


5-1-2017

## Unilateral Jurisdiction to Provide Global Public Goods: A Republican Account

Aravind Ganesh

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### Recommended Citation

Aravind Ganesh, *Unilateral Jurisdiction to Provide Global Public Goods: A Republican Account*, 42 Brook. J. Int'l L. 571 (2018).  
Available at: <https://brooklynworks.brooklaw.edu/bjil/vol42/iss2/1>

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# UNILATERAL JURISDICTION TO PROVIDE GLOBAL PUBLIC GOODS: A REPUBLICAN ACCOUNT

*Aravind Ganesh\**

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## INTRODUCTION

Climate change, international terrorism, the spread of communicable diseases, and other similar problems affect the lives of everybody all over the world. Ideally, states and other political institutions of jurisdiction<sup>1</sup> would cooperate to solve them, and quickly. Despite their urgency, however, multilateral efforts in a number of these areas have progressed too slowly, if at all. Even where progress is made, all it takes to undo it is for one or two important players to pull out.<sup>2</sup> In this context, some states have unilaterally taken measures to regulate activities outside their territory. Well-known examples include the ban enacted by the United States against imports of shrimp caught in

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1. The category of “political institutions of jurisdiction” contains just one example, the European Union. The European Union is not a sovereign state but exercises direct jurisdiction over individuals nonetheless. The difficult issues of democratic legitimacy that this raises cannot be examined here. For the purposes of this article, it shall be treated in the manner of a defective federal state.

2. As this article was being prepared, President Trump announced the withdrawal of the United States from the Paris Climate Accord, an agreement on the reduction of greenhouse gas emissions that had been hailed as the best opportunity for averting catastrophic climate change and which had been signed by 195 countries. Michael D. Shear, *Trump Will Withdraw U.S. From Paris Climate Agreement*, N.Y. TIMES (June 1, 2017), at A1.

the high seas using nets that tended to snare endangered turtles,<sup>3</sup> and the European Union's Emissions Trading Directive, which required all aircraft landing or taking off from EU to offset their carbon emissions, regardless of nationality or place of emission.<sup>4</sup> Such measures are by no means the preserve of large economic and military powers. In 2014, the island republic of Singapore unilaterally legislated to create civil and criminal liability for any corporation engaged in massive burning of forests in neighboring Indonesia of the type that tended to cause widespread air pollution in Singapore.<sup>5</sup> Along with Australia, Cape Verde, Angola, and South Africa, Singapore has also enacted data protection laws applying to organizations even if not physically located in the country.<sup>6</sup>

The international legality of these measures is a matter of heated controversy.<sup>7</sup> As shown in Part I, however, a number of

3. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-162, §609 (103 Stat.) 988, 1037-38 (codified at Endangered Species Act of 1973 (ESA), 16 U.S.C. §1537 (1994)).

4. Council Directive 2008/101, 2008 O.J. (L 8) 3 (EC) (amending Council Directive 2003/87, 2009 O.J. (L 8) 3 (EC)) [hereinafter *EU Emissions Trading Directive*].

5. Transboundary Haze Pollution Act, No. 24 (2014), §§ 4-8 (Sing.). For useful readings, see Mahdev Mohan, *A Domestic Solution for Transboundary Harm: Singapore's Haze Pollution Law*, 2 BUS. & HUM. RTS J. 325 (2017).

6. Personal Data Protection Act, No. 26 (2012), (Sing.). See Sheena Jacob & Jinesh Lalwani, *Personal Data Protection law is enacted in Singapore*, BIRD & BIRD (Oct. 18, 2012), <http://www.twobirds.com/en/news/articles/2010/personal-data-protection-law-is-enacted-in-singapore-1012>; Dan B. Svantesson, *The Extraterritoriality of EU Data Privacy Law—Its Theoretical Justification and Its Practical Effect on U.S. Businesses*, 50 STAN. J. INT'L L. 53, 88-89 (2014).

7. Both the U.S. and EU measures mentioned in notes 3 and 4 were ultimately scuppered. The United States' prohibition on the importation of shrimp was held to be incompatible with the United States' obligations under the General Agreement on Trade and Tariffs (GATT) in Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (adopted Oct. 12, 1998). The legality of the EU Emissions Trading Directive was challenged before the Court of Justice of the European Union (CJEU), but upheld in Case C-366/10, *Air Transport Association of America v. Secretary of State for Energy and Climate Change*, 2011 E.C.R. I-2735. Following the decision, twenty-three countries threatened retaliation including international litigation and review or cancellation of air transport service agreements. The European Union subsequently shelved emissions offsetting requirements on international flights, and now only imposes them on

prominent scholars defend them using the concept and terminology of “public goods” borrowed from the economic sciences.<sup>8</sup> On this view, environmental protection, the prevention of terrorism, competitive markets, and many other things are designated as “global public goods,” on the basis that they enhance utility for all,<sup>9</sup> but tend to be “undersupplied” due to certain structural features of nonrivalrousness and nonexcludability, which in turn leaves particular individuals and states with no incentive to supply them but instead to “free ride” on the efforts of others.<sup>10</sup>

Such accounts begin from what this article calls the “liberal” premise that the fundamental concern of law is with the well-being of individual human beings. They generally argue that unilateral measures asserting extraterritorial jurisdiction are justified on grounds that they provide certain kinds of utility—

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flights within the European Economic Area. See European Commission, *Reducing emissions from aviation*, [http://ec.europa.eu/clima/policies/transport/aviation/index\\_en.htm](http://ec.europa.eu/clima/policies/transport/aviation/index_en.htm) (last visited July 29, 2016).

8. See Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. STAT. 387, 387–89 (1954); MANCUR OLSON, *LOGIC OF COLLECTIVE ACTION PUBLIC GOODS AND THE THEORY OF GROUPS* (1965).

9. See, e.g., Inge Kaul, Isabelle Grunberg & Marc A. Stern, *Defining Global Public Goods*, in *GLOBAL PUBLIC GOODS: INTERNATIONAL COOPERATION IN THE 21ST CENTURY* 2, 2–9 (Inge Kaul, Isabelle Grunberg, & Marc A. Stern eds., 1999); Daniel Bodansky, *What's in a Concept? Global Public Goods, International Law, and Legitimacy*, 23 EUR. J. INT'L L. 651, 652–53 (2012); Fabrizio Cafaggi, *Transnational Private Regulation and the Production of Global Public Goods and Private “Bads,”* 23 EUR. J. INT'L L. 695, 695–96 (2012); Petros C. Mavroidis, *Free Lunches? WTO as Public Good, and the WTO's View of Public Goods*, 23 EUR. J. INT'L L. 731, 731 (2012) (mentioning that he “assumes the commonplace definition” suggests that there may be others); Elisa Morgera, *Bilateralism at the Service of Community Interests? Non-Judicial Enforcement of Global Public Goods in the Context of Global Environmental Law*, 23 EUR. J. INT'L L. 743, 748 (2012); Nico Krisch, *The Decay of Consent: International Law in an Age of Global Public Goods*, 108 AM. J. INT'L L. 1, 3 (2014) (defining public goods as “goods that are *non-excludable* and *non-rivalrous* in their consumption. . .”).

10. See Inge Kaul, *Global Public Goods: Explaining their Underprovision*, 15 J. INT'L ECON. L. 729, 730–36 (2012); Gregory Shaffer, *International Law and Global Public Goods in a Legal Pluralist World*, 23 EUR. J. INT'L L. 669, 674 (2012) (arguing that the “major challenge for the production of many (but not all) global public goods . . . is collective action and free-riding.”); Krisch, *supra* note 9, at 3 (arguing that “[m]ore than anything, using the label *public goods* . . . points to the difficulties of maintaining adequate availability or production.”).

“interests” or “values”—that would otherwise go undersupplied.<sup>11</sup> In contrast, this article offers a “republican” account, which proceeds from the premise that law’s fundamental concern is *freedom*, or the simple idea that no person is subject to the will of another.<sup>12</sup> In particular, the republicanism of this article is that of Immanuel Kant, especially as interpreted by Arthur Ripstein.<sup>13</sup> In this vein, it proposes an understanding of public goods in juridical terms as things that must be provided publicly in order to ensure the equal freedom of all members of the political community.<sup>14</sup> From this, it ultimately follows that states have the right to do anything necessary to provide their

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11. See André Nollkaemper, *International Adjudication of Global Public Goods: The Intersection of Substance and Procedure*, 23 EUR. J. INT’L L. 769, 775–77 (2012) (arguing that the legal scholarship on public goods divides broadly into one group that defines that concept in terms of common or shared values, whereas the other emphasizes their underenforcement); Kaul, *supra* note 10, at 732–33 (distinguishing between “[p]ublicness in utility and publicness in consumption” and arguing that “[i]n which way and to what extent a public good, notably a [global public good], affects the welfare and well-being of different population groups depends not only on the overall provision level of the good but also on how it is shaped”); Morgera, *supra* note 9, at 746 (arguing that “[c]ommon but differentiated responsibility encapsulates the need for concerted action by all states to contribute to the ‘general global welfare’ based on mutual responsibility and solidarity as the basis for a sense of community and global partnership.”).

12. For useful studies on the difference between liberal and republican conceptions of freedom, see QUENTIN SKINNER, *LIBERTY BEFORE LIBERALISM* (1998) (detailing the proliferation of “neo-roman” political theorists during the English Civil War and Revolution and their disappearance following the establishment of the protectorate and restoration); PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 17–50 (1997) (arguing that the prevalent mode of thinking about freedom in the Anglophone world was in republican terms of non-domination, until the nineteenth century, when the Hobbesian idea of freedom as non-interference was resurrected and popularized under the influence of Jeremy Bentham).

13. IMMANUEL KANT, *THE CAMBRIDGE EDITION OF THE WORKS OF IMMANUEL KANT: PRACTICAL PHILOSOPHY* (Mary J. Gregor ed., 1999); ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT’S LEGAL AND POLITICAL PHILOSOPHY* (2009) [hereinafter RIPSTEIN, *Force and Freedom*] Citations to the *Doctrine of Right* and the *Perpetual Peace* are described with “DR” and “PP” respectively. As is custom, references are made to the pagination of Kant’s collected works as compiled by the Berlin-Brandenburg *Akademie der Wissenschaften*, as well as to Mary Gregor’s translation.

14. See *infra* Part III, and RIPSTEIN, *Force and Freedom*, *supra* note 13, at ch. 8.

subjects public goods, including asserting and enforcing jurisdiction extraterritorially over non-subjects. Moreover, they need not first establish that they have suffered, or will suffer harm.

Part I of this article recounts a prominent liberal theory of unilateral jurisdiction to provide global public goods—Eyal Benvenisti's pathbreaking concept of sovereigns as trustees of humanity.<sup>15</sup> After identifying certain fundamental problems with this concept, Part II then introduces the republican concept of human dignity as freedom from being subject to the will of another. Such a conception of dignity gives rise to three basic kinds of legal relations: tortious, contractual, and fiduciary. Torts divide into two: wrongful damage—always violations of *property* rights, and wrongful use—always violations of *personality* rights. Violations of property rights require proof of damage, and are remedied by compensation. For violations of personality rights, however, damage is irrelevant, and the remedy is restitution.

Part III turns to public law and argues that none of these relations can be achieved as a matter of right in a condition of pure private interaction—the “state of nature.” Instead, they require a combination of political institutions known as the “state,” which wields public authority over its subjects. It is then argued that the state is itself a person, and secondly, that it stands in the relation of a fiduciary toward its subjects. As the public fiduciary, the state has obligations to provide public goods for all its subjects. From this obligation to provide public goods, it derives rights to enact measures to provide them, as well as rights against all other persons who undermine this ability. Part IV arrives at international law, and argues that as persons, the dignity of states also lies in not being subject to the will of another. This then requires the establishment of political institutions at the international level. This second, international “rightful condition,” however, differs from the first, domestic rightful condition. One reason for this is that states have no property, only

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15. Eyal Benvenisti, *Sovereigns as Trustees of Humanity: on the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT'L L. 295 (2013) [hereinafter Benvenisti, *Sovereign Trusteeship*]. Benvenisti developed the basic themes of the article into a regulatory framework for global governance bodies in his General Course at the Academy of International Law, The Hague, published as EYAL BENVENISTI, *THE LAW OF GLOBAL GOVERNANCE* (2014) [hereinafter BENVENISTI, *Global Governance*].

personality. Accordingly, all international wrongs are in fact violations of personality rights, where damage is irrelevant, and the proper remedy is restitution.

Finally, Part V discusses the problem of “global public goods.” The state’s purpose of providing public goods must not remain unfulfilled due to lack of cooperation by other persons, state and nonstate, but can be legislated for and executed unilaterally. Interferences with the state’s ability to provide public goods constitute violations of the state’s personality rights, and are wrongful regardless of damage. The same principles governing the provision of public goods domestically also apply at the international level, as a result of which it must submit itself to an international judicial instance in order to answer legal challenges. Lastly, where a state exercises authority over individual distant strangers in the course of providing global public goods, it acquires human rights obligations towards them as a constructive public fiduciary.

#### I. LIBERAL THEORIES: SOVEREIGN TRUSTEESHIP OF HUMANITY

A comprehensive treatment of the different liberal theories is impossible within a single paper, so instead this article focuses on one particularly rich and compelling variant thereof: Eyal Benvenisti’s concept of “sovereign trusteeship of humanity,” which constructs sovereign states as bearing fiduciary obligations not just toward their own citizens, but to all of humanity in general. Benvenisti begins by noting the challenge posed by globalization to traditional notions of international law, which generally envision sovereign states as the highest sources of authority, and describe the binding force of international law as deriving from their consent or convenience.<sup>16</sup> The standard reason given for according states this paramount status is the possession of popular legitimacy, ideally expressed through representative institutions.<sup>17</sup> Benvenisti demolishes this assumption

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16. Benvenisti, *Sovereign Trusteeship*, *supra* note 15, at 296 (describing the “new realities” of globalization as “play[ing] out in an intellectual, political and legal environment still rooted in the vision of sovereignty as the ultimate source of authority.”)

17. See THOMAS HOBBS, *LEVIATHAN* 90 (Richard Tuck ed., 1996) (1651):

In all times, kings, and persons of sovereign authority, because of their independency, are in continual jealousies, and in the state and posture of gladiators; having their weapons



with an arresting metaphor: the global condominium. As he observes, “[i]n past decades, the predominant conception of sovereignty was akin to owning a large estate separated from other properties by rivers or deserts. By contrast, today’s reality is more analogous to owning a small apartment in one densely packed high-rise that is home to two hundred separate families.”<sup>18</sup> Crucially, Benvenisti argues that globalization has brought about ever less congruence between the persons setting policies and those affected by them.<sup>19</sup> As such, the traditionalist premise that states speak for their peoples is argued to be increasingly untenable.<sup>20</sup>

Benvenisti is deeply skeptical that these losses in accountability can be recovered by removing policy-making functions to the international level—he criticizes “globalist” theories eschewing Westphalian statism altogether, global constitutionalist theories advocating drastic changes to international institutional structures, and the literature on global administrative law for

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pointing, and their eyes fixed on one another; that is, their forts, garrisons, and guns upon the frontiers of their kingdoms; and continual spies upon their neighbours; which is a posture of war. But because they uphold thereby, the industry of their subjects; there does not follow from it, that misery, which accompanies the liberty of men.

See also JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005) (using rational choice theory to argue that international law primarily reflects the interests of powerful states); JENS DAVID OHLIN, *THE ASSAULT ON INTERNATIONAL LAW* (2015) (criticizing Goldsmith and Posner but also explicating international law from enlightened self-interest along the lines of David Gauthier).

18. Benvenisti, *Sovereign Trusteeship*, *supra* note 15, at 295; BENVENISTI, *Global Governance*, *supra* note 15, at 122–23.

19. Benvenisti, *Sovereign Trusteeship*, *supra* note 15, at 295, 297–98, 303; BENVENISTI, *Global Governance*, *supra* note 15, at 122.

20. Benvenisti, *Sovereign Trusteeship*, *supra* note 15, at 297–98:

The solipsist vision of sovereignty as the ultimate source of authority has survived due to the perception of a perfect or almost perfect fit between the sovereign and the affected stakeholders—its citizens. . . . But in our contemporary global condominium, the “technology” of global governance that operates through discrete sovereign entities no longer exists.

lacking normative substance.<sup>21</sup> Moreover, in other work, Benvenisti adduces numerous domestic and international examples in evidence to demonstrate that flights to international “governance” invariably allow powerful states to shut out weaker ones from international policymaking as well as strengthen unaccountable private lobbies and executive branches at the expense of domestic legislatures.<sup>22</sup> In short, Benvenisti is not “quick to endorse the demise of sovereignty” but claims instead “that through *other-regardingness*, sovereigns can indirectly promise global welfare as well as global justice.”<sup>23</sup> The state is not dead but in need of reform. Accordingly, Benvenisti sets out a program premised upon four moral intuitions—he calls them “normative bases”<sup>24</sup>—calling for altruistic duties to outsiders. From these he derives four *legal* obligations.

Benvenisti’s first intuition is that states are necessary because they remain the only viable means for achieving personal and communal self-determination.<sup>25</sup> In his view, a world without borders would deny the world’s distinct communities the ability to live out their values, while governments become unworkable if they ranged over populations not held together by what John Stuart Mill calls “common sympathies”—that is, language, religion, ethnicity, or other communal bonds.<sup>26</sup> Second, all human beings possess “equal moral worth” entitling them to human rights, which Benvenisti conceives as entitlements to well-being, again in reliance upon Mill.<sup>27</sup> On this rationale, the world’s governments are instituted to ensure the general welfare of human beings, and each therefore bears the burden of *legally* justifying its exclusion of nonmembers.<sup>28</sup> This then implies an interna-

21. *Id.* at 298–300.

22. BENVENISTI, *Global Governance*, *supra* note 15, at 73–102. *See also* Eyal Benvenisti & George W. Downs, *The Empire’s New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595 (2007) (arguing that fragmentation of international law conduces to the advantage of powerful states, and that such states deliberately encourage it by setting up multiple international organizations).

23. Benvenisti, *Sovereign Trusteeship*, *supra* note 15, at 300.

24. *Id.* at 301.

25. *Id.* at 302–03.

26. *Id.* at 306. *Citing* JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 303 (1861).

27. Benvenisti, *Sovereign Trusteeship*, *supra* note 15, at 306–07.

28. *Id.* at 307–08.

tional legal order devoted to human rights, which “allocates” responsibilities for ensuring the same between governments on the basis of their ability to promote the interests grounding those rights.<sup>29</sup> In this connection, Benvenisti cites the seminal *Island of Palmas* arbitration, where the sole arbitrator, Max Huber, held that the concept of sovereignty “serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian. . . .”<sup>30</sup> From this premise, Benvenisti argues that, “given that the global legal order has its foundations in human rights, sovereigns can and should be viewed as organs of a global system that allocates competences and responsibilities for promoting the rights of human beings and their interest in sustainable utilization of global resources.”<sup>31</sup> Importantly, he believes that this legal order was actually created at an identifiable point in history: the signing of the 1948 Universal Declaration of Human Rights (UDHR).<sup>32</sup>

Third, Benvenisti envisions sovereigns as exercising “ownership” over discrete portions of the globe: “As much as it is an extension of the personal right to autonomy, sovereignty is also the extension of the private claim for ownership. Both ownership and sovereignty are claims for the intervention in the state of

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29. *Id.* at 308. See also BENVENISTI, *Global Governance*, *supra* note 15, at 138–40.

30. *Island of Palmas* (Neth v. U.S.), 2 R.I.A.A. 829, 839 (Perm. Ct. Arb. 1928).

31. Benvenisti, *Sovereign Trusteeship*, *supra* note 15, at 307 (internal citations omitted).

32. *Id.*; See also Prosecutor v. Tadić, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, No. IT-94-1-I, ¶ 97 (Oct. 2, 1995):

[T]he impetuous development and propagation in the international community of human rights doctrines, particularly after the adoption of the Universal Declaration of Human Rights in 1948, has brought about significant changes in international law, notably in the approach to problems besetting the world community. 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. . . .

nature by carving out valuable space for exclusive use.”<sup>33</sup> Therefore, just as the exclusion of distant strangers from government must be legally justified, so too must their exclusion from property.<sup>34</sup> In this regard, Benvenisti invokes a number of famous tropes from the natural law property theories of Hugo Grotius and John Locke. First, he cites the famous passage in the *Law of War and Peace*, where Grotius likens the original acquisition of property to occupying a seat in a public theatre: even though the theatre is originally a public place, “it is correct to say that the seat which a man has taken belongs to him,” as long as the persons involved depart as little as possible from natural equity.<sup>35</sup> Second, Benvenisti invokes the so-called “Lockean proviso,” whereby Locke theorized that rights in property could be acquired in a state of nature, as long as one ensured that there was “enough and as good, left in common” for others after one’s particular act of enclosure.<sup>36</sup> While often viewed as a justification of original acquisition, Benvenisti recasts the Lockean proviso into grounds for limiting established property rights. Although this may be controversial for libertarian Lockeans who generally claim that the proviso applies only until the creation of a permanent store of wealth in the form of money,<sup>37</sup> Benvenisti’s reading is not without support from other prominent Locke and property scholars.<sup>38</sup> In a subsequent work, Benvenisti introduces a fourth normative ground: the interdependence of individual sovereigns.<sup>39</sup> Building on his vision of sovereigns as enveloped in a deeper legal order, he argues that sovereignty is not

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33. Benvenisti, *Sovereign Trusteeship*, *supra* note 15, at 308.

34. *Id.* at 308–09.

35. HUGO GROTIUS, *DE JURE BELLI AC PACIS* [ON THE LAW OF WAR AND PEACE] 193 (Francis W. Kelsey trans., James Brown Scott ed., 1925) (1625).

36. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* § 27 (C.B. Macpherson ed., 1980) (1690). Benvenisti mentions the Lockean proviso at Benvenisti, *Sovereign Trusteeship*, *supra* note 15, at 311, n. 87, but cites to the later § 33 instead.

37. See LOCKE, *supra* note 36, at §§ 46–50; ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 175–82 (1974).

38. See Jeremy Waldron, *Enough and as Good Left for Others*, 29 *PHIL. Q.* 319 (1979) (arguing that the proviso applies not to original acquisition but life in the civil condition).

39. BENVENISTI, *Global Governance*, *supra* note 15, at 143–45.

an inherent quality but “freedom that is organized by international law and committed to it.”<sup>40</sup>

Benvenisti’s basic moral claim is that as bearers of unique and awesome powers, sovereigns must have regard, and owe an account, to those whom they *affect*, whether by action or omission. Accordingly, Benvenisti identifies four “trusteeship” obligations to distant strangers: (1) to “take into account” or give “due respect” in the making of domestic policy to the interests of distant strangers whose interests may be affected,<sup>41</sup> (2) to allow potentially affected distant strangers to participate and voice opinions in domestic policymaking processes,<sup>42</sup> (3) to accommodate foreign interests when such accommodation would not result in any loss,<sup>43</sup> and (4) to accommodate foreign interests where not doing so would be catastrophic.<sup>44</sup> These broad trusteeship principles not only obligate sovereigns to outsiders, but also empower them to legislate for humanity in general. As Benvenisti notes in a subsequent work:

The trusteeship concept offers a clear endorsement to democracies that wish to unilaterally promote global welfare. . . . As trustees of humanity, national decision-makers must regard themselves as partaking in a collective effort to promote global welfare. . . . In fact, the sovereign-as-trustee concept even obliges states to pursue such policies. The fact that some states fail to cooperate should not hinder those who wish to act in pursuit of improving global standards, provided that they take into account the interests of others when devising policies. . . .<sup>45</sup>

In terms of generating rights and obligations to provide global public goods, much heavy lifting is done by the third obligation

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40. *Id.* at 144 (citing Lisbon Treaty judgment, BVerfG, June 30, 2009, 2 BvE 2/08, ¶ 223 (internal citations omitted)).

41. Benvenisti, *Sovereign Trusteeship*, *supra* note 15, at 314–18. *See also* BENVENISTI, *Global Governance*, *supra* note 15, at 163 (“Even before the instrumental benefits that accrue from an open and inclusive decision-making process, the intrinsic argument applies: decision-makers that affect the lives of others must respect and ensure the individual rights of those they affect.”).

42. Benvenisti, *Sovereign Trusteeship*, *supra* note 15, at 318–20. *See also* BENVENISTI, *Global Governance*, *supra* note 15, at 162–68.

43. Benvenisti, *Sovereign Trusteeship*, *supra* note 15, at 320–25.

44. *Id.* at 325–26.

45. Eyal Benvenisti, *Legislating for Humanity: May States Compel Foreigners to Promote Global Welfare?*, in INTERNATIONAL LAW-MAKING: ESSAYS IN HONOUR OF JAN KLABBERS 3, 12 (2014) [hereinafter Benvenisti, *Legislating for Humanity*].

to accommodate harmless interests, which is invoked to ground obligations to supply life-saving drugs, allow compulsory licensing of pharmaceutical products, and share disease samples.<sup>46</sup> The basic rationale is again that exclusion must be justified, for which Benvenisti again cites Grotius:

If any person should prevent any other from taking fire from his fire or light from his torch, I should accuse him of violating the law of human society. . . . 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?<sup>47</sup>

This quotation is taken from the chapter of the *Free Seas* where Grotius defends the freedom of the high seas in terms of nonexcludability and nonrivalrousness that are highly reminiscent of economic discourses about public goods.<sup>48</sup>

Benvenisti also reads Grotius' torch metaphor as prohibiting individuals from insisting upon their strict legal rights if it would be ethically disgraceful or unconscionable to do so—that is, as an imperative of *equity*.<sup>49</sup> In this connection, he recalls an equitable precept in Jewish law, which condemns an unbending insistence upon “what’s mine is mine and what’s yours is yours” as the “manner of Sodom.”<sup>50</sup> Again, the principle not only obligates, but also empowers—just as a maker of a harmless request has a claim-right to the satisfaction of her request, a state may presumably enact extraterritorial measures if costless to others, or if the cost is outweighed by the benefits resulting from the

46. Benvenisti, *Sovereign Trusteeship*, *supra* note 15, at 324–25.

47. HUGO GROTIUS, *MARE LIBERUM* [THE FREEDOM OF THE SEAS] 38 (Ralph von Deman Magoffin trans., James Brown Scott ed., 1916) (1609).

48. GROTIUS, *supra* note 47, at 27 (arguing that “all that has been so constituted by nature that although serving some one person it still suffices for the common use of all persons, is today and ought in perpetuity to remain in the same condition as when it was first created by nature.”).

49. *See* *Earl of Oxford’s Case* (1615) 21 Eng. Rep. 485, 486 (Ch.) (stating the purpose of equity administered by the Chancellor is often to “mollify the Extremity of the law”); *Dudley v. Dudley* (1705) 24 Eng. Rep. 118, 119 (Ch.) (“[E]quity is no part of the law, but a moral virtue which qualifies, moderates and reform the rigour, hardness and edge of the law.”).

50. Benvenisti, *Sovereign Trusteeship*, *supra* note 15, at 321 (citing AARON KIRSCHENBAUM, *EQUITY IN JEWISH LAW: HALAKHIC ASPIRATIONISM IN JEWISH CIVIL LAW* 187–91 (1991)).

unilateral measure.<sup>51</sup> As Benvenisti puts it, “foreigners—including foreign states—affected by such unilateral policies must consider complying with them due to their own duty to take others’ interests into account and to promote global welfare.”<sup>52</sup> Crucially, however, Benvenisti requires that his proposed obligation of harmless accommodation be limited by a criterion of “restricted Pareto optimality,” forbidding states from offering themselves up to foreign interests in exchange for side payments.<sup>53</sup> In order to substantiate his claim that the obligation of harmless accommodation is either already law or is in the process of becoming law, Benvenisti cites *Right of Passage over Indian Territory*,<sup>54</sup> the *Iron Rhine Railway* arbitration,<sup>55</sup> *Dispute Regarding Navigational and Related Rights*,<sup>56</sup> and the *Lake Lanoux* arbitration.<sup>57</sup> These cases will be examined in detail in Part V.

Altogether, Benvenisti’s theory of sovereign trusteeship can be characterized as (1) proceeding from interests, (2) conceiving of sovereign states as tools deployed for precisely this purpose by a wider international order, and (3) *equitable*, in that ethical standards may sometimes displace legal rules. The same three ideas are expressed by Anne Peters:

[T]he humanized concept of sovereignty leads to a reassessment of humanitarian intervention, all the while insisting that the prohibition on intervention must be upheld as the rule. . . . When humanity, i.e. human needs, is taken as the doctrinal and systematic starting point of legal argument, the focus is shifted from states’ rights to states’ obligations towards natural persons. . . . In the humanist perspective, the [U.N. Security] Council has the duty to authorize humanitarian action if

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51. Benvenisti does say, however, that this equitable right is not necessarily enforceable. Benvenisti, *Sovereign Trusteeship*, *supra* note 15, at 314 (observing that there is no obligation to “succumb” to interests of foreigners expressed in consultation processes).

52. See Benvenisti, *Legislating for Humanity*, *supra* note 45, at 12.

53. Benvenisti, *Sovereign Trusteeship*, *supra* note 15, at 320–21.

54. *Right of Passage over Indian Territory* (Port. v. India), 1960 I.C.J. 6 (Apr. 12).

55. *Iron Rhine Railway*, (Belg. v. Neth.), 27 R.I.A.A. 35 (Perm. Ct. Arb. 2005).

56. *Dispute Regarding Navigational and Related Rights*, (Costa Rica v. Nicar.), 2009 I.C.J. 212 (July 13).

57. *Lake Lanoux Arbitration*, (Fr. v. Spain), 12 R.I.A.A. 281 (Perm. Ct. Arb. 1957).

the very narrow conditions of right cause, proper purpose, and proportionality are fulfilled.<sup>58</sup>

Another scholar following this liberal approach is Cedric Ryngaert, who draws upon Benvenisti to develop a similar “equity-based” theory, where unilateral measures to advance global public goods are permitted on ethical principles of “reasonableness.”<sup>59</sup> Ryngaert defines the precise contours of “reasonableness” as being (1) “reasonableness” in terms of the distribution of costs and benefits between the sovereign enacting the measure and the sovereign imposed upon,<sup>60</sup> (2) “dual illegality,” that is, where the unilateral measure legitimate regulates conduct prohibited under the law of the territory where it occurs,<sup>61</sup> (3) “democratic participation” by outsiders potentially affected by the measure,<sup>62</sup> (4) “equivalence” or nonduplication of measures across sovereigns,<sup>63</sup> and (5) compensation offered by the state taking the unilateral measure to the state whose interests are affected.<sup>64</sup> Ryngaert’s last maxim contradicts Benvenisti’s restricted Pareto optimality limitation, which prohibits states from accepting payments in exchange for accommodating foreign interests.

### A. Harms and Wrongs

This section identifies certain problems with Benvenisti’s concept of sovereign trusteeship, which set the stage for an alternative, republican account of unilateral jurisprudence to provide

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58. Anne Peters, *Humanity as the A and Ω of Sovereignty*, 20 EUR. J. INT’L L. 513, 544 (2009). *See also id.* at 514 (arguing that “the normative status of sovereignty is derived from humanity, understood as the legal principle that human rights, interests, needs, and security must be respected and promoted, and that this humanistic principle is also the *telos* of the international legal order.”).

59. CEDRIC RYNGAERT, UNILATERAL JURISDICTION AND GLOBAL VALUES 124–30 (2015) [hereinafter RYNGAERT, *Unilateral Jurisdiction*]. *See also* CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW, Chapter 5 (2d ed. 2015) (setting out a “reasonableness” approach to jurisdictional questions in general but acknowledging that it is not the accepted method of addressing jurisdictional questions outside the United States).

60. RYNGAERT, *Unilateral Jurisdiction*, *supra* note 59, at 111–18.

61. *Id.* at 118–21.

62. *Id.* at 121–33.

63. *Id.* at 133–35.

64. *Id.* at 135–40.



global public goods. Consider again Benvenisti's proposed obligation to accommodate the interests of outsiders where costless. While Benvenisti recognizes that states differ in some fundamental way from private persons,<sup>65</sup> his rationale from property ownership and his use of the Grotian torch metaphor mean that that obligation must in principle be applicable to private persons. After all, private persons own property. This, however, brings to light certain problems.

Consider a total stranger who enters your house in the middle of the night, not to steal or damage anything, but only to admire you while you sleep. It is hard to imagine any legal system that would obligate you to accommodate him, even though his visits cost you absolutely nothing. To the contrary, they would actively provide you a cause of action against him. For instance, a seminal English precedent of civil and constitutional significance on both sides of the Atlantic pronounces that "no man can set foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all. . . ."<sup>66</sup> Similarly, batteries are actionable even if entirely painless—all you need is an unwelcome and intentional touching, such as if your visitor ran his fingers through your hair as you slept.<sup>67</sup> It might be exceedingly ungracious of you to proceed against such a harmless admirer, but you have your cause of action regardless. In fact, you would have it even if he positively advanced your material welfare, say, by doing your laundry before leaving.<sup>68</sup> In short, it is possible to *wrong* someone without harming them.

Secondly, consider that there are regrettably many people in the world who suffer from renal failure while you, through no special merit of your own, are blessed with two healthy kidneys. Should the law compel you to part with a superfluous kidney, say, to a close relative in desperate need? Such an obligation might follow not just from Benvenisti's proposed obligation to

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65. Benvenisti, *Sovereign Trusteeship*, *supra* note 15, at 306.

66. *Entick v. Carrington* (1765) 95 Eng. Rep. 807, 817 (KB).

67. MARC A. FRANKLIN, *INJURIES AND REMEDIES: CASES AND MATERIALS ON TORT LAW AND ALTERNATIVES* 606 (1979) (arguing that battery "is not limited to serious injuries; a man who suffers the indignity of having his coat lapels grabbed or of being spat on may recover.").

68. ARTHUR RIPSTEIN, *PRIVATE WRONGS* 49, n. 29 (2016) [hereinafter RIPSTEIN, *Private Wrongs*] (citing Susan Warren, 'Cleaning Fairy,' *Accused Of Breaking Into Home And Cleaning It*, HUFFINGTON POST (May 31, 2012, 12:36 PM), [http://www.huffingtonpost.com/2012/05/31/susan-warren-cleaning-fairy-broke-into-home-cleaned-ohio\\_n\\_1559477.html](http://www.huffingtonpost.com/2012/05/31/susan-warren-cleaning-fairy-broke-into-home-cleaned-ohio_n_1559477.html).)

accommodate costless interests, but also from his fourth proposed obligation to avert catastrophes. Nevertheless, it is hard to imagine any court ordering you to do so, even though it would be despicable of you not to donate your kidney in such circumstances.<sup>69</sup> Evidently, it is also possible to harm someone, grievously, without wronging them. You might start a business that drives another's into bankruptcy, resulting in him and his elderly grandmother being evicted from their cottage, in the middle of a snowstorm on Christmas Eve. As unquestionably bad as it is, you have not wronged him. This consideration, if taken, puts Benvenisti's theory of sovereign trusteeship in grave danger because it undermines its first premise. The mere fact that globalization presents us with incomparably many more opportunities to inflict significant harms upon each other, does not necessarily mean we thereby violate a single legal obligation toward one other, or even that we have any.<sup>70</sup>

### *B. Public Actors and Human Rights Jurisdiction*

At this point, Benvenisti might attempt a rescue from his second normative ground—that is, his notion of the UDHR as a global original contract constituting an international order devoted to advancing human rights understood in terms of well-being, and as allocating human rights obligations among the various sovereign states according to their ability to advance well-being. If successful, this would allow Benvenisti to distinguish between private individuals and sovereigns, and to impose unique obligations of altruism upon the latter, thus nullifying the objections made in the previous section.

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69. *McFall v. Shimp*, 10 Pa. D.&C. 3d 90, 91–92 (1978) (holding that the court lacked equitable power to enjoin defendant to donate bone marrow via painful but not life-threatening medical procedure to plaintiff—a relative dying of a rare bone disease—despite finding the defendant's conduct “morally indefensible”); *Curran v. Bosze*, 566 N.E.2d 1319 (Ill. 1990) (refusing to order defendant, the mother and legal guardian of twins, of whom plaintiff was the father, to submit the twins for medical tests to see if they were suitable as bone marrow donors for another of the plaintiff's children, a twelve-year-old dying of leukemia).

70. See Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law*, 20 INDIANA J. GLOB. LEG. STUD. 605, 624 (2013) (“Interdependence alone is not itself sufficient to establish the duty of a national community to take into account the effects of their actions on outsiders.”).

On this conception of the human rights practice, the clauses on “state jurisdiction” or “human rights jurisdiction” that define the scope of a state party’s obligations arising under most human rights treaties ought to track each state’s ability to affect the interests of human beings all over the world. Precisely such a view is taken by Marko Milanovic in his widely cited monograph on the extraterritorial application of human rights treaties.<sup>71</sup> Specifically, Milanovic argues that “negative” human rights obligations apply universally because it is always within a state’s power not to harm someone,<sup>72</sup> while “positive” obligations to provide resources or services are limited to state territory because they require greater levels of coordination with actors not under the state’s effective control.<sup>73</sup> Thirdly, Milanovic postulates that there can be extraterritorial positive “procedural and prophylactic” obligations to investigate killings outside of state territory, on the basis that such killings might have been perpetrated by agents under the state’s control.<sup>74</sup>

These propositions, however, do not reflect actual legal practice, especially that of the European Court of Human Rights, whose jurisprudence on extraterritorial human rights obligations arising under the European Convention on Human Rights (ECHR) is particularly prominent and well-developed.<sup>75</sup> One obvious way in which a state may adversely affect the well-being of distant human beings would be by dropping bombs on them. It is also always within a state’s ability not to bomb someone. Despite this, however, it is almost certain that if an ECHR state party were to launch drone strikes upon persons far away, any action brought on their behalf would be declared inadmissible as falling outside that state’s jurisdiction. Precisely such a result

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71. MARKO MILANOVIC, *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY* (2011).

72. *Id.* at 212–15.

73. *Id.* at 210–11.

74. *Id.* at 215–19.

75. See Samantha Besson, *The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to*, 25 LEIDEN J. INT'L L. 857, 858 (2012) (arguing that Milanovic is “too quick to assimilate [human rights jurisdiction] to some kind of mere factual power or control test.”); Aravind Ganesh, *The European Union’s Human Rights Obligations Towards Distant Strangers*, 37 MICH. J. INT'L L. 475, 518–25 (2016) (questioning all three of Milanovic’s proposed general rules).

obtained in *Banković*, which concerned an action brought by relatives of civilians killed during the NATO bombing of Belgrade.<sup>76</sup> Certainly, most of the court's reasoning has been abandoned after deserved criticism.<sup>77</sup> That said, an application brought today on similar facts would be dismissed just the same. This time, however, the dismissal would follow from the reasoning in *Al-Skeini*, which definitively settles that human rights jurisdiction under the ECHR arises only where a state party exercises "effective control" over the territory where the purported violation takes place, or if its agents exercised "authority and control" over the individuals whose human rights were purportedly violated.<sup>78</sup> As Milanovic recognizes:

*Bankovic* is . . . still perfectly correct in its result. While the ability to kill is "authority and control" over the individual if the state has public powers, killing is not authority and control if the state is merely firing missiles from an aircraft. Under this reasoning, drone operations in Yemen or wherever would be just as excluded from the purview of human rights treaties as under *Bankovic*.<sup>79</sup>

Thus, the human rights practice contradicts Benvenisti's assumption that a state's human rights obligations track its capacity to affect an individual's material interests, say, in existence. Even if one reads Benvenisti as making only the weaker claim that the UDHR *should* be interpreted as imposing legal obligations on states to advance human flourishing where feasible, the fact remains that the settled jurisprudence of the world's pre-eminent human rights court totally contradicts that proposition.

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76. *Banković v. Belgium and others*, 2001-XII, Eur. Ct. H.R. 335. See also *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346 (Fed. Cir. 2004), cert. denied, 545 U.S. 1139 (2005) (Plaintiff's factory in Sudan was destroyed by a U.S. bomb strike. Plaintiff's claim for compensation under the Takings Clause was dismissed as a nonjusticiable political question).

77. See Yuval Shany, *Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law*, 7 L. & ETHICS HUM. RTS 49, 51–56 (2013). Milanovic's monograph was offered largely as a critique of the *Banković* decision. See MILANOVIC, *supra* note 71, at 264 ("I certainly do not suffer from the naïve belief that my proposed model of extraterritorial application will be adopted any time soon. At least when it comes to Strasbourg, it requires a major departure from existing jurisprudence, above all from *Bankovic*.").

78. *Al-Skeini v. United Kingdom*, (2011) 53 Eur. Ct. H.R. 589, ¶¶ 133–40.

79. Marko Milanovic, *Al-Skeini and Al-Jedda in Strasbourg*, 23 EUR. J. INT'L L. 121, 130 (2012) (internal citations omitted).

Instead, it appears that you can purposely be dealt the most appalling harms without having even the beginnings of a human rights claim. The attempt to abolish the difference between harms and wrongs by invoking human rights fails because the human rights practice itself makes that distinction.

### *C. The Failure of the Argument from Well-Being*

The mere fact that we nowadays increasingly affect each other does not automatically mean we also have legal claims against each other. Moreover, it is not plausible as a matter of legal doctrine to say that sovereigns owe duties of welfare advancement to the whole world in general. Rather, the crucial question is how the unilateral decisions of one state or political community could possibly *bind* others, even if the various costs and benefits were calibrated perfectly. As Mattias Kumm notes, “the more effective provision of public goods globally is not itself an argument against denying states the authority to determine for themselves whether and how to address issues relating to the provision of public goods.”<sup>80</sup> Moreover, while international law provides

means to reap the benefits of better cooperation and coordination between interdependent actors . . . this assertion merely provides a functional argument for states to sign up for certain kinds of international cooperative endeavors. It does not, without further argument, undermine the claim that it is within the state’s authority to decide on how to address concerns surrounding the provision of public goods.<sup>81</sup>

Such considerations are reflected by the principle of nonintervention in Article 2(7) of the Charter of the United Nations, which the International Court of Justice (ICJ) relied upon in *Military and Paramilitary Activities in and Against Nicaragua* to hold that “[i]ntervention is wrongful when it uses methods of coercion *in regard to such choices, which must remain free ones.*”<sup>82</sup>

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80. Mattias Kumm, *Sovereignty and the Right to Be Left Alone: Subsidiarity, Justice-Sensitive Externalities, and the Proper Domain of the Consent Requirement in International Law*, 79 L. & CONTEMP. PROBS. 239, 244 (2016).

81. *Id.*

82. *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 205 (June 27).

For these reasons, most of Ryngaert's rules of reasonableness are equally objectionable. Cagliostro could not legitimately prescribe one jot or tittle of regulation regarding Ruritania's oil-fields even if it extended Ruritanian citizens rights not just to sit in at its legislative hearings, but to vote in its general elections. Nor would it have any right to enact extraterritorial laws for Ruritanians simply because, contrary to a human rights treaty binding upon both parties, Ruritania habitually issued parking tickets in a manner violating the right against self-incrimination. Moreover, Ryngaert's contention that extraterritorial measures are reasonable if they regulate conduct tainted by "dual illegality" is contradicted by the U.S. "public law taboo," which holds that "the courts of no country will execute the penal laws of another."<sup>83</sup> Ultimately, "reasonableness" is of no help because people have radically differing visions of what that means. For this reason, rather than offering a pragmatic solution to problems of global coordination, a "reasonableness" approach to unilateral jurisdiction might actually be the perfect recipe for discord.

Ryngaert concedes as much, observing that invocations of "jurisdictional reasonableness" as pioneered in U.S. antitrust law have "not surprisingly - come under severe criticism for failing to provide legal certainty"<sup>84</sup> and that when "exercising unilateral jurisdiction in the perceived global interest, it appears indeed inevitable that states will apply *their* notions of global justice to foreign territories and persons."<sup>85</sup> Nevertheless, he claims that despite the lack of consensus on "a globally shared justice conception . . . to reject reasonableness means to accept either that jurisdictional problems can be solved via bright-lines of territoriality or personality or that such problems cannot be solved at all."<sup>86</sup> Similarly, Benvenisti acknowledges that imperial powers often made appeals to "humanity" when subjugating other peoples, and that his proposed obligations of altruism may be too heavy for developing states to bear.<sup>87</sup> Nevertheless, he remarks

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83. *Massachusetts v. Mellon*, 262 U.S. 447, 481 (1923). See Andreas F. Lowenfeld, *Public Law in the International Arena: Conflict of Laws, International Law and Some Suggestions for Their Interaction*, 163 RECUEIL DES COURS 311, 322-26 (1980).

84. RYNGAERT, *Unilateral Jurisdiction*, *supra* note 59, at 113.

85. *Id.* at 114.

86. *Id.*

87. Benvenisti, *Sovereign Trusteeship*, *supra* note 15, at 328.

somewhat chillingly that “the stark question for the weaker countries is whether clinging to formal nineteenth century-type sovereignty remains in their best interest.”<sup>88</sup> Essentially, the liberal theories end in counsels of despair—they acknowledge their deep problems, but plead for them to be ignored because that is the best that can be done. It must therefore be examined whether there are any viable alternatives.

## II. PRIVATE RIGHT: DIGNITY AS FREEDOM FROM DOMINATION

Consider again the problem of the secret visitor. Why do legal systems almost universally allow legal redress against him, despite his utter harmlessness—or even advantage—to you? An interest theorist might argue on rule-utilitarian lines that trespassers are almost always up to no good, so that while your particular secret visitor might have been harmless, overall societal interests in personal security are more likely to be advanced than set back by a general prohibition against such conduct. Moreover, given our default assumptions about intruders:

The thought that at any moment complete strangers might freely enter and observe these most intimately personal places will leave most of us profoundly uncomfortable; the fact that they would do no damage, harbor no ill intentions, or that we would be unaware of their presence would do little to remove that discomfort.<sup>89</sup>

Another strategy would be to specify certain “protected interests” as deserving heightened protection because they are fundamental to the enjoyment of all other interests. For instance, Jason Varuhas accounts for the wrongfulness of harmless trespasses because “my interest in the exclusive possession of land is a more important and inherently valuable interest than my interest in quiet enjoyment of land (exclusive possession of land is basic in that before I can freely enjoy my land I must have dominion over it).”<sup>90</sup> On this view, the law provides remedies to

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88. *Id.*

89. See Colin Bird, *Harm Versus Sovereignty: A Reply to Ripstein*, 35 PHIL. & PUB. AFFS. 179, 184 (2007). See JOHN STUART MILL, UTILITARIANISM 81 (Parker, Son & Bourn eds., 1863) (“The interest involved is that of security, to everyone’s feelings the most vital of interests. Nearly all other earthly benefits are needed by one person, not needed by another . . . but security no human being can possibly do without. . .”).

90. Jason N.E. Varuhas, *The Concept of “Vindication” in the Law of Torts: Rights, Interests and Damages*, 34 OXF. J. LEG. STUD. 253, 259 (2014).

“vindicate” such protected interests out of an abundance of caution, and the secret visitor’s trespass is said to result not in material damage, but in “normative” damage.<sup>91</sup>

The first, rule-utilitarian strategy appears limited to types of conduct that are ordinarily harmful or unproductive of social benefit.<sup>92</sup> It cannot account for instances where conduct is actionable despite being of a type that is presumptively beneficial—for instance, when lifesaving medical treatment is administered to persons refusing consent for religious reasons.<sup>93</sup> Nor does the resort to feelings of discomfort or other forms of psychological pain seem proper, or even helpful. Depending upon their culture and upbringing, people may respond with deep, visceral distress at radically opposite things; from the sight of a woman with her face unveiled, to the sight of a woman with her face veiled. The “protected interest” strategy, on the other hand, strains the meaning of the word “fundamental.” The interests in corporeal integrity and in liberty supposedly grounding battery seem foundational enough, but the same cannot be said of the interest in exclusive possession of land which supposedly grounds trespass. As demonstrated by Grotius’s example of the torch, and by the case of the secret visitor, it is possible to enjoy your home without excluding others, say, when you are asleep or away on holiday. The interest in reputation, on the other hand, does not seem “basic” in any robust sense, certainly not more so than the interest in food and shelter. In fact, losing your reputation could be a most liberating experience. Finally, the claim that harmless torts nevertheless cause normative or “moral” damage bears the distinct air of question-begging—of

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91. See *id.* at 258 (“In this sense, vindication means to attest to, affirm and reinforce the importance and inherent value of particular *interests*.”); and *id.* at 268 (“[I]n order to mark the conceptual distinction between such damage, which exists solely on the legal plane, and other forms of damage which correspond with real-world effects, we might describe such damage as ‘normative’ in nature.”).

92. Bird, *supra* note 89, at 188 (arguing that a general prohibition against harmless trespasses makes sense on the rule-utilitarian account because “there is no vital social interest in sleeping in other people’s beds.”).

93. See *Malette v. Shulman*, [1990] 72 O.R. 2d 417 (Can. C.A.) (holding doctor liable in battery and awarding damages of \$20,000 CAD for knowingly administering a life-saving blood transfusion to a Jehovah’s Witness).



smuggling into the premises the very conclusion sought to be derived.<sup>94</sup>

Interest-based theorists no doubt have other ingenious strategies to offer, but this article cannot anticipate them all. As such, the possibility cannot be excluded that the prohibition against harmless trespasses does indeed maximize aggregate welfare in the world, and that the judges from various legal traditions who crafted broadly similar rules over the centuries somehow were aware of this despite not being trained in econometrics or empirical methods. Instead, this article can only suggest the following provisional but intuitive explanation: The reason why the secret visitor wrongs you by entering your house or by touching without your consent, even if he does you no harm, is because your body and your house are *yours*. Only you get to decide what to do with your house and your body. Likewise, you do not wrong someone when you refuse to donate them your kidney, because your organs are yours, not theirs. If others could simply help themselves to your body or your property to satisfy their desires or even needs, that would mean you had neither a life nor purposes of your own. It is irrelevant that their purposes may be ultimately beneficial to you; a slave who is extravagantly provided for by his master is nevertheless wronged by him. Dignity lies not in being kept happy by being supplied with things necessary for the satisfaction of interests, even the very basic ones called needs. Nor is it even to be understood as the freedom to do whatever you like, for that is just another way of describing the satisfaction of interests. A slave whose master is on permanent holiday nevertheless lacks dignity because of the simple

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94. See *Baget c. Rosenweigh*, Cass. (Ch. Réunion) 15 juin 1833, Sirey 1833.I.458 (Fr.), the seminal French decision that introduced the concept of moral damage into French civil law. The case concerned a claim by certain licensed Paris pharmacists intervening as civil parties in criminal proceedings against certain unlicensed pharmacists. The plaintiffs were unable to establish any quantifiable material loss as required for all delictual (tortious) actions by Articles 1382–1383 of the French Civil Code. *Id.* at 459–60. The Court of Cassation nevertheless held that the plaintiffs could recover for “moral damage,” on grounds that “the illegal conduct of the pharmacy trade necessarily involves harm to the pharmacists, since it constitutes a usurpation of the rights guaranteed them by the law. . . .” *Id.* at 462–63 [l’exercice illégal de la pharmacie porte nécessairement un dommage aux pharmaciens, puisqu’il constitue une usurpation des droits qui leur sont garantis par la loi. . . .]. In short, the court manufactured “moral damage” solely to get around the Civil Code’s requirement of damage for delictual claims.

fact that he is still completely dependent upon the master's will. Instead, dignity consists in freedom in the sense of *independence*; that is, in not being subject to the will of another. This idea constitutes the single regulative principle from which the argument of the rest of this article flows.

#### A. *Private Legal Relations*

The “republican” theory set out in this article draws upon Kant’s legal and political philosophy, as expressed in the *Perpetual Peace* and *Doctrine of Right*. To this end, this section provides a summary of Kant’s basic legal concepts, from which he eventually crafts a comprehensive theory of constitutional, international, and cosmopolitan law. The following discussions of such private law concepts as damage, injury, property, and personality may seem unusual in the context of an article purporting to deal with public international law. They are, however, crucial, because these concepts permeate the entirety of Kant’s legal philosophy.

In the *Doctrine of Right*, Kant draws a fundamental distinction between persons and things. A *person* is defined as “a subject whose actions can be imputed to him” as a result of which he is “subject to no other laws than those he gives to himself.”<sup>95</sup> In contrast, a *thing* is an “object of free choice” to which “nothing can be imputed.”<sup>96</sup> Being treated rightly as a person consists in being treated appropriately according to one’s nature as a person. A wrong, on the other hand, occurs when a person is dominated or instrumentalized as a thing. Accordingly, the concept of dignity as non-domination means that “*Freedom* (independence from being constrained by another’s choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity.”<sup>97</sup>

This “innate” right gives rise to three kinds of “acquired” rights: “a right to a thing (*ius reale*), or a right against a person (*ius personale*), or a right to a person akin to a right to a thing (*ius realiter personale*), that is, possession (though not use) of

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95. *DR* 6:223, at 378.

96. *Id.*

97. *DR* 6:237, at 393.

another person as a thing.”<sup>98</sup> This crucial passage can be explicated as follows: a thing can be both used and possessed at the same time. If your dignity lies in being treated as a person and not as a thing, this does not mean that you can never be possessed or used. It simply means that you cannot be possessed and used at the same time. This leads to three possible categories of *legal* rights; that is, claims that are morally permissible to enforce through coercion:<sup>99</sup>

(1) *Tortious* rights entitle one person to prevent all other persons from interfering with the things she is rightfully controlling in pursuit of her purposes—her *property* and her *person*.<sup>100</sup> (The question of how one comes to be in rightful control of things shall be explained in the next part.)

(2) *Contractual* rights entitle one person to *use* another person—they “enable parties to modify their respective rights, so that one person is entitled to depend upon the specified deed of another.”<sup>101</sup> For instance, your employer gets to use you in pursuit of her purposes. If she uses you, however, she cannot also *possess* you. You must have signed up for the job, and you can always quit. A contractual right is therefore to performances; to delivery, rather than title.<sup>102</sup>

(3) *Fiduciary* rights arise where a person is entitled to *possess* another—that is, to “bind” them by their decisions. If you are a child, your mother can tell you to eat your dinner, and you must do it. If your attorney accepts a settlement offer, you must live with it. If they possess you, however, they cannot also *use*

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98. DR 6:260, at 412. See also DR 6:247, at 402 (describing three categories of external objects of choice as “1) a (corporeal) *thing* external to me”; 2) another’s *choice* to perform a specific deed (*praestatio*); 3) another’s *status* in relation to me”); RIPSTEIN, *Force and Freedom*, *supra* note 13, at 76 (describing the “triangulation” of the “category of status in relation to property and contract.”).

99. DR 6:231, at 388 (defining “[r]ight [as] connected with an authorization to use coercion.”).

100. RIPSTEIN, *Force and Freedom*, *supra* note 13, at 66–69 (describing this category of rights as “property,” paralleled by similar rights against interferences with one’s person).

101. *Id.* at 69.

102. DR 6:274, at 424.

you. The decisions they make in respect of you have to be consistent with your purposes, never theirs.<sup>103</sup> The conception of fiduciary relations discussed here has nothing to do with equity<sup>104</sup> or with notions of differentiated and limited property ownership associated with trusts in English law. Instead, the concern is with obligations arising from another's "possession" of you, that is, their entitlement to dispose of your rights regardless of your choice.<sup>105</sup>

The categories of rights most relevant for the purposes of this article are those pertaining to tortious and fiduciary relations. The next section elaborates on torts and describes the distinct sub-categories of damage and injury.

### *B. The Division of Torts: Property and Personality Wrongs*

Torts are defined as interferences with your *means*, that is, the things you are rightfully using and/or possessing in pursuit of

103. RIPSTEIN, *Force and Freedom*, *supra* note 13, at 70–76 (describing the category as “status” relations). The “legal relation between a fiduciary and a beneficiary is one such case” of status relations. *Id.* at 73.

104. Contrary to the sources cited at note 49, Kant does not treat equitable claims as demands upon ethical principles extraneous to law. He acknowledges that they are legal claims, but argues that they cannot alone authorize coercion because they lack crucial particulars, which then requires judges to employ their discretion. As such, equity can be invoked by a judge only when disposing of her own rights—say, whether or not to accept irregularly filed pleadings—or the rights of someone on whose behalf she is authorized to speak, such as the sovereign in a lawsuit between the sovereign and his employees. In other cases, equity is a “mute divinity who cannot be heard.” *DR* 6:234-35, at 390–91.

105. For greater color on the notion of fiduciary relations animating this article, see Paul B. Miller, *A Theory of Fiduciary Liability*, 56 *MCGILL L.J.* 235, 278 (2010) (defining a fiduciary relationship as that in which one person “exercises discretionary authority to set or pursue practical interests (including matters of personality, welfare or right) of another.”); Paul B. Miller, *Justifying Fiduciary Duties*, 58 *MCGILL L.J.* 969, 1012–13 (2013) (arguing that “fiduciary power is not properly understood as connoting relative strength, ability, or influence . . . [but] ought to be understood as a form of *authority*,” or the ability to “render rightful conduct that would otherwise be wrongful.”); *Frame v. Smith*, [1987] 2 S.C.R. 99, ¶ 60 (Can.) (Wilson J., dissenting) (defining a fiduciary relation as one where: “(1) the fiduciary has scope for the exercise of some discretion or power; (2) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary’s legal or practical interests; and (3) the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power”).

your purposes. The frustration of a “mere wish”<sup>106</sup>—a project you would like to accomplish but do not have the means for—may harm you, but it does not wrong you. As Ripstein explains:

What you can accomplish depends on what others are doing—someone else can frustrate your plans by getting the last quart of milk in the store. If they do so, they don’t interfere with your independence, because they impose no limits on your ability to use your powers to set and pursue your purposes. They just change the world in ways that make your means useless for the particular purpose you would have set.<sup>107</sup>

For this reason, you do not wrong someone if you refuse to donate them your kidney, because their need for it, no matter how urgent, is just a mere wish. Your organs are not their means.

If torts are understood as wrongful interferences with means, there are just two ways another may commit one against you: she may deprive you of your means, or she may use your means for her purposes rather than yours.<sup>108</sup> The first category covers losses arising from deprivations of means.<sup>109</sup> Merely reducing the value of your means—for example, your business—does not deprive you of it. It simply changes the world around you, making your means unsuitable for the purposes you had intended, and is therefore unrecoverable pure economic loss. Moreover, mere deprivation of, or physical damage to your things is not enough. Instead, you must have suffered *loss* arising from that damage—only then does another’s interference with your things constitute a deprivation of your means.<sup>110</sup> In contrast, for the

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106. *DR* 6:230, at 387.

107. RIPSTEIN, *Force and Freedom*, *supra* note 13, at 16.

108. *See* RIPSTEIN, *Private Wrongs*, *supra* note 68, at 43–52.

109. *See id.* at 48–50.

110. *See* PETER BIRKS, *THE ROMAN LAW OF OBLIGATIONS: THE COLLECTED PAPERS OF PETER BIRKS 195–96* (Eric Descheemaeker ed. 2014) (arguing that the accidental castration of a slave-boy does not give rise to a wrongful damage claim because it actually increases his value), *citing* DIG. 9.2.23.8 (Ulpian, Ad Edictum 18). Ripstein appears to take a different view, that another may “wrong you by depriving you of [your] means even if you had no plans to use them.” RIPSTEIN, *Private Wrongs*, *supra* note 68, at 48. For this purpose, he cites Lord Halsbury L.C.’s asking rhetorically if “a person took away a chair out of my room and kept it for twelve months, could anybody say you had a right to diminish the damages by showing I did not usually sit in that chair, or that there were plenty of other chairs in the room?” *The Mediana*, [1900] App. Cas. 113, 117 (Eng.). The sentences immediately following reveal Lord Halsbury characterizing the taking away of the chair as wrongful use rather than

second category of torts—that is, wrongful use—harm is irrelevant because you have not actually lost anything.<sup>111</sup> Your secret visitor’s trespass is not inconsistent with your possessing and using your house because, evidently, you can still do this.

This logic carries over into the remedies. If someone has deprived you of your means, she must give it back to you—*compensation*. In contrast, compensation cannot remedy wrongful uses.<sup>112</sup> Instead, because purposes are wrongful if accomplished through the wrongful use of others’ means, they therefore cannot be suffered to exist, and must therefore be reversed in *restitution*. For instance, if you lead tour groups through onyx caves partly lying under your neighbor’s land, you must hand over the appropriate portion of the profits.<sup>113</sup> While both compensation and restitution serve the same purpose of reversing wrongs, they differ in that “[c]ompensation places the victim in the pre-wrong position, whereas restitution places the agent in the pre-wrong position.”<sup>114</sup> For this reason, restitution and compensation might sometimes bear a surface resemblance. For instance, if someone

wrongful deprivation. *See id.* at 117–18, remarking that “when you are endeavouring to establish the specific loss of profit . . . [i]n that case you must shew it, and by precise evidence . . . [b]ut when we are speaking of general damages no such principle applies at all.”

111. *See* RIPSTEIN, *Private Wrongs*, *supra* note 68, at 46–48; BIRKS, *supra* note 110, at 224 (arguing, regarding *iniuria*, that “[t]he evaluation is not of *damnum*. It is not about loss. That is the province of the *lex Aquilia*.”). The *Lex Aquilia* was a plebiscite enacted probably in the first half of the third century BCE, which introduced the concept of compensatory remedies for damage to property. Prior to this, fixed rates for different kinds of damages were set individually in the Twelve Tables. *See* REINHARD ZIMMERMANN, *THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION* 953–961 (1996).

112. *See Merest v. Harvey* (1814) 128 Eng. Rep. 761, 761 (CP) (Gibbs C.J.) (“Suppose a gentleman has a paved walk in his paddock, before his window, and that a man walks up and down before the window of his house, and looks in while the owner is at dinner, is the trespasser to be permitted to say, ‘here is a halfpenny for you, which is the full extent of the mischief I have done?’ Would that be a compensation? I cannot say that it would be.”).

113. *Edwards v. Lee’s Administrator*, 265 Ky. 418, 96 S.W.2d 1025 (1936). *See also* *Ministry of Defence v. Ashman* (1993) 25 H.L.R. 513 (C.A.) (Eng.) (Hoffmann L.J.) (holding that “[a] person entitled to possession of land can make a claim against a person who has been in occupation without his consent on two alternative bases. The first is for the loss which he has suffered in consequence of the defendant’s trespass. . . . The second is the value of the benefit which the occupier has received. This is a claim for restitution. . .”).

114. FRANCESCO GIGLIO, *THE FOUNDATIONS OF RESTITUTION FOR WRONGS* 225 (2007).

spits in your face and you contract a disease from it, your remedy will include your medical bills. This, however, is not because compensation is the proper remedy but because erasing the tortfeasor's wrongful purpose includes setting back those expenses. The opposite does not hold for the first category of torts. If you negligently run over your neighbor's rosebushes while rushing to collect your lottery winnings, you need only replace the rosebushes. You need not undo your purpose by handing over your winnings.

Such a description of the law of torts and its attendant remedies might sound surprising to Anglo-American lawyers, for whom the idea of gain-based or restitutionary remedies for tort is radically heterodox.<sup>115</sup> It is, however, trite in the Roman law, where the categories of wrongful damage and wrongful use are represented in the law of delict by the division between actions for *damnum iniuria datum* (loss given by a wrong) and *iniuria* (wrongs).<sup>116</sup> The former comprises only violations of *property* rights,<sup>117</sup> whereas the latter pertains to violations of *personality* rights—enumerated canonically as rights in body, reputation, and *dignitas* (status, honor, or worth).<sup>118</sup> The identification of wrongful damage solely with property rights and wrongful use solely with personality rights may sound curious, as it seems apparent that one can wrongfully damage another's body or wrongfully use another's property. For instance, Anglo-American lawyers may tend to think of trespass primarily as a violation of a property right, actionable the moment the trespasser sets foot on any part of your land.<sup>119</sup> In contrast, in Roman law a trespass

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115. See Varuhas, *supra* note 90, at 284–89 (arguing against a trend in English cases recognizing restitutionary remedies in tort); JASON N.E. VARUHAS, DAMAGES AND HUMAN RIGHTS 57 (2016) (observing that “despite damages for trespass to land being classified as compensatory for nearly their entire history, under the influence of restitution theorists some courts have, in recent times, classified user damages as restitutionary. . .”).

116. See, e.g., ROBERT W. LEE, AN INTRODUCTION TO ROMAN-DUTCH LAW 271 (1915) (“The underlying principles of *injuria* and *damnum injuria datum* are applicable to all kinds of delict. To-day all delictual liabilities (with few exceptions) are referable to one or other of these two heads.”); WILLIAM W. BUCKLAND & ARNOLD D. MCNAIR, ROMAN LAW AND COMMON LAW: A COMPARISON IN OUTLINE 340–44 (1965).

117. All claims for economic loss were made under the *Lex Aquilia*. See BIRKS, *supra* note 110, at 195–98.

118. DIG. 47.10.1.2 (Ulpian, Ad Edictum 56).

119. See *Entick v. Carrington*, (1765) Howell's St. Tr. 1029, 1066 (K.B.) (Lord Camden C.J.) (“By the laws of England every invasion of private property, be

is conceived as a violation of *dignitas*, akin to spitting in your face.<sup>120</sup> To grasp this, recall that your secret visitor's conduct is not inconsistent with your possession of your house. Instead, what it contradicts is "your ability to be the one who determines how [the house] will be used."<sup>121</sup> The trespass is not about the house—it is about you.

More astonishing, but crucial for this article, is the fact that Roman law does not recognize a direct action for careless damage to the body of a free man.<sup>122</sup> The precise reason given by the Roman jurist Ulpian for this, is because *dominus membrorum suorum nemo videtur*—meaning, "no one is to be seen as the owner of his limbs."<sup>123</sup> James Edelman interprets the *dominus membrorum* principle to mean that property and personality are distinct: "Whatever meaning is given to 'property,' it is independent of personhood."<sup>124</sup> Consequently, a "living person can be the holder of a property right but he or she cannot be the object of it."<sup>125</sup>

Kant adopts precisely this principle in the following passage:

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it ever so minute, is a trespass."); ANDREW BURROWS, *PRINCIPLES OF THE ENGLISH LAW OF OBLIGATIONS* 136 (§ 2.10) (2015) ("Defamation protects reputation. Conversion protects property rights in goods. Trespass to land and private nuisance protect property rights in land.").

120. See BUCKLAND & MCNAIR, *supra* note 116, at 102 (noting that trespass is actionable only if the owner "had expressly forbidden entry or if it was an enclosure, such as a dwelling-house, into which everyone knew that free entry would be forbidden. . . . But it is a wrong against personality, not against property."); David L. Carey Miller, *Public Access to Private Land in Scotland*, 15 *POTCHEFSTROOM ELECTRON. L.J.* 119, 120 (2012) ("There is no delict of trespass in the Romanist common law of Scotland; the landowner has an enforceable right to require a trespasser to leave but there is no civil claim for the act of trespass *per se* as there is, on the basis of the 'tort of trespass', in English law.").

121. RIPSTEIN, *Force and Freedom*, *supra* note 13, at 67.

122. See BIRKS, *supra* note 110, at 198; ZIMMERMANN, *supra* note 111, at 1014–17.

123. DIG. 9.2.13.8 (Ulpian, Ad Edictum 18).

124. James Edelman, *Property Rights to Our Bodies and Their Products*, 39 *U.W. AUST. L. REV.* 47, 53 (2015).

125. *Id.* See also *R v. Bentham* [2005] UKHL 18 (Eng.). The defendant had threateningly held his fingers under his jacket in the shape of a gun, for which he was convicted possessing an imitation weapon. The conviction was reversed on appeal, with Lord Rodger of Earlsferry invoking the *dominus membrorum* principle to hold that if "no-one is to be regarded as the owner of his own limbs . . . [e]qually, we may be sure, no-one is to be regarded as being in possession of his own limbs." *Id.* ¶ 4.



An external object that in terms of its substance belongs to someone is his *property (dominium)*, in which all rights in this thing inhere (as accidents of a substance) and which the owner (*dominus*) can, accordingly, dispose of as he pleases (*ius disponendi de re sua*). But from this it follows that an object of this sort can be only a corporeal thing (to which one has no obligation). So a man can be his own master (*sui iuris*) but cannot be the owner of himself (*sui dominus*) (cannot dispose of himself as he pleases). . . .<sup>126</sup>

In other words, having ownership over property means being able to dispose of it at your pleasure. Your dignity as a person means you cannot do this to yourself—say, by selling yourself into slavery.<sup>127</sup> Put differently, property has the aspect of being “mine or yours,” which means it is always and everywhere *transmissible*.<sup>128</sup> As James Penner explains, the “very idea of transmissibility is related to this idea of contingency—what is yours might as well be, and might come to be, not only mine, but his, hers, theirs, and so on.”<sup>129</sup> The contingency of property in turn means that if someone deprives you of your property, it can be replaced. Accordingly, wrongful damage is remedied by compensation.

In contrast, personality rights cannot be disposed of in this way—they are *inalienable*. Thus defined, your personality includes more than just your body but extends to all other things which cannot become another’s, but can only be yours. For instance, your reputation is “an innate external belonging . . . that clings to [you] as a person. . . .”<sup>130</sup> It is separate from you, but

126. DR 6:270, at 421.

127. See RIPSTEIN, *Force and Freedom*, *supra* note 13, at 135–40 (arguing that slave contracts are juridically incoherent because they involve a person purporting to undertake an obligation to become a slave, which, as a thing, is incapable of having obligations).

128. DR 6:246, at 401. The original German reads “mein und dein.” See also James W. Harris, *Ownership of Land in English Law*, in THE LEGAL MIND: ESSAYS FOR TONY HONORÉ 143, 145–146 (Neil MacCormick & Peter Birks eds., 1986) (explaining that the concept of private property in land in English law requires three kinds of legal provisions: trespassory rules, transmission principles, and general use rules); Peter Birks, *The Roman Law Concept of Dominium and the Idea of Absolute Ownership*, 1985 ACTA JURIDICA 1, 20–23 (describing the necessary connection between freedom of alienation and property).

129. James Penner, *On the Very Idea of Transmissible Rights*, in PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW 244, 256 (James Penner & Henry Smith eds., 2013).

130. DR 6:295, at 441.

cannot be separated from you. Others may filch your good name from you just like they might steal your purse, but unlike your purse, *your* good name cannot become *their* good name. Similarly, the feats of bravery you accomplish in the course of your life—your *dignitas*—cannot be left to your descendants like the rest of your property.<sup>131</sup> For this reason, Kant criticizes hereditary titles of nobility as being as silly as hereditary professorships.<sup>132</sup> Since your personality rights cannot be taken away from you, they can be violated only by wrongful use. Accordingly, damage is irrelevant, and the remedy is restitution.

### C. *The Three Defects in the State of Nature*

It is central to Kant's legal philosophy that none of the rights described in the previous section can actually be realized in a condition of pure private interaction—the state of nature.<sup>133</sup> This is necessarily the case even though in such a condition persons endowed with reason can know what proper legal relations are, and even if they act on nothing but the best of intentions. Instead, civil government is required to address three structural defects in the state of nature: indeterminacy, non-reciprocity, and unilateralism. While the first two can be dealt with expeditiously, the third requires greater examination because it will become central to the discussion of international law in Part IV.

The first defect is that rights are indeterminate without a non-partisan judge.<sup>134</sup> Suppose you and another person genuinely believe that a particular thing is yours. In the absence of a neutral arbitrator, the only way to settle the dispute is by fighting. If you win, however, that does not mean your claim was correct, but only that you are a superior fighter. Your right remains indeterminate, even unnecessary. You might as well have taken it without making any claim of right, and another better fighter might

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131. *DR* 6:329, at 471 (arguing that “if an ancestor had merit he could still not bequeath it to his descendants: they must acquire it for themselves. . .”).

132. *Id.* For similar condemnations of hereditary nobility and bondage, see *PP* 8:351, at 232, and *DR* 6:348-49, at 485-86. There is, however, one heritable status—citizenship. See *DR* 6:343, at 482.

133. See *DR* 6:242, at 397 (arguing that “a *state of nature* is not opposed to social but to a civil condition, since there can be society in a state of nature, but no *civil* society (which secured what is mine by public laws.)”); *DR* 6:256, at 409 (arguing that rights to have external things as one's own are possible only in a civil condition in a lawful condition under an authority giving laws publicly).

134. RIPSTEIN, *Force and Freedom*, *supra* note 13, at 168-72.

do likewise to you.<sup>135</sup> You therefore remain in a barbaric condition where might determines right. The solution is a judiciary that issues binding decisions *publicly* and *systematically*—that is, in open court and according to principles applicable to all.<sup>136</sup>

The second defect is nonreciprocity.<sup>137</sup> As a person endowed with reason, you know that you must not use violence against others, but you are prevented from promising them that you will not do this because you cannot be sure they will do the same for you. If you disarm unilaterally you will effectively surrender yourself to the mercy of others. This is inconsistent with your dignity, and therefore not just imprudent but immoral.<sup>138</sup> The solution to this prisoner's dilemma is an executive with a monopoly on enforcement of determined rights, to be exercised, once again, publicly and systematically.<sup>139</sup>

The third defect, and the one most important to this article, relates to the acquisition of property and directly contradicts the natural law theories Benvenisti relies upon. Specifically, Kant's theory of original acquisition stands in particular contrast to Locke's theory, as expressed in the following canonical passage:

135. See Jeremy Waldron, *Kant's Legal Positivism*, 109 HARV. L. REV. 1535, 1539–40 (1996) (“The point of using force in the name of justice is to *assure* people of that to which they are entitled. But if force is being used to further contradictory ends, then its connection with assurance is ruptured. In such a situation, force is being used simply to represent the vehemence with which competing opinions about justice are held, and this use of force may well be worse than force not being put to the service of justice at all.”).

136. See Ernest J. Weinrib, *Private Law and Public Right*, 61 U. TORONTO L.J. 191, 197 (2011) (“The adjudication of liability manifests both publicness and systematicity. First, a court exercises its authority in a public manner by exhibiting justifications for liability that are accessible to public reason. . . . Second, the court's decision partakes of the systematicity of the entire legal order.”); RIPSTEIN, *Force and Freedom*, *supra* note 13, at 169–74.

137. RIPSTEIN, *Force and Freedom*, *supra* note 13, at 159–68.

138. *Id.* at 161–66. See DR 6:307, at 452 (arguing that “[n]o one is bound to refrain from encroaching on what another possesses if the other gives him no equal assurance that he will observe the same restraint towards him. No one, therefore, need wait until he has learned by bitter experience of the other's contrary disposition. . . .”).

139. See RIPSTEIN, *Force and Freedom*, *supra* note 13, at 165 (arguing that “[o]nly a ‘common and powerful will’ can ‘provide this assurance’ and can provide everyone with systematic incentives in relation to the possessions of others,” and describing that systematicity as lying in an assurance that rights will not be erased by others' wrongs, and that violations will be made “prospectively pointless.”) (*citing* DR 6:256, at 409).

Though the earth and all inferior creatures be common to all men, yet every man has a property in his own person; this nobody has any right to but himself. The labour of his body and the work of his hands we may say are properly his. Whatsoever, then, he removes out of the state that nature hath provided and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state Nature placed it in, it hath by this labour something annexed to it that excludes the common right of other men. For this “labour” being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good as left in common for others.<sup>140</sup>

Recall that Locke’s notion of leaving enough and as good in common for others plays a prominent role in Benvenisti’s justification of the altruistic duties of sovereigns. Of interest to this article, however, is Locke’s idea of mixing one’s labour as a first step to enclosing property, which has given rise to a number of well-known difficulties.<sup>141</sup> Can an undertaker acquire property in the corpses she embalms, like a mechanic acquiring a lien over the cars she is fixing?<sup>142</sup> If your labour is your “unquestionable” property, does that mean contracts for service are actually conveyances of property?<sup>143</sup> The most incisive and memorable critique comes from Jim Harris, who argued that Locke had committed a “spectacular *non sequitur*” in the first sentence of the cited passage by suggesting that persons must necessarily own themselves if they are not slaves owned by others. Instead, Harris invokes the *dominus membrorum* principle to argue that, “[f]rom the fact that nobody owns me if I am not a slave, it simply

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140. LOCKE, *supra* note 36, § 27.

141. See JAMES W. HARRIS, PROPERTY AND JUSTICE 184–88 (1996). For a celebrated critique from a scholar generally sympathetic to Locke, see Jeremy Waldron, *Two Worries About Mixing One’s Labour*, 33 PHIL. Q. 37 (1983).

142. See *Haynes’s Case* (1614) 77 Eng. Rep. 1389 (KB) (Sir Edward Coke C.J.) (holding a grave robber liable in theft with respect to winding sheet, but not the corpse, because there is no property in a dead body).

143. HARRIS, *supra* note 141, at 191–94. For an example of the results of conflating contractual and proprietary rights, see *Lochner v. New York*, 198 U.S. 45, 53 (1905) (“The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution. . . . Under that provision no State can deprive any person of life, liberty or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right.”).

does not follow that I must own myself. Nobody at all owns me, not even me."<sup>144</sup>

In contrast to Locke, Kant separates body and property by distinguishing between *innate* and *acquired* rights to objects: an "innate right is that which belongs to everyone by nature, independently of any act that would establish a right; an acquired right is that for which such an act is required."<sup>145</sup> Your body, reputation, and honor are innately yours. You do not have to account for how you came to possess them because they cannot have been in anyone else's possession first. In contrast, your right to your purse is an acquired right because, if history had taken a different course, it could very easily have been someone else's.<sup>146</sup>

With this in mind, the first step to acquiring an external object in the state of nature is by engulfing it with an innate object, much like Grotius's notion of bodily occupying a theatre seat.<sup>147</sup> When you wrap your fingers around an apple, the only way another person can get to it and try to make it theirs is to prise off your fingers, which you can resist because your fingers are innately yours.<sup>148</sup> This, however, is not enough for your control of the object to amount to "ownership" because, the moment you let go, anyone can take it. This is where the trouble starts for Grotius' theatre seat metaphor—your claim to the seat lasts only so long as you sit there. Others cannot oust you because this involves touching you. The moment you leave, however, another may grab your place.<sup>149</sup> A property right entails more than just a right not to be assaulted while occupying the thing—it means

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144. HARRIS, *supra* note 141, at 196.

145. DR 6:237, at 393.

146. RIPSTEIN, *Force and Freedom*, *supra* note 13, at 59–60.

147. DR 6:263, at 415 ("The only condition under which a *taking possession* (*apprehensio*), beginning to hold (*possessio* *physicae*) a corporeal thing in space, conforms with . . . [external freedom] is the *first* taking possession (*prior apprehensio*), which is an act of choice."). See also DR 6:268, at 419 ("We have found the *manner of acquisition* in the empirical conditions of taking possession (*apprehensio*), joined with the will to have the external object as one's own.").

148. DR 6:247-48, at 402. RIPSTEIN, *Force and Freedom*, *supra* note 13, at 94.

149. Harris illustrates this with a joke about a Home Counties man attending a cricket match in Yorkshire. Having left his hat on his seat in order to get a drink, he returns to find his place taken by a local. Upon protesting, he is told: "Nay, lad, up here it's bums that keep seats, not hats!" HARRIS, *supra* note 141, at 214.

being able to exclude others from the thing, even when you are not in physical possession of it.<sup>150</sup> Such exclusion, however, cannot be justified by simply ensuring others have enough and as good left for their needs. If you claim a right to exclude others from a certain plot of land because you have grown enough apples on it to feed everyone, they may justifiably retort that they prefer oranges and, more importantly, that it was not for you to decide that they must have apples.

This reveals a deficiency in Grotian and Lockean natural law theories of original acquisition. Merely wrapping your fingers around the apple does not change the legal rights and obligations of others—they are already under an obligation not to interfere with your person. Claiming *property* in it does change the legal rights and obligations of others—they are now obligated not to interfere with it even after you let go. No private person outside of a fiduciary can change another’s legal position, and the encloser is certainly not a fiduciary of the excluded. Harris accordingly concludes that the Grotian-Lockean approach “suffers from the following fatal flaw”: it “presupposes a unilateral power to create new trespassory obligations.”<sup>151</sup> Such obligations can be created only “omnilaterally”—that is, by the whole of society coming together as one to back up your claim to exclude others from the thing, even when you no longer physically occupy it.<sup>152</sup> The solution is to postulate an institution capable of defining the “signs” we must give one another to demonstrate taking control of a thing with an intention to continue controlling it.<sup>153</sup> There is no property without law. In order to bind everyone, the law must be made by an institution acting publicly and systematically as the voice of the united will of all the persons bound. In other words, you need a representative legislature.<sup>154</sup>

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150. *DR* 6:247, at 402 (“I shall not call an apple mine because I have it in my hand (possess it physically), but only if I can say that I possess it even though I have put it down, no matter where.”).

151. HARRIS, *supra* note 141, at 202.

152. See RIPSTEIN, *Force and Freedom*, *supra* note 13, at 157–58.

153. *DR* 6:265, at 417.

154. RIPSTEIN, *Force and Freedom*, *supra* note 13, at 157 (“[M]y appropriation can only change your legal situation if everyone, including you, has conferred a power on me to appropriate. My act of appropriation is thus a unilateral exercise of an omnilateral power, rather than a unilateral act . . . my act genuinely binds them only when the general will has authorized it.”).

*D. Legislating With Respect to Property and Personality*

Once the executive, judiciary, and legislature are set up, the rightful condition is complete.<sup>155</sup> The state is “constituted,” and you are required to enter it, not because it is so advantageous that it would be irrational to remain outside but because it is an offer you *cannot* refuse. Your consent is mandatory. If you remain outside, this means you are reserving for yourself the opportunity to use violence against others as and when you please. Others need not—indeed must not—abide this. The innate right to freedom of all persons means that others can compel you to enter into a condition with them where they will be assured of their equal freedom. Put differently, authority is necessary for freedom; you *become* free by submitting to authority.<sup>156</sup> If you choose not to submit, that makes you unfree, which in turn means you can be forced—forced to be free. Law and authority seem incompatible with freedom only if freedom is understood as *license*; that is, the ability to do whatever one pleases without constraint. If, however, freedom is understood as independence from domination by others, it becomes obvious that it cannot exist without political institutions vested with the authority to use force.

The rightful condition, however, consolidates and preserves innate and acquired rights under a system of lawfully constituted authority as property and personality rights.<sup>157</sup> To recall the previous section, property is always transmissible, and personality is always inalienable. This, however, is not to deny the existence of so-called “inalienable” forms of property such as fee tails,

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155. DR 6:316, at 459. See also RIPSTEIN, *Force and Freedom*, *supra* note 13, at 173 (demonstrating the interlocking manner in which the “legislature must authorize all acts that change, enforce, or demarcate rights; the executive must enforce rights in accordance with law, and the judiciary must decide disputes and authorize remedies, again in accordance with law.”).

156. See DR 6:316, at 459 (“[O]ne cannot say: the human being in a state has sacrificed a *part* of his innate outer freedom for the sake of an end, but rather, he has relinquished entirely his wild, lawless freedom in order to find his freedom as such undiminished, in a dependence upon laws, that is, in a rightful condition, since this dependence arises from his own lawgiving will.”).

157. RIPSTEIN, *Force and Freedom*, *supra* note 13, at 157 (arguing that while “people might come to recognize each other’s claims to property or under contracts without an omnilateral authorization . . . whether or not they accept them depends on the matter of their choices.” Instead, only under a rightful condition do any rules or dispute resolution procedures possess “genuine authority.”).

praedial servitudes, or usufructs. Rather, transmissibility simply means that “the same constraints on the conduct of others pass over to the new owner intact.”<sup>158</sup> Contrariwise, neither does the inalienability of personality mean that you are not allowed to donate your kidney. Rather, it means that you cannot sell your kidney as if it were your property, and that stringent legal protections have to be in place to ensure that your decision to alienate it is not the product of domination. This is perhaps best illustrated by the infamous passages in the *Doctrine of Right* dealing with sexual intercourse. Kant begins by observing that because a “human being cannot have property in himself, much less in another person,” making use of another’s body without infringing upon their dignity requires a “morally necessary” purpose such as procreation, rather than plain enjoyment of another “as a thing.”<sup>159</sup> Otherwise, sex becomes a “cannibalistic” form of “use by each of the sexual organs of another, [such that] each is actually a *consumable* thing (*res fungibilis*) with respect to the other, so that if one were to make oneself such a thing by *contract*, the contract would be contrary to law.”<sup>160</sup> Most legal systems the reader may be familiar with will not pursue these legal prescriptions to the extreme. Nevertheless, much of Kant’s rationale for rejecting of commercial contracts for prostitution is reflected in developed legal regimes governing sex work or bodily alienations such as euthanasia and organ transplantation. Where we permit such bodily alienations, we generally prohibit them being carried out on commercial terms, and even if we do, we take great pains to ensure that they are the result of genuine and informed choice, rather than vulnerability and exploitation.

In short, transmissibility and inalienability mean that property and personality raise exactly opposite problems for lawmakers. As Japa Pallikathayil notes, “[w]e need rules for property acquisition, which involve acquiring a right and hence imposing obligations on others, and we need rules for bodily alienation,

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158. Arthur Ripstein, *Property and Sovereignty: How to Tell the Difference*, 18 THEORETICAL INQUIRIES L. 243, 253 (2017) [hereinafter Ripstein, *Property and Sovereignty*]. See also Birks, *supra* note 128, at 20–21 (arguing that “it is not nonsense to speak of ownership of a usufruct, a right definitionally temporary and inalienable. If the law declared sheep inalienable, the conclusion would have to be that you could not own sheep but only “sheepright”: “sheepright” would be definitionally inalienable, whereas sheep are not.”).

159. *DR* 6:359, at 495.

160. *DR* 6:359-60, at 494–95.



which involve renouncing a right and hence relieving others of obligations.”<sup>161</sup> This difference in treatment reflects the deeper conviction that personality rights are not actually rights of “ownership” at all. One cannot be both the object and the subject of property rights. Nobody owns you, not even you.

### III. PUBLIC RIGHT: THE STATE AS FIDUCIARY

This Part of the article deals with sovereignty. Notwithstanding the focus on public law, private law themes of damage, injury, and fiduciary relations continue to play a central role. In particular, this Part is in agreement with Benvenisti in understanding the state as a fiduciary. It will be demonstrated firstly that the state is a person and secondly that, as the public fiduciary, the state has obligations to provide its subjects with “public goods.”

#### A. *The Separate, Public Person of the State*

Once the state is constituted, the question arises as to whether it is by nature a “person” or a “thing.” While trained by long tradition to call it a person, international lawyers differ significantly in what they mean by this usage. According to the standard liberal view, it tends to mean that the state acts as a placeholder for a collectivity of natural “flesh-and-blood” individuals. For instance, in his defense of private law analogies to model legal relations between states, Hersch Lauterpacht observes that “[t]he analogy—nay, the essential identity—of rules governing the conduct of states and of individuals is not asserted for the reason that states *are like* individuals; it is due to the fact states *are composed* of individual human beings. . . .”<sup>162</sup> Likewise, Benvenisti describes the state as “not more than the aggregate of individuals who define their and others’ property rights through the political process.”<sup>163</sup>

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161. Japa Pallikkathayil, *Persons and Bodies*, in FREEDOM AND FORCE: ESSAYS ON KANT’S LEGAL PHILOSOPHY 35, 50 (Sari Kisilevsky & Martin J. Stone eds., 2017).

162. Hersch Lauterpacht, *The Grotian Tradition in International Law*, 23 BR. Y.B. INT’L L. 1, 27 (1946).

163. Eyal Benvenisti, *Sovereignty and the Politics of Property*, 18 THEORETICAL INQUIRIES L. 447, 448 (2017). See LOCKE, *supra* note 36, § 120 (“By the same Act therefore, whereby any one unites his Person, which was before free, to any Commonwealth, by the same he unites his Possessions, which were before free, to it also; and they become, both of them, Person and

On such a view, the state and its subjects are one and the same. As Lauterpacht explains:

[B]ehind the mystical, impersonal, and therefore necessarily irresponsible personality of the metaphysical state there are the actual subjects of rights and duties, namely, individual human beings . . . [t]he individual is the ultimate unit of all law, international and municipal, in the double sense that the obligations of international law are ultimately addressed to him and that the development, the well-being, and the dignity of the individual human being are a matter of direct concern to international law.<sup>164</sup>

Because the state's personhood is simply an aggregation of the personhoods of the individual human beings who are the "ultimate unit of all law," the former may presumably be picked apart and rearranged if conducive to the benefit of the latter.<sup>165</sup> Or, in Geoffrey Howe's inimitable phrase: "Sovereignty is not virginity, which you either have or you don't. Rather, it is like . . . [a] bundle of sticks, and the subject of a never-ending series of transactions between nation-states, handing over some things and taking back others."<sup>166</sup>

On this notion of the state as a collectivity of individuals, it would seem that sovereign or *public* obligations are in essence actually rights and obligations operating "horizontally" between private parties. For instance, Henry Shue describes states as "mediating" institutions for "perfecting" pre-political rights and duties between private individuals to guarantee "a few basics . . . when helpless to secure them for [themselves],"<sup>167</sup> and that "negative" rights create corresponding duties on all persons public and private, while "positive duties need to be divided and assigned among bearers in some reasonable way."<sup>168</sup> This approach of collapsing all public rights and obligations into claims arising

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Possession, subject to the Government and Dominion of the Commonwealth, as long as it hath a being.").

164. Lauterpacht, *supra* note 162, at 27.

165. See Peters, *supra* note 58, at 534–55.

166. Geoffrey Howe, *Sovereignty and Interdependence: Britain's Place in the World*, 66 INT'L AFF. 675, 679 (1990) (explicitly likening sovereignty to freehold real estate ownership in English law). See also Lauterpacht, *supra* note 162, at 29–30 ("The very notion of sovereignty, which Grotius conceived, like property, as dominion held under law, helped to deprive it of the character of absoluteness and indivisibility.").

167. Henry Shue, *Mediating Duties*, 98 ETHICS 687, 687 (1988).

168. *Id.* at 690.

essentially in private relationships seems unable to account for certain important intuitions about the nature of human rights claims. For instance, if your neighbor were to drag you into her dungeon and waterboard you, we would say that this constitutes a tort against you, rather than a violation of your human rights. The latter occurs only if her conduct is not prevented or redressed by appropriate civil and criminal legislation, adjudication, and enforcement. Human rights violations seem to require more than just private moral failures. Instead, they imply a *public* failure by your entire community. This quality of publicness, however, cannot be accounted for as an aggregation of many different horizontal claims against each and every individual community member, like a mass tort. Rather, it has the characteristic of a failure by someone whose job it is to take care of you—a fiduciary. This is reflected in legal practice, where there are vanishingly few judicial decisions or constitutional provisions asserting the horizontality of human rights between private persons—instead, the overwhelming trend being to find them as possessing “indirect” horizontal effect in private legal relations, on the grounds that the state must be presumed to have posited the private law in a manner consistent with its human rights and constitutional obligations.<sup>169</sup>

There are other areas of legal practice similarly irreconcilable with the conception of the state as an aggregation of individuals. Consider the example of a sovereign debt. Ordinarily, an unsecured debt is a contractual obligation that expires with the debtor, and which cannot be passed on to her heirs. If the state is not more than the collection of citizens who make it up, a sovereign debt ought logically to expire with the last citizen alive at the time it was incurred. This is obviously not the case. Instead, states are liable for their debts no matter how many generations it takes to pay them off.<sup>170</sup>

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169. For readings critical of this trend, see Aoife Nolan, *Holding Non-State Actors to Account for Constitutional Economic and Social Rights Violations: Experiences and Lessons from South Africa and Ireland*, 12 INT'L J. CONST. L. 61, 65, 88, *passim* (2014); Stu Woolman, *The Amazing, Vanishing Bill of Rights*, 124 S. AFR. L.J. 762, 763 (2007) (observing the South African Constitutional Court's preference for conform-interpretation of common law and statutes with constitutional rights and “persistent refusal to engage in the direct application of the Bill of Rights,” notwithstanding explicit textual grant in § 8(2)–8(3) of the South African Constitution).

170. See Frederick W. Maitland, *The Crown as Corporation*, in MAITLAND: STATE, TRUST AND CORPORATION 32, 39–40 (David Runciman ed., 2003).

In contrast to the view of the state as an aggregation of its people, Kant recognizes the state as a distinct moral person, with a life and purposes separate from those of its subjects and officials.<sup>171</sup> For this reason, Kant argues that plundering the population of a defeated enemy state is prohibited because “to force individual persons to give up their belongings . . . would be robbery, since it was not the conquered people who waged the war; rather, the state under whose rule they lived waged the war *through the people*. . . .”<sup>172</sup> Attributability and responsibility—the defining characteristics of personhood—belong not to the people, but to the separate person of their state. This notion of separate personality is also reflected in Ronald Dworkin’s metaphor of an orchestra, which is much more than just an aggregation of musicians playing particular notes on particular instruments at particular times.<sup>173</sup> Instead, it constitutes “a personified unit of agency in which [the musicians] no longer figure as individuals but as components. . . .”<sup>174</sup> As such, Dworkin argues that “[w]hen an integrated community exists, the statements citizens make within it about its success or failure are not simply statistical summaries of their own successes or failures as individuals. An integrated community has interests and concerns of its own—its own life to lead.”<sup>175</sup>

Thus, on the republican conception, the state is a person in its own right, possessed of a life and purposes distinct from its individual subjects and officials. Its *sole* purpose is to provide a condition where no member of the political community is subject to

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171. For a different view, see Fernando R. Tesón, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53, 70–71 (1992) (arguing that the “state . . . does not acquire moral value greater than its components”, and that the “state as moral person is just an analogy. . . .”). Tesón derives this conclusion from *PP* 8:344, at 318, which he concedes “seems to conceive of the state in a holistic way as a moral person. . . .” Tesón, *supra* note 171, at 70.

172. *DR* 6:348, at 485.

173. RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* 226 (2000).

174. *Id.*

175. *Id.* The strong personification of the state is in fact the source of Ronald Dworkin’s interpretive principle of “integrity,” understood as the coherence over time and space of a community’s scheme of justice. Dworkinian integrity draws its strength from the essentially Kantian idea that a person “cannot treat himself as the author of a collection of laws that are inconsistent in principle. . . .” RONALD DWORKIN, *LAW’S EMPIRE* 189 (1986). Dworkin never quite explains how the orders of another person, no matter how well-integrated, can count as self-legislation. The fiduciary notion of authority closes that gap.

the will of another. To this end, it wields authority over subjects—that is, claims an entitlement to determine their legal rights and duties, to bind them by its pronouncements. This means that the state is simply an extension of the private law concept of a fiduciary.<sup>176</sup> Since it possesses its subjects, it may not also use them. Whatever decisions it makes in respect of its subjects must be consistent with purposes they could have set for themselves. Just as a beneficiary requires the intercession of her trustee in order to exercise her rights, say, in a piece of property, neither can an individual enjoy the freedom that is her innate right without the state. Equally, just as the private law contains a set of principles to ensure that private fiduciary relationships do not degenerate into exploitation, public law contains a set of principles to ensure that authority does not degenerate into domination: *human rights*.<sup>177</sup> Human rights are neither entitlements to the satisfaction of a set of basic interests, nor are they the fount of the entire global legal order. Instead, their sole purpose is to ensure that those who possess us neither use us, nor permit others to use and possess us.

Accordingly, this article is in agreement with Benvenisti's conception of sovereigns as fiduciaries. It is submitted, however, that this commitment necessarily requires the state-fiduciary to be a separate person from its subjects-beneficiaries. In Peter

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176. See EVAN FOX-DECENT, *SOVEREIGNTY'S PROMISE: THE STATE AS FIDUCIARY* 111–12 (2011) (arguing, from the premise that no one may be a judge in their own cause, that private parties are juridically incapable of authority, thus making them reliant upon the state to provide legal order, thereby making the state a fiduciary of them.). See also *Stone v. Mississippi*, 101 U.S. 814, 820 (1879) (“The power of governing is a trust committed by the people to the government. . . . The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights.”); *Black River Regulating Dist. v. Adirondack League Club*, 121 N.E.2d 428, 433 (N.Y. 1984) (holding that “the power conferred by the Legislature is akin to that of a public trust to be exercised not for the benefit or at the will of the trustee but for the common good.”).

177. See EVAN J. CRIDDLE & EVAN FOX-DECENT, *FIDUCIARIES OF HUMANITY: HOW INTERNATIONAL LAW CONSTITUTES AUTHORITY* 106 (2016) (arguing that “[h]uman rights protect individuals against state domination and instrumentalization by entitling all persons to be treated in certain ways by public institutions as a matter of rights. Human rights are thus claim-rights against public authorities.”). See generally *id.* at ch. 3. See also David L. Attanasio, *The State Obligation to Protect*, chs. 3, 6 (2015) (unpublished Ph.D. dissertation, University of California, Los Angeles) (arguing that positive human rights obligations can only be accounted on fiduciary principles).

Birks's excellent phrase, fiduciary obligations are "inseparably compound"<sup>178</sup>: they envisage one person—the fiduciary—taking "positive steps in the interest of *another*"<sup>179</sup>—the beneficiary. If states-fiduciaries were one and the same as their subjects-beneficiaries, we would have no criteria by which to judge and criticize the former's relationship with the latter. Any subjects-beneficiaries disagreeing with the directives of the state-fiduciary would effectively be contradicting themselves.

For this reason, it would be deeply destructive of the human rights practice if human interests in, say, security could oust sovereign personality as the organizing principle of public law. This was demonstrated in the English case of *A v. Home Secretary*, which involved the legality of "control orders," which kept under indefinite detention foreign nationals suspected of terrorist links, but who could not be deported to their home countries because they risked being tortured.<sup>180</sup> The key question for the House of Lords was whether there was a "public emergency threatening the life of the nation"<sup>181</sup> justifying a "derogation" from the rights to liberty and trial guaranteed by the U.K. Human Rights Act of 1998 and the ECHR.<sup>182</sup> In his speech denying the legality of the control orders, Lord Hoffmann observed that:

The "nation" is a social organism, living in its territory (in this case, the United Kingdom) under its own form of government and subject to a system of laws which expresses its own political and moral values . . . The life of the nation is not coterminous with the lives of its people. The nation, its institutions and values, endure through generations. In many important respects, England is the same nation as it was at the time of the first Elizabeth or the Glorious Revolution. The Armada

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178. Peter Birks, *The Content of Fiduciary Obligation*, 34 ISRAEL L. REV. 3, 33 (2000).

179. *Id.* at 37–38. (Emphasis added).

180. *A and others v. Secretary of State for the Home Department; X and another v. Secretary of State for the Home Department*, [2004] UKHL 56 (appeal taken from Eng.).

181. See *Lawless v. Ireland*, (1961) 1 Eur. H.R. Rep. 15, ¶ 28 (defining the phrase as "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed.").

182. Human Rights Act, 1998, c. 42 (U.K.); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221. The Human Rights Act incorporates the treaty protections under the ECHR into domestic British law.

threatened to destroy the life of the nation, not by loss of life in battle, but by subjecting English institutions to the rule of Spain and the Inquisition. The same was true of the threat posed to the United Kingdom by Nazi Germany in the Second World War.<sup>183</sup>

Lord Hoffmann added that he was willing to accept the Home Secretary's submissions that there were credible threats of terrorist plots, and that he "did not underestimate the ability of fanatical groups of terrorists to kill and destroy" individual subjects.<sup>184</sup> Nevertheless, this in itself was insufficient to "threaten the life of the nation."<sup>185</sup> Instead, the "real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, [came] not from terrorism but from laws such" as the control orders.<sup>186</sup>

In exactly this sense, Kant remarks that people who have united themselves into a society and therefore share a general will must regard the state as existing in perpetuity.<sup>187</sup> The state lives and dies by its fiduciary purpose alone: its immortality is "a pure normative requirement, grounded in its ability to speak and act for everyone" notwithstanding changes in membership.<sup>188</sup> Thus, contrary to a prominent trend in contemporary human rights literature,<sup>189</sup> a very strong personification of the

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183. *A v. Home Secretary*, [2004] UKHL, ¶ 91.

184. *Id.* ¶ 96.

185. *Id.*

186. *Id.* See also *Judicial Guarantees in States of Emergency*, 9 *Inter-Am. Ct. H.R.* (ser. A), at 40, OEA/ser.L/VI/111.9, doc. 13 (1987) (noting that armed conflict may justify a declaration of a state of emergency only if finite in duration, thus prohibiting open-ended emergency rule); CRIDDLE & FOX-DECENT, *supra* note 177, at 136–37 (arguing that "terrorist violence will rarely justify a state's recourse to emergency powers" because a "threat to the organized life of the community" lies in the "disrupt[ion of] the state's ability to guarantee its subjects' secure and equal freedom" rather than the danger to the lives of individual subjects).

187. *DR* 6:326, at 468.

188. RIPSTEIN, *Force and Freedom*, *supra* note 13, at 272–73.

189. See John Tasioulas, *Towards a Philosophy of Human Rights*, 65 *CURRENT LEG. PROBS.* 1, 24 (2012) (observing and approving the fact that "the language of human rights is often deployed by those implacably opposed to the state, or to its assertions of legitimacy. . . ."); Peters, *supra* note 58, at 514 (arguing that post-Cold War developments in international law "definitely ousted the principle of sovereignty from its position as the *Letztbegründung* (first principle) of international law" and that the doctrine of sovereign personality "remains foundational only in a historical or ontological sense. . . .") See

state is not only compatible with the human rights practice but essential to it.<sup>190</sup> In particular, claims of positive or socioeconomic rights are in no way “basic” or “fundamental” but are in fact the most extravagant demands anyone could ever make as a matter of right, such that no private individual could ever be held to such obligations, much less allowed the awesome powers they come with. These can be borne and wielded only by one indivisible person—the state.<sup>191</sup>

Interpreting human rights and sovereignty along such republican lines allows one to situate the human rights practice neatly alongside the rule of law and democracy and to picture these as integrated and mutually supporting, rather than as incompatible and opposed to one another. That said, it contradicts a central orthodoxy of the human rights movement—that they are “pre-political,” or held purely in virtue of being human.<sup>192</sup> Rather, human rights are fully political and are held in virtue of a very particular status; that of being a *subject*.<sup>193</sup> This explains

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also Louis Henkin, *That S Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 68 *FORDHAM L. REV.* 1, 2 (1999) (arguing that “a state is not a person, but an abstraction—and its relation to other abstractions, such as the governments which represent states, has inevitably brought distortion and confusion.”).

190. H el ene Ruiz Fabri, *Human Rights and State Sovereignty: Have the Boundaries been Significantly Redrawn?*, in *HUMAN RIGHTS, INTERVENTION, AND THE USE OF FORCE* 33, 41 (Philip Alston & Euan MacDonald eds., 2008) (arguing that the “human rights discourse cannot afford to treat the state as nothing more than an oppressive structure to be opposed wherever possible” and that the “dilution of [State] power does not automatically correspond to improvements in the level of actual human rights protections. . .”).

191. *Id.* at 84 (arguing that “[h]uman rights are, in effect, structurally dependent on the existence of an authority capable of guaranteeing them; in the absence of any “horizontal effect” of these rules (which would represent one further step on the path to their objectification), the subjects of the obligations both to respect and protect them are states.”).

192. See, e.g., A. JOHN SIMMONS, *JUSTIFICATION AND LEGITIMACY: ESSAYS ON RIGHTS AND OBLIGATIONS* 185 (2001) (“[H]uman rights are rights possessed by all human beings (at all times and in all places), simply in virtue of their humanity . . . [as] natural rights that are innate and that cannot be lost (that is, that cannot be given away, forfeited, or taken away.”); Charles Beitz, *Human Rights and the Law of Peoples*, in *THE ETHICS OF ASSISTANCE: MORALITY AND THE DISTANT NEEDY* 193, 196 (Deen K. Chatterjee ed., 2004) (describing Simmons’s position as “orthodox.”).

193. See Lord Dyson M.R., *The Extraterritorial Application of the European Convention on Human Rights: Essex Lecture 2014*, at 5 (Jan. 30, 2014),



the discussion on human rights jurisdiction in Part I, and in particular, the claim that a state may drop bombs upon distant strangers without them having even the beginnings of a human rights claim. Consider in this regard the discussion towards the end of the *Al-Skeini* decision, where the ECtHR considered a hypothetical scenario in which soldiers cross over into foreign territory and shoot civilians there.<sup>194</sup> While earlier decisions suggested *obiter* that those circumstances gave rise to human rights jurisdiction,<sup>195</sup> the *Al-Skeini* court instead opined that jurisdiction could arise only if the civilians were first ordered into a van, taken to a nearby cave, and then shot.<sup>196</sup> Such a position would be absurd and outrageous on the understanding of the human rights practice as advanced by Benvenisti—that is, as imposing upon states an obligation to advance human welfare wherever they have the capacity to do so.

It makes sense, however, on the notion of human rights as public fiduciary claims made not against those wielding mere *power*, but against those wielding *authority*.<sup>197</sup> If you are merely shot by marauding soldiers or killed in a drone strike, you have only been affected, albeit extremely adversely, as if by a gunman. If, however, you were ordered into a van and transported to a cave before being shot, you can say that for that brief duration, you were being governed. This is why the threshold for human rights jurisdiction is described in *Al-Skeini* as “*authority and control*” rather than “*power or effective control*.”<sup>198</sup> Only under the for-

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<https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/lord-dyson-speech-extraterritorial-reach-echr-300114.pdf> (“The reason [human rights] jurisdiction has been established is because there is a relationship between the State and an individual that can and should entail a responsibility on the part of the State to observe that individual’s human rights. The categories of exceptional circumstances are *manifestations* of jurisdiction but they are not the *reason* for jurisdiction.”).

194. *Al-Skeini*, (2011) 53 Eur. Ct. H.R., ¶¶ 133–40.

195. *Issa v. Turkey*, App. No. 31821/96, 41 Eur. Ct. H.R. 567, ¶ 71 (2004); *Pad and others v. Turkey*, App. No. 60167/00, Eur. Ct. H.R., ¶ 54 (June 28, 2007); *Isaak v. Turkey*, App. No. 44587/98, Eur. Ct. H.R., ¶ 19 (Sept. 28, 2006).

196. *Al-Skeini*, (2011) 53 Eur. Ct. H.R., ¶ 136.

197. Besson, *supra* note 75, at 875–77 (arguing that a claim of authority, which she calls “normative guidance,” is the key “constitutive element” of human rights jurisdiction).

198. This is the preferred formula of the UN Human Rights Committee (HRC). See UN Hum. Rts. Comm., General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 10 U.N.

mer condition can claims of human rights be made. This confirms Hannah Arendt's prescient critique of the UDHR, in which she observed that "we are not born equal; we become equal as members of a group on the strength of our decision to guarantee ourselves mutually equal rights."<sup>199</sup> This, however, leads to a paradox where "the loss of human rights . . . coincides with the instant when a person becomes a human being in general . . . representing nothing but his own absolutely unique individuality which, deprived of expression within and action upon a common world, loses all significance."<sup>200</sup> In the state of nature, no one can count on any rights whatsoever.

### *B. Public Goods: Ripstein's Roads*

A political community needs certain things in order to ensure the independence of all its members, which cannot be held or provided privately. As the public fiduciary charged with ensuring the dignity of its subjects, the state must provide them. These are *public goods*.

Contemporary legal discourse overwhelmingly understands public goods in substantive economic terms as utility-enhancing things that are nonrivalrous and nonexcludable, leaving private persons no incentive to produce them, but instead to free ride. In contrast, using roads as an archetype, Ripstein provides a definition of public goods in *legal* terms as things that must be provided publicly to ensure the freedom of all members of the political community.<sup>201</sup> Ripstein offers the following thought experiment: Imagine that all the land in your community was completely under private ownership, such that there was no way of traveling from one part of the territory to another without the permission of individual landowners. Under such conditions, your ability to communicate with others would be rendered completely subject to the pleasure of your neighbors. Welfare considerations are irrelevant: your house may be so vast or your curiosity so stunted that you are happy never to step outside.<sup>202</sup> In-

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Doc. CCPR/C/21/Rev.1/Add.13 (2004). HRC General Comments are not legally binding.

199. HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 301 (2d ed. 1958).

200. *Id.* at 302.

201. RIPSTEIN, *Force and Freedom*, *supra* note 13, at ch. 8.

202. *Id.* at 248.

stead, it is the very fact that you need your neighbor's permission to leave your land, or to be let back in if you have left, which constitutes the affront to your dignity.<sup>203</sup>

You would have no recourse against your neighbors in private law, for they neither damage your property nor injure you. In no way do they wrongfully deprive you of the land that you have, because by refusing to let you cross their land, they merely use their land in a manner which makes yours unsuitable for your desired projects.<sup>204</sup> Nor do they wrongfully use your land, so long as they do not set foot on it. Why then should you worry? Because in this condition, "*somebody else* gets to decide" countless crucial aspects of your life, such as whether or when you can step outside, or whom you are allowed to associate with, as if you were a serf under their lordship.<sup>205</sup> You will not be the master of the land. Rather, the land will be the master of you.<sup>206</sup> This systemic problem cannot be solved by merely bundling rights of private ownership with easements of necessity in favor of all other persons, for that would render landowners subject to the whims of anyone who might want to cross it. They would, for instance, have to seek the individual consent of everyone in the community before they could, say, build an extension.<sup>207</sup> Instead, the solution is for the state to build and maintain a system of publicly administered spaces for all persons to travel upon—*roads*.

Thus described, roads, highways, and waterways are designated as public goods not because they facilitate the substantive good of navigability,<sup>208</sup> but to ensure that no person will be made

203. *Id.* at 247–48.

204. *Id.* at 245–46.

205. *Id.* at 246. *See id.* at 248 (arguing that "the right to be your own master is contrastive: no other person is your master. A neighbor who is entitled to decide who you can associate with would be your master.").

206. Consider the *glebae adscripti*—a category of slave "adscripted" to the land in that they were forbidden to leave it, and title to them ran with the land. Kant mentions them twice in the *Doctrine of Right*, in the first of which he describes them as "*grunduntertänig*"—that is, as "subservient to the land." *DR* 6:324, at 466, and 6:330, at 471.

207. RIPSTEIN, *Force and Freedom*, *supra* note 13, at 252.

208. Under Roman law, interdicts could be issued preventing work from being done on public rivers regardless of whether they were navigable. DIG. 43.13.1.2–3 (Ulpian, Ad Edictum 68). *See also Van Niekerk & Union Government (Minister of Lands) v. Carter* (1917) A.D. 359, 373 (Supreme Court of Appeal) (S. Afr.) (Innes C.J.) (observing that "[s]o far as their public character was concerned, the Roman law drew no distinction in principle between navigable

systematically dependent upon the arbitrary choices of others. The same rationale applies to requirements of socioeconomic justice, such as the provision of adequate housing and basic education.<sup>209</sup> A homeless person may not sleep upon the property of another without their permission, nor may she sleep on the streets without being a public nuisance. Illiterate people tend to be systematically dependent on those who can read. Thus, unless housing and education are made available and affordable, persons are put in a position where they are systematically dependent upon the kindness of others. Nobody could consent to such conditions consistently with their dignity as a free person not subject to the will of another.<sup>210</sup>

Finally, the freedom-based rationale for public goods also applies to the environment. A polluter affects the ability of the individuals in his vicinity to make use of their means—their bodily health and property. Trespass is unavailable if there is no tangible physical invasion.<sup>211</sup> On the other hand, private nuisance, defined as the “nontrespassory invasion of another’s interest in

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and non-navigable rivers, though they were in some respects separately dealt with by the Praetor’s Edicts.”).

209. Kant argues that the moral obligation to enter into an original contract implies that the State must provide “the means of sustenance to those who are unable to provide for even their most necessary natural needs.” *DR* 6:326, at 468. Note that this and the surrounding passages are unusual and differ from the general tenor of his legal theory, in that they seem to invoke welfare concerns. As such, it may be more accurate to describe this article’s justification of socioeconomic rights as a *Kantian* argument, based upon Kant’s contemporary interpreters. See generally RIPSTEIN, *Force and Freedom*, *supra* note 13, at ch. 9; Evan Fox-Decent & Evan J. Criddle, *The Fiduciary Constitution of Human Rights*, 15 *LEG. THEORY* 301, 330–32 (2009); Ernest J. Weinrib, *Poverty and Property in Kant’s System of Rights*, 78 *NOTRE DAME L. REV.* 795, 810–21 (2002).

210. RIPSTEIN, *Force and Freedom*, *supra* note 13, at 279–81.

211. Rechtshaffen and Antolini argue that “[i]n the environmental context, a key issue in a trespass action is whether an appropriate “object” has indeed entered plaintiff’s property. Traditionally, the thing has to be “tangible,” that is visible—such as shrapnel from a bullet, a utility line, or an arm—and it must have caused “direct” interference. . . .” While they note that some courts have “loosened up on” the directness requirement in the wake of scientific advances regarding “dust, vibration, and smoke,” they also acknowledge that “[m]any courts have been unwilling to extend trespass in this direction because it would produce ‘too much liability.’” (internal citations omitted). Clifford Rechtschaffen & Denise E. Antolini, *Common Law Remedies: A Refresher*, in *CREATIVE COMMON LAW STRATEGIES FOR PROTECTING THE ENVIRONMENT* 11, 14–15 (Clifford Rechtschaffen & Denise E. Antolini eds., 2007).

the private use and enjoyment of land,”<sup>212</sup> requires applicants to prove non-negligible damage and trace its causation by the individual defendant polluter.<sup>213</sup> This is all but impossible where there are many different polluters contributing to environmental degradation, which takes place slowly over time.<sup>214</sup> Thus, just like the inhabitants of Ripstein’s roadless community, victims of pollution living under a system of pure private right are frustrated not just in the achievement of particular projects, but rendered systematically subject to the will of polluters. This calls for a public and systematic solution in the form of environmental regulation, which the state is obligated to provide.

The state’s obligation to provide public goods endows it with rights to do so and to compel subjects into doing what is necessary to maintain them. It may therefore impose taxes, expropriate land under eminent domain, and allow others to use or even destroy others’ property in emergencies.<sup>215</sup> This is part of the offer that cannot be refused. You are unfree—a prisoner in your own home—unless you agree to the scheme of public roads, so force may be employed against you to secure your freedom.

Finally, conduct that interferes with or frustrates the state’s rights regarding the provision of public goods constitutes a wrong not against the individual subjects harmed, but only

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212. RESTATEMENT (SECOND) OF TORTS, § 821 D (1979).

213. See, e.g., *Louisiana ex rel Guste v. M/V Testbank*, 752 F.2d 1019 (5th Cir. 1985), cert. denied, 477 U.S. 903 (1986) (denying claims by plaintiffs, whose fishing and shrimping activities were disrupted by an oil spill caused by defendant).

214. See e.g., James R. Allum, “An Outcrop of Hell”: *History, Environment, and the Politics of the Trail Smelter Dispute*, in *TRANSBOUNDARY HARM IN INTERNATIONAL LAW: LESSONS FROM THE TRAIL SMELTER ARBITRATION* 13, 19–20 (Rebecca M. Bratspies & Russell A. Miller eds., 2006) (describing the development of Canadian jurisprudence on environmental torts, whereby the onset of the industrial revolution in the early twentieth century led to polluter’s liability being assessed against the productive value of the polluting activity, such that courts “demanded absolute proof of “tangible economic injury” before granting compensation and only reluctantly imposed conditions on the future operations of even the most egregious offenders.”).

215. RIPSTEIN, *Force and Freedom*, supra note 13, at 253 (citing *Taylor v. Whitehead* (1781) 99 Eng. Rep. 475, 477 (K.B.) (Eng.) (Lord Mansfield C.J.) (holding that while the flooding of a private easement will not entitle the holder to traverse on land to the side of it, “[h]ighways are governed by a different principle. They are for the public service, and if the usual tract is impassable, it is for the general good that people should be entitled to pass in another line.”).

against the state, in *public* nuisance.<sup>216</sup> Public nuisance is structurally distinct from the complaint of an individual subject in private nuisance. Firstly, it is available only for interference with a “public right”—that is, “an indivisible resource shared by the public at large, like air, water, or public rights of way.”<sup>217</sup> Secondly, it cannot be explained as an aggregation of harms suffered by multiple private persons.<sup>218</sup> To illustrate, imagine you and your friends decide to play football in the middle of a highway, thereby causing a traffic jam. The “victims” whom you hold up in traffic may lose significant income as a result of being made late for various appointments, but they nevertheless have no cause of action against you.<sup>219</sup> Your conduct harms them, but does not wrong them. Instead, the only person who may complain of a wrong is the state, in public nuisance.<sup>220</sup> As regards this wrong, however, harm is irrelevant.<sup>221</sup> You would be liable

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216. RIPSTEIN, *Force and Freedom*, *supra* note 13, at 261–62.

217. *State v. Lead Industries Assn.*, 951 A.2d 428 (R.I. 2008) (holding paint manufacturers not liable for harms caused by lead paint in private homes under private nuisance) (citations omitted).

218. RESTATEMENT (SECOND) OF TORTS §821B, cmt. g (1979) (“Conduct does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons.”); Thomas W. Merrill, *Is Public Nuisance a Tort?*, 4 J. TORT L. 1, 10 (2011).

219. Anglo-American common law is sometimes thought to allow private litigants to recover “special injury” under public nuisance. *Iveson v. Moore* (1699) 91 Eng. Rep. 486 (KB) (Eng.) (holding that deterioration of plaintiff’s coals caused by defendant’s obstruction of highway is recoverable as special damage); *Rose v. Miles* (1815) 105 Eng. Rep. 773 (KB) (Eng.) (holding that plaintiff barge owner is allowed to recover special damages from defendant, whose obstruction of canal required him to transport goods overland at great cost). Merrill argues that the special damage exception is the result of a misreading of a sixteenth-century case, and that contemporary doctrine recognizes that the private individual’s claim is a separate cause of action from the public nuisance. Merrill, *supra* note 218, at 13–15, *citing* an anonymous Year Book decision of 1535, reported at Y.B. Mich., 27 Henry 8, n. 27. *See also* RESTATEMENT (FIRST) OF TORTS, *Introduction to ch. 40*, 217–18 (1939) (“An individual cannot maintain an action for a public nuisance as such. . . . The private action for personal injuries from a public nuisance, like the action for private nuisance, is an action on the case, and it is often called an action for nuisance.”).

220. RIPSTEIN, *Force and Freedom*, *supra* note 13, at 261–62. *See also* Merrill, *supra* note 218, at 12–16 (arguing that public nuisance is enforced only by public actions).

221. *See* Merrill, *supra* note 218, at 17 (arguing that public nuisance “does not require proof of actual injury,” meaning harm, nor does it “typically require that the defendant be shown to have engaged in particular acts giving rise to

in public nuisance even if, miraculously, no traffic was disrupted at all.<sup>222</sup>

Thus stated, Ripstein's theory of public goods bears an obvious resemblance to the public trust doctrine in U.S. environmental law. In the celebrated article in which that doctrine was first expounded, Joseph Sax observed that of the three strands of precedent that he drew from, the one "with the greatest historical support" was one which held "that certain interests are so intrinsically important to every citizen that their free availability tends to mark the society as one of citizens rather than of serfs."<sup>223</sup> Ripstein's account differs, however, in that it does not suggest or require any notion of *property* rights.<sup>224</sup> It thus avoids a number of difficulties identified by Sax regarding the idea of common property ownership by citizens.<sup>225</sup> For instance, governments are constitutionally obligated to compensate owners for takings of property. If, however, the owners are the people, then governments, as representatives of the people, may presumably just pay themselves.<sup>226</sup> Beneficial ownership also suggests that, contrary to law and policy, the designation of things as trust property is irrevocable.<sup>227</sup> In the end, Sax concedes that the fundamental concern is not about the state's rights and obligations

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the condition or that the defendant did so in breach of some duty or standard of care.").

222. *Id.* at 10 ("The blockage is therefore an injury common to the general public. It does not matter whether the road or the waterway is actually used by everyone or indeed by anyone at all.").

223. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 484 (1970). *See also* Joseph L. Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185, 189 (1980) (observing that French customary laws preserving forests, meadows and pastures as common property preserved a measure of economic independence of the peasantry from their feudal lords, which was gradually lost by the enclosure of the commons).

224. *See, e.g.*, *City of Milwaukee v. State*, 193 Wis. 423, 449 (1927) ("The equitable title to those submerged lands vests in the public at large, while the legal title vests in the state, restricted only by the trust, and the trust, being both active and administrative, requires the law-making body to act in all cases where action is necessary, not only to preserve the trust, but to promote it.").

225. *Id.* at 484 (remarking upon the "rather dubious notion that the general public should be viewed as a property holder.").

226. Sax, *supra* note 223, at 479-80.

227. *Id.* at 482 ("However strongly one might feel about the present imbalance in resource allocation, it hardly seems sensible to ask for a freezing of any

relating to property but about its *status* as an authority: the state may not “divest itself of authority to govern the whole of an area in which it has responsibility to exercise its police power . . . in effect, to abdicate legislative authority over navigation.”<sup>228</sup>

These problems of property do not arise in legal systems based upon the Roman law. For instance, in the South African case of *Mostert Snr v. S*, the defendant farmers had, among other things, been convicted of theft for illegally abstracting water from the Lomati river.<sup>229</sup> On appeal, the South African Supreme Court of Appeal reasoned that:

Roman law recognised certain things as being *res extra patrimonium* which were incapable of being owned, including those things classified as *res communes* being “things of common enjoyment, available to all living persons by virtue of their existence.” Public water, running in a river or a stream, was recognised as being *res communes* and therefore incapable of being owned. . . . As water in a public stream was therefore incapable of being owned, it was also incapable of being stolen. . . .<sup>230</sup>

The defendants’ conviction for theft was accordingly reversed, leaving them liable solely for other offenses.<sup>231</sup> This result, though curious, is correct. As the Scottish judge Lord Kames once held, if rivers and other public goods were property, the state could potentially alienate them to one person, thus “putting it in the power of one man to lay waste a whole country.”<sup>232</sup>

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future specific configuration of policy judgments, for that result would seriously hamper the government’s ability to cope with the problems caused by changes in the needs and desires of the citizenry.”).

228. *Id.* at 489, citing *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892).

229. *Mostert Snr. and another v. S* (2010) 2 All SA 482 (Supreme Court of Appeal) (S. Afr.).

230. *Id.* ¶¶ 22–23.

231. *Id.* ¶ 36.

232. *Magistrates of Linlithgow v. Elphinstone*, (1768) 3 Kames’s Decisions 331, 332 (S.C.) (Scot.). See also *H. Jones & Co. Pty. Ltd. v. Kingborough Corporation* (1950) 82 C.L.R. 282, ¶ 18 (Aus.) (“A right to use the water of a stream (and all the water thereof if that can lawfully be done) is illusory if the flow of the stream can be diminished at will by another person. A positive right in a landowner to the use of the water of a stream *prima facie* invites a right to present such interference with the stream as would prevent him from using the water.”).



*C. Limitations upon the Right to Provide Public Goods*

Because the state's right to provide public goods derives from its fiduciary obligations toward its subjects, any measures it may take are open to two types of legal challenge: lack of public purpose and lack of necessity. The first limitation arises from the nature of the state as a *public* person. The state is a separate person from its subjects constituted for the single purpose of ensuring their equal freedom, which it does by expressing the "general will" of the people.<sup>233</sup> Contrary to Benvenisti's first normative ground, the purpose of the state is not to serve as a forum for the celebration of its subjects' common sympathies, which are necessarily private affairs.<sup>234</sup> The performance of religious rituals and compliance with sumptuary laws may be generally desired but difficult to achieve in the absence of official compulsion.<sup>235</sup> Such compulsion, however, would be incompatible with the rightful condition.<sup>236</sup>

This can be illustrated again by Dworkin's metaphor of an orchestra. To wit, an orchestra consists of individual musicians who possess private habits, desires, and aspirations that may be vastly different from each another. The orchestra itself, however, can only have one purpose—making music. As Dworkin explains, the orchestra's members "do not suppose that the orchestra also has a sex life, in some way composed of the sexual activities of its members, or that it has headaches, or high blood pressure, or responsibilities of friendship, or crises over whether it should care less about music and take up photography instead."<sup>237</sup> Similarly, as a public person, the state can only have a public purpose—the provision of equal freedom for its subjects.<sup>238</sup> It therefore cannot establish an official religion, even one

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233. See DR 6:326, at 468 ("The general will of the people has united itself into a society which is to maintain itself perpetually; and for this end it has submitted itself to the internal authority of the state in order to maintain those members of the society who are unable to maintain themselves.").

234. DR 6:327, at 469 (arguing that the state must keep a close guard on religious institutions, lest they come into "very unequal conflict with the civil power.").

235. RIPSTEIN, *Force and Freedom*, *supra* note 13, at 259–60.

236. DR 6:327, at 469 (arguing that for a sovereign to establish a religion would be "beneath its dignity," for thereby "the monarch makes himself a priest. . .").

237. See DWORKIN, *supra* note 173, at 227.

238. DR 6:318, at 461 (arguing that "the well-being of a state must not be understood as the *welfare* of its citizens and their *happiness*; for happiness can

practiced by every one of its subjects. Any such law would manifest not the people's general will, but their "parallel" wills.<sup>239</sup> This is not simply because of concern for minorities not sharing the majority's sympathies but because the state would become just another private person if it was to promote and advance the private purposes of its individual constituents, and therefore unable to wield political authority rightfully.<sup>240</sup> The second limitation follows from the first. Coercion is justified only "as a *hindering of a hindrance to freedom*."<sup>241</sup> As such, the state cannot invade or exact any more than is necessary for the provision of equal freedom. Anything in excess can only be for a private purpose.<sup>242</sup>

#### IV. INTERNATIONAL LAW: PROPERTY AND BODY

Public goods become "global" when they cannot be provided by one state acting alone. Perhaps the only passable roads or navigable waterways run through the territory of another country, or the polluters are ensconced on a distant continent. This does not and cannot mean that the members of a political community are to be denied the freedom that is their innate right. Elucidating this, however, requires a theory of the legal relations between one state and another. The starting point is that as persons, the dignity of states also lies in freedom from the arbitrary choice of others.<sup>243</sup> Like natural persons, their freedom is unre-

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perhaps come to them more easily and as they would like it to in a state of nature (as Rousseau asserts) or even under a despotic government. By the well-being of a state is understood . . . that condition in which its constitution conforms most fully to principles of right. . . .").

239. RIPSTEIN, *Force and Freedom*, *supra* note 13, at 132.

240. See DWORKIN, *supra* note 173, at 223 (criticizing a strand of communitarian thinking for "suppos[ing] that a communal life is the life of an outsize person, that it has the same shape, encounters the same moral and ethical watersheds and dilemmas, and is subject to the same standards of success and failure as the several lives of the citizens who make it up").

241. *DR* 6:231, at 388.

242. RIPSTEIN, *Force and Freedom*, *supra* note 13, at 254.

243. See Ruiz Fabri, *supra* note 190, at 34 (arguing that sovereignty "is the legal translation of the political notion of independence . . . and should not be understood as a power, but as a freedom: the freedom of the state to exercise as it sees fit the powers at its disposal."); Martti Koskenniemi, *What Use for Sovereignty Today?*, 1 *ASIAN J. INT'L L.* 61, 70 (2011) (arguing that "[s]overeignty articulates the hope of experiencing the thrill of having one's life in one's own hands.").

alizable in an international state of nature, but requires a rightful condition to be set up.<sup>244</sup> Benvenisti's fourth normative ground is correct. Subjection to international law is not just compatible with sovereignty, but necessary for it.

The international state of nature, however, differs from the domestic, in that there is only one defect, not three.<sup>245</sup> The defect common to both conditions is the indeterminacy of rights. For the same reasons that apply to natural persons, states can never settle their disputes through war.<sup>246</sup> Because Grotius, Pufendorf, and Vattel contend otherwise and argue that states are entitled to make war if they think they have a just claim or that war is a suitable procedure for settling legal disputes, they therefore serve to encourage endless war, which is why Kant excoriates them as "sorry comforters" in the *Perpetual Peace*.<sup>247</sup> Instead, only under the international rightful condition "can the idea of a public Right of Nations be realized," because states may decide "their disputes in a civil way, as if by lawsuit, rather than in a barbaric way (the way of savages), namely by war."<sup>248</sup>

An executive is unnecessary at the international level because, unlike private persons, republican democracies are supposed to be fully rational. Private persons must surrender the enforcement of their rights to an executive because they are a seething mess of mutually incompatible passions. Rightfully constituted states need not because they have only one purpose: the provision of a rightful condition for their subjects. Peace will be guaranteed among rightfully constituted states so long as the persons deciding whether or not to go to war are the public—the people who will carry out the actual fighting and the repayment of war debts—rather than unaccountable monarchs or military-industrial lobbies.<sup>249</sup> Rightfully constituted states will also remain at peace with nonrightfully constituted states for as long as possible under a precarious *modus vivendi*. Where this is not possible,

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244. DR 6:344, at 482.

245. RIPSTEIN, *Force and Freedom*, supra note 13, at 227–28.

246. DR 6:354, at 491 (concluding that "morally practical reason pronounces in us its irresistible veto: *there is to be no war, neither war between you and me in the state of nature nor war between us as states . . . for war is not the way in which everyone should seek his rights.*").

247. PP 8:355, at 326.

248. DR 6:351, at 488.

249. PP 8:350-51, at 324.

rightfully constituted states, acting in concert under a “confederation of peace,” can and will be just as warlike as nonrightfully constituted states are with respect to one another.<sup>250</sup>

Once again, however, legislatures are our main concern, but this time the question is why the international rightful condition lacks one. In Part II, we saw that the domestic rightful condition requires a legislature to make property ownership possible. There is no legislature at the international level because rightfully constituted states do not own property. Contrary to Benvenisti’s third normative intuition, sovereigns are not proprietors of portions of the earth’s surface. In fact, they are not proprietors of anything at all.

Recall that property rights are acquired rights to external objects of choice; that is, things that could have been another’s if events had panned out differently. If you and your friend were to exchange belongings, your lifestyles would be transformed, perhaps immeasurably, but the two of you could still carry on with the identities you ordinarily present to the world. Not quite so if you exchanged bodies. Similarly, Ruritania and Cagliostro would not simply be changed if they exchanged their lands, natural endowments, and people. They would simply cease to exist as Ruritania or Cagliostro. Accordingly, a state “is always necessarily in possession of its territory, just as a person is always in possession of his or her own body.”<sup>251</sup> The state does not *own* its territory, government, and natural resources—it *is* the territory, government, and natural resources.

While Kant does not say this in so many words, there are several passages which lead to this conclusion. For instance, while Kant does say that title to the state’s land is held by the head of state acting as the “supreme proprietor,”<sup>252</sup> he describes that role as consisting solely in organizing the “division” of the land, rather than as an “aggregation” of private ownership claims

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250. See also JOHN RAWLS, *THE LAW OF PEOPLES: WITH, THE IDEA OF PUBLIC REASON REVISITED* 44–45 (§5) (1999); Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs*, 12 *PHIL. & PUB. AFFS.* 205 (1983) (offering an empirical demonstration of the “democratic peace theory”). In the *Doctrine of Right*, Kant ceases to believe in the possibility, much less “guarantee,” of eternal peace. Instead, he argues that human beings and states nevertheless have the duty to continually “approximate” toward it, even if it is all ultimately futile. *DR* 6:350, at 487.

251. RIPSTEIN, *Force and Freedom*, *supra* note 13, at 228.

252. *DR* 6:323, at 466.

therein.<sup>253</sup> Moreover, “[a]ll land belongs only to the people (and the people taken distributively, not collectively. . . .)”<sup>254</sup> The difference between property and sovereignty is also apparent from Kant’s discussion of the right of emigration. A subject has the right to emigrate because the state cannot hold him back as if he were the state’s property.<sup>255</sup> He can, however, only take his movable belongings, which includes the liquid proceeds of the sale of his land.<sup>256</sup> Only the property is transmissible, not the sovereignty. With respect to the subject, a particular clod of earth is property. With respect to the state, however, it is body.

Certainly, an objection may be made that a cursory glance at history would show that there is probably no inhabited spot on earth over which sovereignty has not changed hands on multiple occasions, such as might suggest that territory is transmissible in the manner of property. In response, Kant would say that this is precisely what makes it so wrongful:

Everyone knows into what danger the presumption that acquisition can take place in this way has brought Europe, the only part of the world in which it is known . . . that states can marry each other, partly as a new industry for making oneself predominant by family alliances even without expending one’s forces, and partly as a way of extending one’s possession of land.<sup>257</sup>

If territories and the resources and populations located there are treated like baubles to be bought and sold or won and lost, this increases the likelihood of disputes, and therefore wars.<sup>258</sup> For precisely this reason, the Second Preliminary Article to the *Perpetual Peace* specifies that “[n]o independently existing state

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253. *DR* 6:323-24, at 466.

254. *DR* 6:324, at 466.

255. *DR* 6:338, at 515.

256. *Id.*

257. *PP* 8:344, at 318.

258. *PP* 8:350, at 324 (arguing that if the “head of state is not a member of the state but its proprietor,” there will be nothing to stop him from “decid[ing] upon a war, as upon a kind of pleasure party. . . .”) See also Arthur Ripstein, *Just War, Regular War, and Perpetual Peace*, 107 *KANT-STUDIEN* 179, 188 (2016) (“The idea of selling, exchanging, bequeathing or donating a state follows from the proprietary model of the state. It is no surprise that Kant also identifies this as a source of war. . . . If states are essentially private and subject to the claims of private right, disputes about them will multiply, and war becomes a means of acquisition.”).

(whether small or large) shall be acquired by another state through inheritance, exchange, purchase, or donation.”<sup>259</sup>

The argument goes further: it claims not just that land, resources, and people are not property, but also that the sovereign cannot have property at all. Full-blooded property ownership in a thing is a truly despotic right to dispose of it as you please.<sup>260</sup> This is so clearly incompatible with any kind of public role that Kant concludes that the sovereign “cannot have any land at all as his private property (for otherwise he would make himself a private person).”<sup>261</sup> The possessory rights of sovereigns are not the same as that which private persons have over their property.<sup>262</sup> They are instead akin to the rights private persons have over their bodies, or the administrative powers fiduciaries possess over their beneficiaries.<sup>263</sup> Whereas private persons may

259. *PP* 8:344, at 318.

260. See HARRIS, *supra* note 141, at 31 (observing that “[o]wnership interests, at any point on the spectrum, entail both open-endedness and permitted self-seeking . . . within the terms of the relevant property institution, [the owner] may defend any use or exercise of power by pointing out that, as owner, he was at liberty to suit himself.”).

261. *DR* 6:323-24, at 466.

262. Ripstein, *Property and Sovereignty*, *supra* note 158, at 12 (“Ordinarily, an official is charged with advancing or protecting the purposes of the institution in which that office is found. By contrast, an owner typically has untrammelled discretion with respect to the purposes for which the property will be used. ‘Do whatever you want’ is not a mandate.”); HARRIS, *supra* note 141, at 105 (arguing that “the privileged domain [regarding dealings with state funds or chattels] afforded to officials falls nowhere along the ownership spectrum since it lacks the crucial feature of legitimate, self-seeking exploitation. . . .”). While Harris claims that states only have quasi-ownership rights in the domestic sphere, he notes in passing that “within the arena of public international law, self-seeking exploitation is allowed,” and “trespassory rules [of international law] protect ‘State territory’ and ‘State territorial sea’, concepts which, in this respect, are frankly modelled on private property ownership interests. . . .” *Id.* These conclusory statements assume without question the conventional idea of sovereigns as domestically public but internationally private actors, which Benvenisti and this article both reject. The state is public, inside and out. See Benvenisti, *Sovereign Trusteeship*, *supra* note 15, at 306.

263. See *Van Brocklin v. Tennessee*, 117 U.S. 151, 158–59 (1886) (internal citations omitted):

The United States do not and cannot hold property as a monarch may, for private or personal purposes. All the property and revenues of the United States must be held and applied,

have full-blooded ownership, but only over particular things, the sovereign only has administrative rights, but over everything.<sup>264</sup>

*A. The Body of the State: Territory, Natural Resources, and People*

The argument that sovereigns cannot have property rights at all does not mean that states may not award themselves property rights in lands or chattels under either their own law, or under the law of another state. Such rights must be respected, but not as rights of sovereigns, only as rights of private persons.<sup>265</sup> Rather, the argument is that *sovereigns* cannot have property titles created under, or recognized by *international law*. A full treatment of how this theoretical claim translates into international law will have to await another occasion.<sup>266</sup> Instead,

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as all taxes, duties, imposts and excises must be laid and collected, to pay the debts and provide for the common defence and general welfare of the United States.

264. This principle is expressed in Latin as *omnia rex imperio possidet, singuli dominio*, which translates as “For the king has authority over everything, but individuals have ownership.” LUCIUS ANNAEUS SENECA, ON BENEFITS 170 (Book 7, §4.2) (Miriam Griffin & Brad Inwood trans., 2011).

265. See, e.g., XIAODONG YANG, STATE IMMUNITY IN INTERNATIONAL LAW 343 (2012) (finding that “[g]enerally speaking, the property of a foreign State enjoys immunity from attachment, arrest and execution when it is used for sovereign or public purposes, but not when it is used for commercial purposes.”). See *id.* at 369–73 for relevant international case law.

266. See the recent litigation between Australia and Timor-Leste before the International Court of Justice, arising from Australia’s seizure of certain “documents, data, and other property” from Timor-Leste’s legal advisers in Australia. Application Instituting Proceedings, *Timor-Leste v. Austl.*, ¶ 2 (Dec. 17, 2013), available at <http://www.icj-cij.org/docket/files/156/17962.pdf>. The litigation was eventually settled out of court. During oral arguments, Timor-Leste claimed that this was in violation of its “property rights [which were] entitled to full respect on the international plane in whatever State they may be located . . . no matter what special provisions may be asserted by Australian law against them.” *Timor-Leste v. Austl.*, Verbatim Record, 27–28 (Jan. 20, 2014, 10:00 AM), available at <http://www.icj-cij.org/docket/files/156/17920.pdf>. Australia conceded that it had taken the documents but countered that such a claim of “an absolute, unqualified right of property at international law,” allowing each state “an absolute right of property in all documents produced by it or its agents in the territory of another State . . . inviolable and immune from any judicial or executive action in that other State,” was tantamount to “a new form of extraterritoriality” and “a quantum leap in the expansion of public international law.” *Id.* at 11–12. Australia further argued that the Timorese argument would “allow a State adventitiously to expand its sovereignty into the

this section will argue only that sovereigns cannot be seen as property owners over sections of the earth's surface.

As with most things in the contemporary study of international law, the first word on this subject belongs to Lauterpacht, who was instrumental in burying the "territory-as-body" view advocated in this article, which he calls the "object" theory.<sup>267</sup> As a result of his contributions, contemporary textbooks almost uniformly profess that the international law of territory was developed from analogy to the Roman law of immovable property.<sup>268</sup> Lauterpacht acknowledges two attractive features of the territory-as-body conception. First, it avoids the problem of the patrimonial state, whose sovereign could buy, sell, devise, or even give away whole provinces and the people living on them.<sup>269</sup> Second, Lauterpacht acknowledges that territory and state appear to be an "inseparable unity," like person and body,<sup>270</sup> and even

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territory of other States." *Id.* at 12. Tzeng observes that, "[a]s absurd as it may sound, Australia is correct." Peter Tzeng, *Comment: The State's Right to Property Under International Law*, 125 *YALE L.J.* 1805–1819, 1805 (2016). *See also* JOHN G. SPRANKLING, *THE INTERNATIONAL LAW OF PROPERTY* (2014). Sprankling's monograph appears to be the only book-length study on the subject of property in international law, but consists entirely of the international law pertaining to or regulating the property rights of private persons, rather than States. Tzeng, *supra*, at 1806, n. 8. Moreover, Sprankling observes that property "was historically viewed as a domestic concern" and that the "conventional wisdom is that international property law does not exist as a category." SPRANKLING, *supra*, at 349.

267. Hersch Lauterpacht, *Property Relations Between States. State Territory*, in *INTERNATIONAL LAW: VOLUME 1, THE GENERAL WORKS: BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT* 367, 367 (Eli Lauterpacht ed., 1970).

268. *See, e.g.*, ROBERT Y. JENNINGS, *THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW* 3 (1963) (explaining that "the so-called modes of acquisition of territorial sovereignty . . . are, as we shall see, obviously derived by analogy from the Roman Law rules governing the acquisition of land in private ownership."); JAMES L. BRIERLY & ANDREW CLAPHAM, *BRIERLY'S LAW OF NATIONS: AN INTRODUCTION TO THE ROLE OF INTERNATIONAL LAW IN INTERNATIONAL RELATIONS* 168–69 (7th ed. 2012) ("Territorial sovereignty bears an obvious resemblance to ownership in private law. . . . As a result of this resemblance, early international law borrowed the Roman rules for the acquisition of property, and adapted them to the acquisition of territory, and these rules are still used as the foundation of the law on the subject."); MALCOLM N. SHAW, *INTERNATIONAL LAW* 353–54 (2014).

269. Lauterpacht, *supra* note 267, at 367.

270. *Id.* at 367–68.



explicitly recommends the *dominus membrorum* rule as preferable to body-extension theories of property.<sup>271</sup>

Nevertheless, Lauterpacht dismisses these problems by resorting to the faulty device of the state as an aggregation of individuals, arguing that:

If we think of the State not in terms of an absolute and mystical entity but as the totality of the individuals organised as a State, then there is nothing artificial in regarding the State as the owner of territory. The individuals, in their collective capacity as a State, own the territory of the State. The State owns its territory.<sup>272</sup>

The bulk of Lauterpacht's argument against the object theory of territory is that it was at total variance with then prevalent state practice. Exchange and sale was recognized as a perfectly legal means of territorial acquisition between states, such a transaction having taken place as recently as 1917, when the United States bought the Danish West Indies for \$25 million USD.<sup>273</sup> Other than customary practices included condominiums, leases and grants in perpetuity, international mandates, and the acquisition of territory by prescription.<sup>274</sup> Regarding the final category of acquisition of territory by prescription, the leading authority was *Island of Palmas*, in which the arbitrator Max Huber explicitly likened territory to private property in land.<sup>275</sup>

The first three examples are precisely the sort of practices that would be abolished under an international order that deemed some connection with democracy, human rights, and law to be necessary. Leased territories, such as Guantanamo Bay and Diego Garcia, are bywords for lawlessness and rampant human rights violations, while the British-French condominium over the New Hebrides felt more like "pandemonium" to the local inhabitants.<sup>276</sup> Moreover, unlike the purely mercenary terms in

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271. *Id.* at 368.

272. *Id.*

273. *Id.* at 367–68.

274. *Id.* at 370–80.

275. *Island of Palmas*, 2 R.I.A.A. at 839 (holding that international law had to recognize acquisitive prescription of territory out of necessity, given that even municipal law felt unable to do so without adverse possession of land, despite possessing a "complete judicial system" enabling it to "recognize abstract rights of property as existing apart from any material display of them.").

276. MICHELLE BENNETT & JOCELYN HAREWOOD, *LONELY PLANET: VANUATU* 14 (2003). See also CAROL ROSENBERG, *GUANTÁNAMO BAY: THE PENTAGON'S*

which Lauterpacht describes the sale of colonies, independent states treat the transfer of territory as a matter of utmost legal and political sensitivity. Consider the widespread public anger against the perceived “sale” of certain Red Sea islands from Egypt to Saudi Arabia,<sup>277</sup> or the scuppering on constitutional grounds of a Norwegian popular initiative to gift the peak of Mount Halti to Finland as a 100th birthday present.<sup>278</sup>

Lauterpacht’s final example, the acquisition of territory by prescription, has undergone a sea change since *Island of Palmas*. The current leading case of *Frontier Dispute (Burkina Faso v. Mali)* emphatically rejects prescription by *effectivités* (effective administration) by one state of the territory of another, and instead requires the positive acquiescence of the latter.<sup>279</sup> While inaction might controversially constitute affirmative evidence of acquiescence or recognition, the rule is definitively no longer one of unilateral prescription.<sup>280</sup> This departure from the principles

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ALCATRAZ OF THE CARIBBEAN (2016); DAVID VINE, *ISLAND OF SHAME: THE SECRET HISTORY OF THE U.S. MILITARY BASE ON DIEGO GARCIA* chs. 8 & 9 (2011); Laura Jeffrey & David Vine, *Sorry, Sadness, and Impoverishment: The Lives of Chagossians in Mauritius*, in *EVICION FROM THE CHAGOS ISLANDS: DISPLACEMENT AND STRUGGLE FOR IDENTITY AGAINST TWO WORLD POWERS* 83, 83 (Sandra Evers & Marry Kooy eds., 2011) (relating how a displaced Chagos Islander characterizes the “deal” by which Mauritius agreed to the hiving off of the Chagos Islands in exchange for independence as one where “Mauritius got independence because it sold my mother’s land.”).

277. Ruth Michaelson, *Egyptian Court Quashes Deal to Transfer Red Sea Islands to Saudi Arabia*, *GUARDIAN*, June 21, 2016, <https://www.theguardian.com/world/2016/jun/21/egyptian-court-quashes-transfer-red-sea-islands-saudi-arabia>.

278. Agence France-Presse, *Halti Plan Halted: Norway Will Not Gift Mountain Top to Neighbour Finland*, *GUARDIAN*, Oct. 15, 2016, <https://www.theguardian.com/world/2016/oct/15/halti-plan-halted-norway-will-not-gift-mountain-top-to-neighbour-finland>.

279. See *Frontier Dispute (Burk. Faso v. Mali)*, 1986 I.C.J. 554, ¶ 63 (Dec. 22) (holding that “[w]here the territory which is the subject of the dispute is effectively administered by a State other than the one possessing the legal title, preference should be given to the holder of the title.”). See Roger O’Keefe, *Legal Title versus Effectivités: Prescription and the Promise and Problems of Private Law Analogies*, 13 INT’L COMM’TY L. REV. 147, 176–77 (2011).

280. *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malay. v. Sing.)* 2008 I.C.J. 12, ¶ 121 (May 23) (observing that “silence may also speak, but only if the conduct of the other State calls for a response.”). See *id.* at Diss. Op. Simma & Abraham, JJ., ¶ 11 (criticizing the majority’s finding of affirmative consent in silence as a smuggling in acquisitive prescription); see *id.* ¶ 13 (emphasizing that “when there is an original sovereign, no exercise of State authority, however continuous and effective, can

of private property has been invoked to question the entire enterprise of private law analogies in explicating international law.<sup>281</sup> There is, however, another possibility: that the correct analogy is not to property but to personality. Territory, like body, is in principle inalienable. The new requirement of positive acquiescence reflects that where transfers of territory are concerned—and by implication the inhabitants and natural resources contained therein—international law places burdens not against acquisition, but against alienation. It cannot be done except under a strict legal regime guaranteeing genuine free choice.<sup>282</sup> Lauterpacht's application of principles taken from colonial and imperial practice to independent states is in fact an instance of Locke's spectacular *non sequitur*. From the fact that a state is independent if no other colonial or imperial power owns its territory, it simply does not follow that *it* owns the territory. In fact, nobody owns the territory, not even the independent state.

As the state's body, the territorial bounds, natural resources, and population are indeed arbitrary, but they are arbitrary in the manner of bodily endowments rather than property holdings. This means that they cannot be altered for reasons of distributive equity. The ICJ has twice rejected sufficiency-based arguments for established borders to be altered. In *Land, Island and Maritime Frontier Dispute*, the ICJ held that "arguments of a human nature," such as El Salvador's high population density and Honduras' abundance of natural resources, could not justify any deviation from the doctrine of *uti possidetis*.<sup>283</sup> In *Continental Shelf (Tunisia v. Libya)*, the ICJ rejected a similar Lockean

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result in a transfer of sovereignty if it is not possible to establish that, in one way or another, the original sovereign has consented to the cession of the territory concerned or acquiesced in its transfer to the State having *de facto* exercised its authority.").

281. O'Keefe, *supra* note 279, at 187–88.

282. See *Land, Island and Maritime Frontier Dispute* (El Sal. v. Hond.; Nicar. intervening), 1992 I.C.J. 351, ¶ 67 (Sept. 11) ("If the *uti possidetis juris* position can be qualified by adjudication and by treaty, the question then arises whether it can be qualified in other ways, for example, by acquiescence or recognition. There seems to be no reason in principle why these factors should not operate, where there is sufficient evidence to show that the parties have in effect clearly accepted a variation. . . .").

283. *Id.* ¶¶ 40, 57–58. See also Michal Saliternik, *Expanding the Boundaries of Boundary Dispute Settlement: International Law and Critical Geography at the Crossroads*, 50 VAND. J. TRANSNAT'L L. 113, 123–26 (2017) (arguing that

proviso-style argument by Tunisia against resource-rich Libya on the grounds that natural resources are “variables which unpredictable national fortune or calamity . . . might at any time cause to tilt the scale one way or the other. A country might be poor today and become rich tomorrow as a result of an event such as the discovery of a valuable economic resource.”<sup>284</sup> Treating state territory as contingent upon the Lockean proviso would render the state’s very existence subject to the choices of other persons—from individual market participants to other states with claims of need. A state’s territory, and consequently the lives and loyalties of the human beings inhabiting it, cannot be rendered so precarious. Moreover, as the ICJ observed in *Frontier Dispute (Burkina Faso/Mali)*, existing borders must be respected no matter how poorly they were drawn by former colonizers, “to prevent the independence and stability of new States [from] being endangered by fratricidal struggles provoked by the challenging of frontiers. . . .”<sup>285</sup> If territories are treated as transmissible property, disputes about these transactions will multiply, and therefore also wars.

### *B. International Wrongs: Iniuria and Restitution*

If the state has no property rights, but only personality rights, wrongs against it necessarily constitute injury rather than damage. This principle animates the classic *Chorzów Factory* decision, where the Permanent Court of International Justice held that:

The rules of law governing the reparation are the rules of international law in force between the two States concerned, and not the law governing relations between the State which has committed a wrongful act and the individual who has suffered damage. Rights or interests of an individual the violation of which rights causes damage are always in a different plane to rights belonging to a State, which rights may also be infringed by the same act. The damage suffered by an individual is never therefore identical in kind with that which will be suffered by a State. . . .<sup>286</sup>

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the determining factor in boundary disputes is the historical borders, and where these are unclear, effective control of territory).

284. *Continental Shelf (Tunis. v. Libya)*, 1982 I.C.J. 473, ¶ 107 (Feb. 24).

285. *Frontier Dispute (Burk. Faso v. Mali)*, 1986 I.C.J., ¶ 20, (Dec. 22).

286. *Factory at Chorzów (Claim for Indemnity) (Merits) (Germ. v. Pol.)*, 1928 P.C.I.J. 4, 28 (ser. A) No. 17 (Sept. 13).

Wrongs against the state and against subjects differ not in degree but in kind. Whereas private persons suffer damage as a result of wrongful deprivations of property, their national state is dealt injury by the mistreatment of its subjects. The latter cause of action is the state's own, and not derivative of the wrong against its mistreated nationals.<sup>287</sup> It has full discretion to decide whether or not to bring suit on behalf of its national, to compromise or settle without consulting with the national, or, if it obtains reparations, decline to hand anything over to the national.<sup>288</sup> These commonplaces of international legal doctrine make sense only if the wrong that is being righted is not damage suffered by the national, but the *injury* to the state.<sup>289</sup>

As injury, material damage is irrelevant: "there is no general requirement . . . that a State should have suffered material harm or damage before it can seek reparation for a breach."<sup>290</sup> As for remedies, the "essential principle contained in the actual notion

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287. *Mavrommatis Palestine Concessions* (Greece v. Gr. Brit.), 1924 P.C.I.J. (ser. A) No. 2, 12 (Aug. 30) (holding that "[b]y taking up the case of one of its subjects . . . a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law.").

288. See *Barcelona Traction, Light and Power Co. Ltd.* (Belg. v. Spain), 1970 I.C.J. 3, 45 (Feb. 5) ("Since the claim of the State is not identical with that of the individual or corporate person whose cause is espoused, the State enjoys complete freedom of action."). See also ZACHARY DOUGLAS, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* 17–18 (§34) (2009); EDWIN M. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD* 366 (§144) (1916).

289. These basic principles have not been changed by recent efforts to center the law of diplomatic protection around the interests of individual persons, see e.g., International Law Commission, *Draft Articles on Diplomatic Protection with Commentaries*, UN Doc.A/61/10 (2006). Although Article 1 of the Draft Articles provides that "diplomatic protection consists of the invocation by a State . . . of the responsibility of another State for an injury caused by an internationally wrongful act of that State *to a natural or legal person*," Article 19 nevertheless only deems it a "recommended practice" for a State to consider the views and wishes of the injured national to transfer the obtained compensation to her, subject to reasonable reduction.

290. *Articles on Responsibility of States for Internationally Wrongful Acts*, in Report of the International Law Commission on the Work of Its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001), Article 31, cmt. 7, at 226 [hereinafter *Articles on State Responsibility*]. See also *Rainbow Warrior* (New Zealand/France), 20 R.I.A.A. 217, ¶109 (1990) (recording the parties' agreement that material damage is not a precondition for liability for international wrongs, but that "injury" may lie in "legal" or "moral" damage). This article has already criticized the concept of moral damage as incoherent at note 94.

of an illegal act . . . is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.”<sup>291</sup> For this reason, the authoritative *Articles on State Responsibility* provide that, “because restitution most closely conforms to the general principle that the responsible State is bound to wipe out the legal and material consequences of its wrongful act by re-establishing the situation that would exist if the act had not been committed, it comes first among the forms of reparation.”<sup>292</sup>

The purely secondary nature of material damage is demonstrated by the drafting history of the commentary to the *Articles on State Responsibility*. In 2000, the Drafting Committee of the International Law Commission (ILC) proposed a definition of “injury” as consisting “of any damage, whether material or moral, arising in consequence of the internationally wrongful act of a State.”<sup>293</sup> James Crawford rightly criticizes this definition by drawing attention to the difference between harms and wrongs in terms similar to the discussion in Part I of this article,<sup>294</sup> and noting that the final version of the commentary now reads that “[i]njury *includes* [rather than “consists” of] any damage. . . .”<sup>295</sup> In sum, wrongs pertaining to the territory and natural endowments of a state—in fact *all* international wrongs—have the nature of injuries rather than damage. As such, proof of harm is irrelevant and the remedy is restitution. With this, all the necessary machinery has been wheeled onto the stage, and we are finally ready to address the problem of public goods that cannot be provided by one state alone.

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291. *Chorzów Factory*, 1928 P.C.I.J. at 47.

292. See *Articles on State Responsibility*, Article 35, cmt. 3, at 238. See also JAMES CRAWFORD, *STATE RESPONSIBILITY: THE GENERAL PART* 509–10 (2013) (observing that the International Law Commission (ILC) retained the traditional principle that international wrongs sound primarily in restitution, despite considerable debate during the second reading of the *Articles on State Responsibility*).

293. [2000] 2(2) Y.B. INT’L L. COMM’N, U.N. Doc. A/CN.4/SER.A/2000/Add.1 (Part 2)/Rev.1, at 68.

294. See CRAWFORD, *supra* note 292, at 485.

295. *Articles on State Responsibility*, Art. 31(2) (emphasis added).

## V. GLOBAL PUBLIC GOODS

The question posed earlier was whether states are prohibited from regulating unilaterally to provide their subjects with public goods, but must hope for the cooperation of other states to address the threat to its and its subjects' freedom. The answer is no. Requiring the state to pursue its purpose solely through multilateral channels would place it at the mercy of all other persons, state and nonstate, in the carrying out of its single purpose, thus violating its dignity as a person. Like domestic public goods, global public goods are either necessary for a sovereign to ensure its subjects' freedom, or to preserve its ability to do so. While most of the global public goods mentioned in the introduction fall under the second category, their rationale may be explicated by considering those falling under the first.

*A. The Theoretical Argument*

Just as persons have rights to visit others in their community, they also have "cosmopolitan" rights to visit distant individuals on the other side of the globe.<sup>296</sup> Again, this is not justified by reference to material advantages such as the benefits of trade. In fact, Kant was more than just a little dubious of such claims. In a blistering passage in the *Perpetual Peace*, Kant notices that European trading companies were somehow always teetering on the brink of insolvency, despite practicing the "cruellest and most calculated slavery" in the Sugar Islands.<sup>297</sup> Instead, he speculates that their actual function was to train sailors for wars back home in Europe on behalf of princes who "make much ado of their piety . . . while they drink wrongfulness like water. . . ."<sup>298</sup> Kant's justification of cosmopolitan right is again entirely formal. A person cannot be thwarted from attempting interaction with distant others at the whim of another without good reason, and the only reasons that are good are those that are non-dominating of her.<sup>299</sup> Visiting with hostile purposes is incompatible with the equal freedom of the hosts and may be prohibited by

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296. *DR* 6:352, at 489.

297. *PP* 8:359, at 330.

298. *Id.*

299. *PP* 8:357-58, at 328-29 (explaining that "[H]ospitality (hospitableness) means the right of a foreigner not to be treated with hostility because he has arrived on the land of another. The other can turn him away, if this can be done without destroying him, but as long as he behaves peaceably where he is, he cannot be treated with hostility.").

the host—Kant therefore approves of the closure by China and Japan of their borders to predatory European trading companies.<sup>300</sup> In contrast, a refugee cannot be turned away because that would “destroy them;” that is, leave them without a rightful condition.<sup>301</sup> Within these limits, persons have rights “to try to establish community with all and, to this end, to visit all regions of the earth,” which cannot be annulled despite the possibility of abuse.<sup>302</sup> A state may not deny a visitor the chance simply to “present oneself for society,”<sup>303</sup> for this would amount to treating her as an untouchable.

Thus described, cosmopolitan right clearly implies the provision and maintenance of international “roads” for all to travel upon—the seas and deserts.<sup>304</sup> Contrary to Grotius, the high seas are not irreducible to property or sovereignty because they are by nature nonexcludable and nonrivalrous; in fact the whole reason he wrote the *Free Sea* was to challenge the Portuguese closure of sea lanes.<sup>305</sup> Rather, it is because the seas are necessary for travel.<sup>306</sup> Pirates and brigands threaten these global thoroughfares, thereby rendering the fulfilment of cosmopolitan right subject to their arbitrary will.<sup>307</sup> As the fiduciaries of their subjects, states accordingly have jurisdiction to punish pirates and brigands as enemies of mankind.

The same rationale can be leveraged to justify the use of state regulatory powers to address climate change. To wit, climate change leaves “peoples living in coastal regions threatened by rising water levels, others threatened by ever-more-frequent and violent storms, and yet others whose agricultural or hunter-

300. *PP* 8:359, at 329–30.

301. *PP* 8:358, at 329.

302. *DR* 6:353, at 489.

303. *PP* 8:358, at 329.

304. *Id.*

305. Wouter Werner, *Mankind's Territory and the Limits of International Law-Making*, in *INTERNATIONAL LAW-MAKING: ESSAYS IN HONOUR OF JAN KLABBERS* 103–118, 108 (Rain Liivoja & Jarna Petman eds., 2014). In any event, we have definitely possessed the technology to mark off exclusive economic zones and to build artificial islands since the 1950s. See Scott J. Shackelford, *The Tragedy of the Common Heritage of Mankind*, 28 *STAN. ENVTL. L.J.* 109, 122–24 (2009).

306. *DR* 6:352–53, at 489 (“Although the seas might seem to remove nations from any community with one another, they are the arrangements of nature most favoring their commerce by means of navigation. . .”).

307. *PP* 8:358, at 329.



gatherer ways of life are threatened by diminishing rains and other climactic changes.”<sup>308</sup> At best, these instances of property damage may ground a claim for private nuisance on the part of the affected private persons, assuming they can hale the distant polluters into their courts, and overcome the insurmountable evidential obstacles. As against their national state, however, climate change-inducing activities constitute wrongs akin to public nuisance because they leave its subjects systematically dependent upon the choices of distant polluters.<sup>309</sup> With respect to private individuals, climate change at best constitutes property damage. As against the state, however, it is injury. Given that certain low-lying or island states may disappear completely as a result of rising sea levels, climate change therefore threatens the very existence of these states as moral persons.<sup>310</sup>

The state’s entitlement to redress such threats to its animating purpose against it is not altered by the fact that the polluter is located outside the jurisdiction. As Kant argues, if a measure is necessary “for its security”—that is, to fulfill its sole purpose of ensuring the equal freedom of its subjects—the state “can and ought to require the others to enter with it into a constitution similar to a civil constitution, in which it can be assured of its right.”<sup>311</sup> The burdens placed upon other persons by such unilateral measures are never wrongful because the invitation to join a rightful condition is an offer that cannot be refused. Or, as Kumm puts it, policy areas with “potential cross-border effects” are “areas in which states lack legitimate authority to effectively control what may or may not be done,” such that:

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308. Evan Fox-Decent, *From Fiduciary States to Joint Trusteeship of the Atmosphere: The Right to a Healthy Environment through a Fiduciary Prism*, in *FIDUCIARY DUTY AND THE ATMOSPHERIC TRUST* 253, 259 (Ken Coghill, Charles Sampford, & Tim Smith eds., 2013).

309. *Id.* at 259–60 (arguing that “vulnerable peoples . . . are left to negotiate as best they can with those who are indifferent to the effects of environmental degradation. . . . The vulnerable are left to beg more powerful parties for compensation that is given as charity, if it is given at all. . . .”); *id.* at 264 (arguing that Pacific “islanders’ rights to their lands are “illusory” if the unilateral actions of other states are permitted to cause global warming and rising sea levels.”).

310. See e.g., Randall S. Abate, *Public Nuisance Suits for the Climate Justice Movement: The Right Thing and the Right Time*, 85 WASH. L. REV. 197, 210 (2010) (observing that “Lohachara Island, in India’s part of the Sundarbans, was the first inhabited island to be claimed by rising seas; this left 10,000 inhabitants homeless.”).

311. *PP* 8:354, at 326.

No injustice is done to states when they are subject to legal obligations without having consented to them. On the contrary, deep legitimacy questions arise when individual states have the capacity to effectively veto the emergence of universally binding obligations in contexts where the behavior of an individual state raises justice-sensitive externality concerns.<sup>312</sup>

A state that remains outside the rightful condition seeks to reserve for itself the ability to bend all others to its arbitrary will. Other states need not, and should not, tolerate this if it is incompatible with their ability to provide their subjects with a rightful condition. Alternatively, a state is unfree if it refuses to enter the international rightful condition. It can thus legitimately be forced, again, only insofar as this is necessary for other states to guarantee their subjects a rightful condition.

In this light, we revisit the cases Benvenisti relies upon in support of his proposed obligation of costless accommodation. The precedent most congenial to Benvenisti's and Ryngaert's equitable approach is the *Iron Rhine Arbitration*, which concerned a dispute between the Netherlands and Belgium regarding the reactivation of a disused railway line linking the two countries.<sup>313</sup> In the complex treaty arrangements pursuant to which the railway line was built, a right of transit had been granted to Belgium over Dutch territory, subject to the Netherlands retaining certain regulatory powers.<sup>314</sup> One question before the tribunal was whether a diversion proposed by the Netherlands for environmental reasons was compatible with the Belgian right of transit.<sup>315</sup> In its award, the tribunal held that Belgium could not "reasonably withhold its consent," especially if the Netherlands offered to bear the extra costs incurred as a result of the diversion.<sup>316</sup> This contradicts Benvenisti's restricted *Pareto* criterion, under which states may not accept side payments in exchange for accommodating others' interests. In *Right of Passage (Port. v. Ind.)*, the ICJ found that Portugal had acquired rights of passage over Indian territory between its then Indian enclaves, largely due to historical use rather than any deeper principle.<sup>317</sup>

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312. Kumm, *supra* note 80, at 251.

313. *Iron Rhine*, 27 R.I.A.A. ¶ 2.

314. *See id.* ¶¶ 28–43.

315. *Id.* ¶ 3.

316. *Id.* ¶ 232.

317. *See Right of Passage (Port. v. Ind.)*, 1960 I.C.J. at 37–38.

More importantly, consider *Lake Lanoux*, which involved a dispute between France and Spain concerning French plans to divert a shared river to construct a hydroelectric dam. The relevant treaty provided that any party seeking to carry out works on the river had to obtain the approval of the other.<sup>318</sup> France proposed a hydroelectric project involving works wholly within its territory and which would not have imposed any costs upon Spain. Spain nevertheless denied its approval, probably in order to ransom the French for a larger share of water and electricity.<sup>319</sup> The crucial passages in the award state as follows:

To admit that jurisdiction in a certain field can no longer be exercised except on the condition of, or by way of, an agreement between two States, *is to place an essential restriction on the sovereignty of a State*, and such restriction could only be admitted if there were clear and convincing evidence. Without doubt, international practice does reveal some special cases in which this hypothesis has become reality. . . . But these cases are exceptional, and *international judicial decisions are slow to recognize their existence, especially when they impair the territorial sovereignty of a State*, as would be the case in the present matter.

In effect, in order to appreciate in its essence the necessity for prior agreement, one must envisage the hypothesis in which the interested States cannot reach agreement. In such a case, it must be admitted that *the State which is normally competent has lost its right to act alone as a result of the unconditional and arbitrary opposition of another State. This amounts to admitting a "right of assent"; a "right of veto", which at the discretion of one State paralyzes the exercise of the territorial jurisdiction of another.*<sup>320</sup>

Clearly, these passages indicate that the legal analysis had nothing to do with weighing or balancing of interests for the maximization of utility, but everything to do with ensuring that no sovereign is rendered subject to the will of another.

Finally, consider *Dispute Regarding Navigational and Related Rights*, where the ICJ was required to construe a treaty between Nicaragua and Costa Rica, under which Costa Rica had been given navigational rights "for the purposes of commerce" along

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318. See Additional Act of May 26, 1866 to the Treaties of Bayonne (Dec. 1, 1856; Apr. 14, 1862; May 26, 1866).

319. Benvenisti, *Sovereign Trusteeship*, *supra* note 15, at 323.

320. *Lake Lanoux*, 24 I.L.R. at 128 (emphasis added).

a river demarcated as entirely within Nicaraguan territory. The issue was whether certain villagers on the Costa Rican bank could rely upon that exception to make use of the river “to meet the basic requirements of everyday life, such as taking children to school or . . . giv[ing] or receiv[ing] medical treatment. . . .”<sup>321</sup> The topography of the region was such that inland travel would have been prohibitively expensive for those communities. The ICJ refused to strain the word “commerce” to include noncommercial activity, holding instead that:

It cannot have been the intention of the authors of the [treaty] to deprive the inhabitants of the Costa Rican Bank of the river, of the right to use the river to the extent necessary to meet their essential requirements, even for activities of a non-commercial nature, given the geography of the area. . . . [T]he parties must be presumed . . . to have intended to preserve for the Costa Ricans living on that bank a minimal right of navigation for the purposes of continuing to live a normal life in the villages along the river.<sup>322</sup>

Once again, the language is not about interests that can be accommodated at no cost or of requests which Nicaragua could not have refused in good conscience. Although Nicaragua never argued it, its interests may very well have been harmed by increased river traffic. Instead, the decision clearly evokes the idea of mandatory cooperation, to which consent cannot be refused. The navigational rights simply had to be accorded by Nicaragua because, otherwise, a community of Costa Ricans would have been left as prisoners in their own homes.

As these precedents show, there is considerable support in existing legal practice for the conception of public goods advocated in this article; that is, as things that must be provided publicly in order to ensure the non-domination of all persons. These doctrinal materials also suggest the outline of a defense of unilateral measures asserting authority extraterritorially with a view to providing global public goods for its subjects. This outline will be fleshed out in the paragraphs that follow.

### *B. The Irrelevance of Harm*

Closing a necessary passage is as internationally wrongful as false imprisonment. Transboundary environmental pollution is

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321. *Dispute Regarding Navigational and Related Rights*, 2009 I.C.J. at 74.

322. *Id.* ¶ 79.

internationally wrongful as a battery upon the body of the state. Both are wrongful regardless of damage. Likewise, a state's right to enact unilateral measures providing global public goods is not contingent upon proof of harm.

The above characterization of transboundary pollution might sound novel, given that international environmental law is thought to be premised upon a "no-harm" principle obligating states to ensure that their territories and resources are not used in ways that cause damage to others above some threshold of significance.<sup>323</sup> In this regard, it resembles the U.S. "effects doctrine," which deems it "settled law . . . that any State may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the State reprehends. . . ."<sup>324</sup> First enunciated in the *Trail Smelter* arbitration,<sup>325</sup> the no-harm principle has since been confirmed by subsequent international judicial decisions<sup>326</sup> and en-

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323. See, e.g., PHILIPPE SANDS & JACQUELINE PEEL, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 190–200 (3d ed. 2012); Jutta Brunnée, *Sic utere tuo ut alienum non laedas*, MAX PLANCK ENCYCLOPEDIA PUB. INT'L L. paras. 11, 12, (Mar. 2010), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1607> (last visited Jul 27, 2016).

324. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945).

325. *Trail Smelter Arbitration (U.S. v. Can.)*, 3 R.I.A.A. 1905, 1965 (1941) (holding that "under the principles of international law . . . no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein. . .").

326. See, e.g., *Corfu Channel (U.K. v. Alb.)*, Judgment, 1949 I.C.J. 4, 22 (Apr. 9) (describing "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States"); *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* 1996 I.C.J. 226, ¶ 29 ("The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.").

shrined in numerous international instruments and pronouncements, such the 1972 Stockholm Declaration,<sup>327</sup> the Rio Declaration,<sup>328</sup> and the ILC Draft Articles on Prevention of Transboundary Harm.<sup>329</sup>

Increasingly, however, environmental scholars and policymakers have begun to find the no-harm principle problematic, particularly in the subfield of climate law. Despite arguing for its continued relevance, Benoît Mayer notes the “counter-intuitive, even surprising [fact] . . . that the no-harm principle has rarely been explicitly invoked in international responses to climate change.”<sup>330</sup> The obvious reason is that requiring demonstrable proof of environmental damage hamstrings the ability of regulators and policymakers to take preventative steps to protect the environment. Jutta Brunnée cites practical difficulties of tracing particular serious harms to particular emitters to conclude that “[c]limate change . . . is not the kind of transboundary pollution contemplated by the no harm rule.”<sup>331</sup> International environmental lawyers have accordingly tweaked the “no-harm” rule to imply two categories of obligations: “substantive” and “procedural.”<sup>332</sup> Substantive obligations are to refrain from causing actual transboundary damage, while procedural obligations are “to notify, warn, inform, or consult states potentially affected by transboundary impacts, to undertake (transboundary) environ-

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327. United Nations Conference on the Human Environment, Stockholm, Swed., June 5–16, 1972, Report of the United Nations Conference on the Human Environment, Principle 21, U.N. Doc.A/Conf 48/14/Rev. 1 (Nov. 1973).

328. Rio Declaration on Environment and Development, U.N. Conference on Environment and Development, Principle 2, U.N. Doc. A/Conf.151/5/Rev. 1 (1992) [hereinafter *Rio Declaration*].

329. Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, in Rep. of the Int’l Law Comm’n to the Gen. Assembly, 53d sess., Article 3, 56 U.N. GAOR Supp. No. 10, U.N. Doc. A/56/10 (2001) [hereinafter *Draft Articles on Transboundary Harm*].

330. Benoît Mayer, *The Relevance of the No-harm Principle to Climate Change Law and Politics*, 19 ASIA PACIFIC J. ENVTL. L. 79, 79 (2016).

331. Jutta Brunnée, *The Global Climate Regime: Wither Common Concern?*, in COEXISTENCE, COOPERATION AND SOLIDARITY: LIBER AMICORUM RÜDIGER WOLFRUM, VOL. 1 721, 722 (Anja Seibert-Fohr et al. eds., 2011).

332. See e.g., ULRICH BEYERLIN & THILO MARAUHN, INTERNATIONAL ENVIRONMENTAL LAW 39–46 (2011); PIERRE-MARIE DUPUY & JORGE E. VIÑUALES, INTERNATIONAL ENVIRONMENTAL LAW 54 (2015).

mental impact assessments . . . and monitor or report performance of treaty commitments as specified by the treaty.”<sup>333</sup> The same idea of avoiding risks instead of harm also animates the precautionary principle, under which hazardous activities are prohibited, even in the absence of full certainty about the risk.<sup>334</sup>

The supposed distinction between substantive and procedural obligations under the “no-harm” principle was discussed in the *Pulp Mills* case, where the ICJ was tasked with construing a treaty between Argentina and Uruguay pertaining to the River Uruguay.<sup>335</sup> In interpreting the “procedural” aspects of the treaty, the court took cognizance of the customary obligation of due diligence, which it found had evolved to contain a requirement “to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource.”<sup>336</sup> The court held that a violation of a procedural obligation under the treaty did not necessarily imply a violation of a substantive obligation as well,<sup>337</sup> and contrariwise that “the fact that the parties [may] have complied with their substantive obligations does not mean that they are

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333. Jutta Brunnée, *International Environmental Law and Community Interests: Procedural Aspects*, in COMMUNITY OBLIGATIONS IN INTERNATIONAL LAW, 3 (Eyal Benvenisti & Georg Nolte eds., forthcoming 2017), <https://papers.ssrn.com/abstract=2784701> (last visited Jan 11, 2017).

334. World Charter for Nature, G.A. Res. 7, U.N. GAOR, 37th Sess., Annex, Agenda Item 21, at 5, U.N. Doc. A/RES/37/7 (1982) (when “potential adverse effects are not fully understood, the activities should not proceed”); *Rio Declaration*, princ. 15 (“In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”).

335. *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, 2010 I.C.J. 14 (Apr. 20). *Id.* ¶ 204. *See also id.* ¶ 101 (“[T]he principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory. It is ‘every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.’ . . . A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State.”) (internal citations omitted).

337. *Id.* ¶¶ 71–74.

deemed to have complied *ipso facto* with their procedural obligations, or are excused from doing so.”<sup>338</sup> The procedural/substantive divide was pursued further between Costa Rica and Nicaragua in the *Certain Activities Carried out by Nicaragua in the Border Area* litigation, where one of the issues raised was whether Nicaragua had procedural obligations to conduct an environmental impact assessment and to notify Costa Rica of its results before commencing dredging on a boundary river. The court held that it did not, on grounds that the dredging did not pose a sufficiently significant environmental risk.<sup>339</sup>

In her separate opinion in that case, Judge Donoghue stated that she found the strategy of distinguishing between procedural and substantive obligations unhelpful, and that she preferred instead to recognize a “requirement to exercise due diligence” as the single “governing primary norm . . . that applies to all phases of a project (e.g., planning, assessment of impact, decision to proceed, implementation, post-implementation monitoring).”<sup>340</sup> On her approach, a failure to exercise due diligence in the planning phase could “engage the responsibility of the State of origin even in the absence of material damage to potentially affected States.” Moreover,

[i]f, at a subsequent phase, the failure of the State of origin to exercise due diligence in the implementation of a project causes significant transboundary harm, the primary norm that is breached remains one of due diligence, but the reparations due to the affected State must also address the material damage caused to the affected State.<sup>341</sup>

Judge Donoghue is correct. To recall, if you and your friends played football in the middle of a highway, you would all be liable in public nuisance, even if, miraculously, you did not disrupt any traffic. Few would say that this was because despite not causing any “substantive” traffic disruption, you nonetheless made “procedural” nuisances of yourselves. Instead, the only

338. *Id.* ¶ 78.

339. *Certain Activities carried out by Nicaragua in the Border Area* (Costa Rica v. Nicar.) and *Construction of a Road in Costa Rica along the San Juan River* (Nicar. v. Costa Rica), 2015 I.C.J. 665, ¶¶ 101–12 (Dec. 16) [hereinafter *Certain Activities Carried Out By Nicaragua*].

340. *Certain Activities Carried Out By Nicaragua*, *supra* note 339 (separate opinion of Judge Donoghue), ¶ 9.

341. *Id.*



question they would ask is: "What if everybody did that?"<sup>342</sup> In cases involving public or common goods, potential damage is secondary. The notion of procedural and substantive obligations under the "no-harm" principle is simply an attempt to shoehorn what is really an injury into the language of damage. There is only one obligation—a substantive obligation to exercise due diligence.

Interest-based accounts that place harms front and center also have tremendous difficulty accounting for the precautionary principle because it is impossible to weigh the unknown harms and benefits of proposed hazardous conduct against the cost of regulation. As Cass Sunstein argued in a series of articles and books, potential harms and benefits fall on both sides of the scale, such that any "balancing" or "weighing" of presently unquantifiable interests is logically impossible.<sup>343</sup> Instead, Sunstein argues that invocations of the precautionary principle usually reflect little more than cognitive and cultural biases.<sup>344</sup> Societies also differ greatly in the harms they revile, such that prioritizations of particular interests, say, in a clean environment, may be attacked as reflecting prejudices, or worse, illicit biases in favor of particular lobbies.<sup>345</sup> Benvenisti remarks in this vein that the precautionary principle is inherently conservative because it "conveys the potentially erroneous message that present uses are *a priori* safe."<sup>346</sup> Sunstein goes even further, arguing that the ultimate result of the precautionary principle is policy paralysis: "[I]t stands as an obstacle to regulation and non-regulation, and to everything in between."<sup>347</sup>

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342. RIPSTEIN, *Force and Freedom*, *supra* note 13, at 262.

343. Cass R. Sunstein, *Beyond the Precautionary Principle*, 151 U. PA. L. REV. 1003 (2003) [*Beyond the Precautionary Principle*] (arguing that the precautionary principle is unworkable because "risks are on all sides of social situations. Any effort to be universally precautionary will be paralyzing, forbidding every imaginable step, including no step at all."). *See also* Cass R. Sunstein, *Irreversible and Catastrophic*, 91 CORNELL L. REV. 841 (2005); CASS R. SUNSTEIN, *LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE* (2005).

344. Sunstein, *Beyond the Precautionary Principle*, *supra* note 343, at 1035–54.

345. *Id.* at 1015–16 (discussing how the precautionary principle features in some areas of EU regulation but not others).

346. EYAL BENVENISTI, *SHARING TRANSBOUNDARY RESOURCES: INTERNATIONAL LAW AND OPTIMAL RESOURCE USE* 110–11 (2002).

347. Sunstein, *Beyond the Precautionary Principle*, *supra* note 343, at 1028.

This conundrum is avoided if one conceives of the purpose of law as guaranteeing freedom from domination, rather than the maximization of utility. As Evan Fox-Decent notes, the “reliance on Kant’s legal theory allows it to trade fruitfully on the Kantian distinction between harms and wrongs” in explicating legal solutions to problems like climate change that are “gradual and non-linear in progression, severely affecting at present a relatively small portion of the earth’s population.”<sup>348</sup> The transfer of the burden of proof under the precautionary principle may be justified in the same way as the burden of proof in defamation. Being a free equal implies a right to be “beyond reproach,” that is, never being required to clear your own name.<sup>349</sup> At common law, a plaintiff in a libel action never has to demonstrate that she has suffered or will suffer damage as a result of an insulting statement.<sup>350</sup> Instead, it is for the defendant to establish its truth, or to withdraw it.<sup>351</sup> If the burdens were otherwise, everyone would have to spend their lives putting out every small fire started by others, rendering them effectively subject to everyone else’s arbitrary choices. The same strategy justifies the prohibition of conduct that is strongly suspected but not proven to be harmful under the precautionary principle. The state can legitimately expect a party proposing *prima facie* harmful activity to prove its harmlessness if such activity presents a risk of leaving its subjects at the mercy of distant polluters.<sup>352</sup> This is not just a

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348. Fox-Decent, *supra* note 308, at 260.

349. *DR* 6:238, at 394; RIPSTEIN, *Force and Freedom*, *supra* note 13, at 50–51.

350. *Uren v. John Fairfax & Sons Pty. Ltd.* (1966) 117 C.L.R. 118, 150 (Austl.) (Windeyer J.) (holding that a plaintiff “gets damages because he was injured in his reputation, that is simply because he was publically defamed.”); *Jameel v. The Wall Street Journal Europe Sprl* [2006] UKHL 44, [2007] 1 App. Cas. 359, ¶ 91 (appeal taken from Eng.) (Lord Hoffmann) (holding that because a man’s “reputation is a part of his personality, the ‘immortal part’ of himself,” “it is right that he should be entitled to vindicate his reputation and receive compensation for a slur upon it without proof of financial loss.”).

351. *Belt v. Lawes* (1882) L.J.Q.B. 359, 361 (Eng.). This remains the position in almost the entire English-speaking world except the United States. See *Hill v. Church of Scientology of Toronto* [1995] 2 S.C.R. 1130 (Can.); *Khumalo v. Holomisa* 2002 (5) SA 401 (CC) (S. Afr.); *The Age Co. Ltd. v. Elliott* (2006) 14 V.R. 375 (Austl.).

352. See Singapore Transboundary Haze Pollution Act, No. 24 (2014), *supra* note 6 at §8(2) (“[W]here—(a) it is proved, or presumed by the operation [the act], that an entity owns or occupies any land situated outside Singapore; and (b) it is further proved, or presumed by operation of [the act], that any haze

collective interest or common “concern,” but also an individual *right* belonging to the state.

The jurisprudence of the CJEU is a particularly rich source of precedent regarding the merely secondary nature of harms with respect to unilateral jurisdiction to provide global public goods. Unlike courts in the United States, the CJEU has *never* invoked the effects doctrine to ground jurisdiction over extraterritorial mergers and cartels. The leading case is *Wood Pulp I*, which involved an international cartel coordinating the prices of wood pulp being sold into the European Union.<sup>353</sup> As is the custom of that court, the judgment was preceded by an advisory opinion by Advocate General Darmon, who recommended the adoption of the effects doctrine.<sup>354</sup> The eventual judgment ignored this advice and held simply that the “decisive factor” grounding the court’s jurisdiction to regulate the cartel was the fact that the anticompetitive agreement was “implemented” in the European Union.<sup>355</sup> The CJEU has reaffirmed this stance numerous times, most recently in *Air Transport Association of America*, where Advocate General Kokott recommended in her advisory opinion that the Emissions Trading Directive be upheld on the basis of the effects of carbon emissions on the EU territory; that is, on a theory of harms.<sup>356</sup> The CJEU once again rejected this advice, finding instead that the European Union’s competence to impose such fees followed simply from the “environmental protection objectives which it has set for itself, in particular where those objectives follow on from an international agreement [the Kyoto Protocol] to which the European Union is a signatory. . . .”<sup>357</sup>

Liberal, harm-based theories face tremendous difficulties in accounting for environmental law, which are avoided on the republican, freedom-based model. Moreover, there is considerable

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pollution in Singapore involves smoke resulting from any fire on that land outside Singapore, it shall be presumed, until the contrary is proved, that the entity which is the owner or occupier of the land engaged in conduct, or engaged in conduct that condones any conduct by another, which caused or contributed to that haze pollution in Singapore.”).

353. Joined Cases 89/85, 104/85, 114/85, 116/85, 117/85 & 125/85 to 129/85, *Ahlström Osakeyhtiö and Others v. Comm’n (Wood Pulp I)*, 1988 E.C.R. 5193.

354. Opinion of Advocate General Darmon, *Wood Pulp I*, 1988 E.C.R. 5214, ¶¶ 57–58.

355. *Wood Pulp I*, 1988 E.C.R. ¶ 16. See generally *id.* ¶¶ 11–18.

356. Opinion of Advocate General Kokott, Case C-366/10, *Air Transport Association of America*, 2011 E.C.R. I-13833, ¶ 154.

357. Case C-366/10, *Air Transport Association of America*, 2011 E.C.R. ¶ 128.

doctrinal support for treating questions of damage as secondary, or even irrelevant, in assessing the legality of extraterritorial measures purporting to provide global public goods, such as competition regulation and environmental protection. Without damage or imminence thereof having to be proved, however, there is the concern that assertions of extraterritorial jurisdiction may become untethered to any limiting principle.

### *C. Public Purpose and Necessity*

A state's competence to enact extraterritorial measures arises not from an obligation to advance welfare generally, nor even because its interests are harmed, but only if its freedom is undermined. In his discussion of cosmopolitan right, Kant reserves special venom for those justifying the use of force against indigenous peoples merely on the basis that thereby "these crude peoples will become civilized," arguing instead that "all these supposed good intentions cannot wash away the stain of injustice in the means used for them."<sup>358</sup> Moreover, extraterritorial jurisdiction is not justified if "neither nature nor chance" has brought a state into contact with "a people that holds out no prospect of civil union with it. . . ."<sup>359</sup>

The same criteria governing the domestic provision of public goods also apply at the international level. Any unilateral measure must be *necessary* for the state's sole public purpose of securing the equal freedom of its subjects. It can neither pursue a private conception of the good reflecting the common sympathies peculiar to a particular community, nor even a "global value" shared by every single state in the world. Even if such a thing existed, coercion is never justified merely because it does another good. The secret intruder would wrong you if he threw away your cigarettes and poured your whisky down the sink, even if you fully and sincerely agreed that drinking and smoking were bad for you. This means, however, that unlike in the domestic rightful condition, a state may not enact extraterritorial measures to pursue aims that are compatible with, but not necessary for, a domestic rightful condition. Cagliostro may not impose taxes upon the citizens of Ruritania to set up a national opera house there, even if Ruritani-ans could really do with a bit

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358. *DR* 6:353, at 490.

359. *DR* 6:266, at 417.

of culture. Such a decision requires Ruritanian democratic approval, which Cagliostro does not possess.

Neither may Cagliostro enact measures that pursue proper public purposes, but which impose greater burdens on Ruritani-ans than are strictly needed. Anything in excess can only be for a private purpose. For this reason, unilateral assertions of extraterritorial jurisdiction may have to be “flexible,” or sensitive to changes in other states’ regulatory regimes.<sup>360</sup> An example is the EU Emissions Trading Directive, which provides that:

If a third country adopts measures, which have an environmental effect at least equivalent to that of this Directive, to reduce the climate impact of flights to the Community, the Commission should consider the options available in order to provide for optimal interaction between the Community scheme and that country’s measures, after consulting with that country.<sup>361</sup>

For such reasons, it may be necessary to invite the participation of foreign stakeholders in domestic policymaking processes. Benvenisti and Ryngaert are therefore correct to advocate these things, even though they do so for different reasons.<sup>362</sup> If the measure meets these criteria, other states will be under an obligation of mandatory cooperation. “Blocking statutes,” such as that which the United States enacted to prohibit U.S. airlines from complying with the EU emissions trading scheme, will be illegal.<sup>363</sup>

Aside from the above substantive criteria, there is one institutional requirement that must be fulfilled: the judicial settlement of disputes. As argued above, the one defect in an international state of nature is the indeterminacy of rights, meaning that the one institutional requirement of the international rightful condition is an international court where states may settle their disputes through lawsuits rather than by war. Therefore, a state purporting to provide a global public good unilaterally must submit itself to the jurisdiction of an international court for the purpose of addressing any legal challenges regarding necessity or public purpose, because claims of right remain indeterminate in

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360. Benvenisti, *Legislating for Humanity*, *supra* note 45, at 13.

361. *EU Emissions Trading Directive*, *supra* note 4, at Recital 17.

362. Benvenisti, *Sovereign Trusteeship*, *supra* note 15, at 329–32; RYNGAERT, *Unilateral Jurisdiction*, *supra* note 59, at 109–40.

363. European Union Emissions Trading Scheme Prohibition Act of 2011, 49 U.S.C. §40101 (2012).

the absence of a nonpartisan adjudicator. No state can simply expect others to accept its professions of good faith.<sup>364</sup> Of course, compulsory general jurisdiction does not exist in international law as it currently stands. Nothing, however, *prevents* a state from accepting the jurisdiction of the International Court of Justice, or of other courts or arbitral tribunals. If states avail themselves of this facility, there will be no reason to question the legitimacy of their unilateral measures in pursuit of global public goods.

#### *D. Extraterritorial Human Rights Obligations*

When a political institution asserts authority over distant strangers in the course of providing public goods, it acquires fiduciary obligations to them in human rights. Because human rights are principles of public fiduciary law, the sole criterion for the possession of human rights obligations is authority, rather than control, or the factual ability to affect the material well-being of persons. This is evident from *Ilașcu*, where the Strasbourg Court held that Moldova was obligated to use all diplomatic, economic, judicial, and other means within its ability to secure the rights of individuals held in a breakaway region over which it had no physical control but nevertheless claimed authority.<sup>365</sup> A similar position was articulated in *Pueblo Bello Massacre*, where the Inter-American Court of Human Rights held Colombia accountable for atrocities committed by paramilitaries in a region where it had only tenuous control.<sup>366</sup> These decisions will seem incomprehensible on a theory of the human rights practice where state obligations track physical control over land and persons, or the ability to affect the welfare of individuals.<sup>367</sup> They make sense, however, on a concept of human rights as public fiduciary law. A state holding itself out as the

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364. Benvenisti, *Sovereign Trusteeship*, *supra* note 15, at 317–18 (rejecting the claim that sovereigns may be allowed to abide by their own judgment without giving others any reasons, but stopping short of requiring compulsory judicial settlement of disputes).

365. *Ilașcu v. Moldova and Russia*, App. No. 48787/99, Eur. Ct. H.R. 2004-VII, ¶¶ 332–52.

366. *Pueblo Bello Massacre v. Colombia*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶¶ 105–40 (Jan. 31, 2006).

367. MILANOVIC, *supra* note 71, at 106-07.

public fiduciary of a group of people must be held to those standards, regardless of its actual ability to play this role.<sup>368</sup> These are obligations of conduct, not result. A state may be excused if it cannot fulfil its obligations, but it bears the burden of proving it tried.

As it happens, there is an example from Strasbourg where extraterritorial human rights jurisdiction arose as a result of unilateral measures taken for the provision of a public good: the preservation of the monetary system. Like roads, money is necessary for intercourse between persons: in the *Doctrine of Right*, Kant specifies the “real definition” of money as “the universal means by which men exchange their industriousness with one another.”<sup>369</sup> A full explanation of how money constitutes a public good is beyond the scope of this article, but the sense is captured by the following quote by Ann Pettifor:

The impact of the financial sector’s power-grab for our monetary system can only be fully grasped if we compare it to a power-grab for the public sanitation system. Were the sanitation system to be captured in the same way, we would live in a world in which a small elite abused a great public good. . . . That is effectively what has happened in economic terms since the finance sector made a power-grab for the money system in the late 1960s and ‘70s.<sup>370</sup>

*Kovačić v. Slovenia* was brought by Croatian applicants who had been prevented by Slovenian legislation from withdrawing their foreign currency deposits held at a Zagreb branch of a Slovenian bank (“Ljubljana Bank”).<sup>371</sup> The accounts had been

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368. See Dyson, *supra* note 193, at 20 (arguing, with respect to the ECHR, that “[i]f a Contracting State has taken over control of the civil administration of the foreign territory then its inability to control the situation is not a ticket out of the Convention.”).

369. DR 6:287, at 435. The “real” definition is contrasted against a “nominal definition” of money as a “thing that can be used only by being alienated,” where such alienation “is intended not as a gift but for reciprocal acquisition (by a *pactum onerosum*).” DR 6:286, at 434.

370. ANN PETTIFOR, THE PRODUCTION OF MONEY: HOW TO BREAK THE POWER OF BANKERS 70 (2017). See *id.* at 15 (arguing that “sound banking and monetary systems—just as sanitation, clean air and water—can be a great “public good.”).

371. *Kovačić v. Slovenia*, (Admissibility Decision) App. Nos. 44574/98, 45133/98 and 48316/99, Eur. Ct. H.R. (Apr. 1, 2004), <http://hudoc.echr.coe.int/eng?i=001-23835>.

opened with the Ljubljana Bank prior to the breakup of Yugoslavia and had been guaranteed by the National Bank of Yugoslavia. Beginning in 1988, the accounts were steadily frozen in order to stem hyperinflation. Following the breakup, newly independent Slovenia legislated to require the Ljubljana Bank to maintain this freeze with respect to all such foreign currency accounts, including those held in branches outside Slovenia.<sup>372</sup>

Notwithstanding the then-recent *Banković* decision, a chamber of the court held unanimously that the matter fell within Slovenia's human rights jurisdiction because "the acts of the Slovenian authorities continue[d] to produce effects, albeit outside Slovenian territory, such that Slovenia's responsibility under the Convention could be engaged."<sup>373</sup> Despite some confusion in the court's language, it was never claimed by the applicants or by the court that the Ljubljana Bank was either controlled by or acting upon the instruction of Slovenia, such that the freezing of the accounts was somehow an act of the Slovenian state. Instead, the crucial factor was that Slovenian legislation had "address[ed]" the operation of bank accounts in Croatia, thus exercising political authority there.<sup>374</sup> Indeed, the applicants' complaint asserted that "Slovenia had chosen to interfere in the Ljubljana bank's private-law relationship to the detriment of non-Slovenian savers."<sup>375</sup> These were *legal* effects—the results of authority, not mere power. The Croatian applicants were legally barred from reclaiming their funds exactly as if those measures had been legislated by Croatia. Slovenia therefore bore human rights obligations toward the Croatian applicants, including positive obligations to protect their rights from violation by a third party, the Ljubljana Bank.

Authority may be wielded legitimately only in a fiduciary capacity. If a state asserts extraterritorial jurisdiction over distant strangers in order to provide public goods for its subjects/beneficiaries, those distant strangers also become its subjects/beneficiaries. As their "constructive" fiduciary, it has obligations toward them in human rights.

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372. The facts are summarized at *id.* ¶ 1.

373. *Id.* ¶ 5(c).

374. *Id.*

375. *Id.* ¶ 5(b).



## CONCLUSION

Human dignity lies not in happiness but in being treated as a person, rather than as a thing at the mercy of others. The only way this can be achieved is through a set of political institutions, which together form a person called the state, whose sole purpose is to ensure its subjects' dignity. The state thus has both obligations and rights to provide public goods, which are necessary to ensure that no subject is left at the mercy of anybody else. The state's sole purpose cannot be frustrated by the arbitrary noncooperation of other persons, state or nonstate, domestic or foreign. All others must mandatorily cooperate with it in order to fulfill this single purpose. In enforcing such cooperation unilaterally, the state need not demonstrate damage because it has no property that can be damaged. The state must subject itself to the jurisdiction of an international court in order to answer legal challenges regarding the necessity and proper purpose of unilateral measures. Finally, the state will acquire fiduciary obligations in human rights to distant strangers to the extent it asserts authority over them in the course of providing a global public good.

And so, despite its very different premises, this article ends by agreeing with Benvenisti both at its beginning and conclusion. Just as for Benvenisti, the germ of this article lies in a belief in the vital necessity of states as political institutions and of their fiduciary office, as well as a conviction that the vast majority of human beings alive today have no control over their lives because their political communities are Bantustans independent only in name. It too culminates in the possibility of sovereigns bearing fiduciary obligations toward distant strangers. Whereas Benvenisti's model conceives of sovereigns as directly owing fiduciary obligations to humanity, this article instead argues that sovereigns owe fiduciary obligations first and foremost only to their subjects, but that in the course of fulfilling these obligations, they constructively make themselves fiduciaries of the rest of humanity. Finally, this article does not deny the importance of identity, values, and wellbeing, be it of individuals or communities. It insists, however, that these things are too complex to be achieved using the blunt implements of the law, and that the best that law can do is to ensure equal freedom for everyone, everywhere. Once individuals and states have been assured of this freedom, what they choose to do with it is their sovereign decision entirely.