we are here in the domain of superior human values, the protection of which is not unknown to the law of nations, although not sufficiently worked upon in international case-law and doctrine to date. It is beyond doubt that the States, as promoters of the common good, are under
some cases, courts have raised community concerns, such as environmental protection, of their own initiative.\textsuperscript{162} Some tribunals have been incrementally enhancing their own capacity to look beyond the disputing parties to wider circles of stakeholders, by opening their doors to non-state actors to provide information that is not controlled by state executives.\textsuperscript{163} Moreover, international tribunals take into account global welfare and global justice concerns. When it has made no economic sense to assign full sovereignty rights to one country over what are essentially shared resources (e.g., international rivers, fisheries), courts have redefined the relevant property as shared despite scant language to that effect.\textsuperscript{164} 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.”\textsuperscript{165} A few national courts have also shown willingness to promote global interests especially in the context of developing universal jurisdiction in criminal and tort law for crimes against humanity and war crimes.\textsuperscript{166}

\begin{footnotesize}
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\item[\textsuperscript{162}] The Southern Bluefin Tuna case (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.”). Markus Benzing, \textit{Community Interests in the Procedure of International Courts and Tribunals}, 5 LAW & PRAC. INT’LCTS & TRIBUNALS 369, 382 (2006); See also Thomas A. Mensah, \textit{Provisional Measures in the International Tribunal for the Law of the Sea (ITLOS) 62 ZAORV, 43, 53 (2002) (both pointing out that ITLOS considered this aspect of the case on its own initiative, even though it had not been raised by the parties).}

\item[\textsuperscript{163}] See Benzing, supra note 162, at 385-6, 395-404.


\item[\textsuperscript{165}] European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246/AB/R 7 April 2004), para. 106

\item[\textsuperscript{166}] 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.” CrimA 336/61 Eichmann v. Attorney General, 16 PD 2033, 2066 [1962] (Isr.). The court relied (on p. 2064) on Morris Greenspan’s book (\textit{MORRIS GREENSPAN, THE MODERN LAW OF LAND WARFARE} 503 (1959)) stating that “[s]ince 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.”.}
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However, the intervention of such external bodies raises serious concerns about the impartiality of global decision-makers and judges, their competence to make better judgment calls than the reviewed sovereigns, and the potential stifling effects on domestic democratic processes. Without attempting to respond to these concerns in the limited space available here, I would point out that international and national courts could be useful to ensuring other-regardingness, not necessarily by preempting domestic deliberations but by actually ensuring them through attention to domestic decision-making processes. Courts can promote meaningful democratic deliberation by insisting on allowing foreigners access to domestic decision-making venues. In fact, international tribunals have interpreted relevant treaties to include procedural requirements that national regulators must conform to as they exercise their discretionary power. Moreover, regional and international institutions can help states overcome their collective action problems by setting regional or global standards. For similar reasons, national courts that resist imposition by global institutions by invoking domestic or international law constraints – especially if acting collectively – may actually promote democratic deliberation and thereby indirectly promote global welfare as well.

In light of such judicial activism, the conclusion may be reached that the minimal requirements of trustee sovereigns explored above do not necessarily reflect a thoroughly progressive move for international law. These requirements are actually modest relative to the freedom some global regulators and tribunals have taken in imposing other-regarding obligations on sovereigns. However, the more ambitious inroads into sovereign discretion must be weighed carefully. They entail careful attention to the different areas of regulation and their relative importance to sovereigns and to the foreign stakeholders, and to the reliability of international reviewing bodies.

V. Conclusion

In an era of intense interdependency between human communities around the globe, the private vision of sovereigns gives rise to three types of challenges: a challenge to the efficient

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167 See the Juno Trader case, supra note 83.
and sustainable management of global resources, a challenge to equality as regards the inegalitarian consequences of sovereigns' partisan action, 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 subjected to at least some minimal normative and procedural other-regarding obligations. Some or all of these obligations are arguably already ingrained in several doctrines of international law that define and limit sovereign rights. The concept of sovereignty as trusteeship can explain the evolution of these doctrines and inspire the rise of new specific obligations. Finally, the trustee sovereignty concept suggests that sovereigns have an obligation to mutually explore and develop the most effective domestic and supranational institutions in response to the challenges to efficiency, equity and democracy that result from the system of sovereign states.