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STATE COURTS AS TRUSTEES OF HUMANITY: TOWARDS A NEW APPROACH TO UNIVERSAL JURISDICTION

Steve Fikhman*

Abstract

Westphalian sovereignty and universal jurisdiction represent two opposing sides in a long-drawn-out theoretical quarrel: the former is known for its uncompromising support of state independence and noninterference, while the latter calls for a more inclusive approach, embracing judicial accountability towards others. The paper examines these two notions and inquires whether they necessarily contradict each other. Building upon the theory of sovereigns as trustees of humanity, the paper analyzes and identifies state courts as having a fundamental role in the sovereign's obligation to take foreign interests into account. Acknowledging this role, the paper presents normative as well as practical justifications in favor of the coexistence of sovereignty and universal jurisdiction, leading to the formation of a new "minimal obligation," namely the obligation of state courts, in some circumstances, to apply universal jurisdiction and adjudicate international law infringements.

> "*Since each sovereign power stands in the position of a guardian of international law, and is equally interested in upholding it, any State has the legal right to try war crimes, even though the crimes have been committed against the nationals of another power* […]"[1]

INTRODUCTION

The concepts of universal jurisdiction and state sovereignty are in a long-drawn-out theoretical conflict, and many efforts to bridge the theoretical gaps have failed.[2]

* I am grateful to Eyal Benvenisti for his helpful comments and guidance throughout the seminar "The Obligation of States to Foreign Stakeholders" during fall 2015 and spring 2016, at the Tel Aviv University Faculty of Law.

[1] MORRIS GREENSPAN, THE MODERN LAW OF LAND WARFARE 503 (1959).

[2] *See*, *Sixty-Fifth Session: The Scope and Application of the Principle of Universal Jurisdiction (Agenda Item 86)*, GEN. ASSEMBLY UNITED NATIONS, www.un.org/en/ga/sixth/66/ScopeAppUniJuri.shtml (last visited Sep. 21, 2016) (discussing the interrelations between sovereignty and universal jurisdiction, and stating: "The view was expressed that there was a delicate balance to be struck between the prevention of impunity and the free exercise of sovereignty by agents of the State").

On the one hand, the traditional Westphalian idea of sovereignty asserts, in a nutshell, the right of a state "to be left alone, to exclude, to be free from any external meddling or interference."[3] Therefore, the traditional view of sovereignty is jealous and protective of its ability to establish jurisdiction within its territory and over its nationals. Consequentially, exercising jurisdiction is equivalent to exercising sovereignty. On the other hand, the concept of universal jurisdiction is considered by many as the complete opposite, allowing states to bring criminal proceedings against perpetrators regardless of "the location of the crime and the nationality of the perpetrator or the victim."[4] In other words, universal jurisdiction allows state courts to deviate from the standard principles for establishing jurisdiction. It follows that any state exercising universal jurisdiction will unavoidably come into conflict with the jurisdictions of other states, leading to a potential infringement of their sovereignty.

This tension between universal jurisdiction and sovereignty leads to the main research question of this paper: Does universal jurisdiction necessarily undermine sovereignty, or could it be the case that a new perception of sovereignty obliges the application of universal jurisdiction by state courts?

This paper aims to propose a theoretical framework for reconciling the conceptual differences between state sovereignty and universal jurisdiction. In order to do so, I will introduce Benvenisti's theory of Sovereignty as Trusteeship of Humanity as an alternative to Westphalian sovereignty.[5] Concisely, Benvenisti aims to adjust the way we perceive the sovereign state in the shrinking, globalized modern world. Accordingly, he argues that sovereign states should not be accountable only to their citizens, nor should they be perceived as only granting rights and powers. Instead, they should embrace a broader view of accountability, recognizing their role as Global Trustees, in some circumstances, on behalf of foreign stakeholders. It follows that sovereign states shall comply with several "other-regarding" minimal obligations.

Drawing on Benvenisti's framework of sovereigns as trustees, I will conceptualize state courts as trustees of humanity, and maintain that sovereignty and universal jurisdiction can and should coexist.

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[3] Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 STAN. J. INT'L L. 283 (2004).
[4] Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 785-788 (1988) [hereinafter "Randall"].
[5] Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT'L L. 295 (2013) (Hereinafter "Sovereigns as Trustees").

The paper is organized as follows: in the first chapter, I review the basic concepts of sovereignty and universal jurisdiction. This review will reveal the potential conflicts between these two concepts, showing that they are inherent due to the link between sovereignty and the ability to exercise jurisdiction. In view of the tensions between the two concepts, it will be maintained that the desirability of the universal jurisdiction principle depends on the concept of sovereignty on which one relies. In the second chapter, I introduce an alternative concept of sovereignty, namely Benvenisti's theory of 'Sovereignty as Trusteeship of Humanity.' In the third chapter, I build upon the introductory information regarding the interrelations between sovereignty and universal jurisdiction, and argue in favor of envisioning state courts as trustees of humanity. Drawing on the theory of sovereigns as trustees, I argue that state courts should play a fundamental role in the "other-regarding" obligations of states to people. Accordingly, I propose a new 'minimal obligation' as part of Benvenisti's sovereignty as trusteeship model, namely the obligation of state courts, in some circumstances, to apply universal jurisdiction and adjudicate international law infringements. This obligation will be grounded in normative justifications derived from the theory of sovereignty as trustees. In the fifth chapter, I delineate the circumstances in which state courts should consider applying universal jurisdiction as part of a broader obligation to take other interests into account. The last chapter concludes.

I. SOVEREIGNTY VERSUS UNIVERSAL JURISDICTION – A PRIMER

The aim of this chapter is to explain the interrelations between the concepts of sovereignty and universal jurisdiction, as well as the potential tensions between them. In order to do so, a brief – yet not exhaustive – review of the basic concepts is required.

A. Sovereignty – an Outline

Historically, the modern concept of state sovereignty can be traced back to the Peace of Westphalia in 1648, which consisted of a series of international peace treaties that ended the Thirty Years War.[6] Scholars of international relations consider the Westphalian agreements to be a significant milestone in the development of the sovereign state due to their confirmation – for the first time in history – of the right of every country to determine its own religious character, as well as the formal equality between different countries and the principle of

[6] Richard Falk, *Revisiting Westphalia, Discovering Post-Westphalia*, 2002 J. OF ETHICS 311, 313 (2002).

territorial integrity.[7] The Westphalian understanding is an integral part of modern international law. For example, Article 2(4) of the United Nations Charter is consistent with the principle of territorial integrity, forbidding "the threat or use of force against the territorial integrity or political independence of any state."[8]

The notion of independence is another important characteristic of Westphalian sovereignty, meaning the "capacity of a state to provide for its own well-being and development free from the domination of other states."[9] This principle is deeply rooted in modern international law. For example, in the *Nicaragua* case, the ICJ stated that "in international law there are no rules, other than such rules as may be accepted by the state concerned, by treaty or otherwise, whereby the level of armaments of a sovereign state can be limited, and this principle is valid for all states without exception."[10] Another significant case for our inquiry is *Lotus*, which linked jurisdiction and sovereignty, and will be discussed below.

The last essential feature of sovereignty for our purposes is the principle of legal equality of states, namely the image of states as equal players with equal legal capacities. This notion is embedded in the United Nations Charter, where Article 2(1) states that "the Organization is based on the principle of the sovereign equality of all its Members."[11] The 1970 Declaration on Principles of International Law explains this principle as follows:[12] "All states enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, in spite of differences of an economic, social, political or other nature."

These three cardinal features of sovereignty, then, are particularly important for the purpose of this paper – territorial integrity, independence, and the legal equality of states. Given the basic contours of the concept of sovereignty, we can delve deeper into the idea of universal jurisdiction, and begin our inquiry into the interrelations between the two.

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[7] Leo Gross, *The Peace of Westphalia*, 42 THE AM. J. OF INT'L L. 20 (1948).
[8] Charter of the United Nations, Art. 2, Par. 4.
[9] MALCOLM SHAW, INTERNATIONAL LAW 211 (6th ed. Cambridge Univ. Press 2008).
[10] Case Concerning Military and Paramilitary Activities in an Against Nicaragua (Nicaragua v. United States of America (1986) ICJ 1, 135.
[11] Charter of the United Nations, Art. 2, Para. 1.
[12] Final Act of the Conference on Security and Co-operation in Europe, Helsinki, 1975.

B. Universal Jurisdiction – an Outline

Generally, jurisdiction refers to "the power, right, or authority to interpret and apply the law."[13] In order to understand the concept of universal jurisdiction and its distinctiveness, we must first briefly review the traditional rules of adjudicatory jurisdiction, namely the criteria by which a court is given the authority to subject different entities to the judicial process it conducts.

Adjudicatory jurisdiction consists of five main principles: territoriality, nationality (i.e., active personality), passive personality, protective and universality.[14] The common thread between the first four sources of jurisdiction is that they are inherently linked to state sovereignty, while the universality principle seemingly conflicts with the notion of sovereignty, as will be extensively discussed below.

The territorial principle: Due to the essential link between territory and sovereignty,[15] a state court – which functions as the judicial organ of the sovereign – can establish jurisdiction over events and persons within the bounds of the sovereign's geographic territory.[16]

The nationality principle: A state court can establish jurisdiction over a crime committed outside its geographic territory when the state's own citizen committed the crime in subject.[17] The reason for this principle of jurisdiction is that a sovereign has a duty not only to protect its citizens, but also to be responsible for prosecuting them whenever they commit crimes, regardless of the location of the crime.[18]

The passive personality principle: A state court can establish jurisdiction over a foreign national for a crime committed outside the state's geographic territory as long as the

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[13] "Jurisdiction." *Merriam-Webster.com*. 2016. www.merriam-webster.com/dictionary/jurisdiction (8 September 2016).
[14] *Research in International Law Under the Auspices of the Faculty of the Harvard Law School, Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 443, 445 (Supp. 1935) (hereinafter "Harvard Research Project").
[15] Martti Koskenniemi, *National Self Determination Today: Problems of Legal Theory and Practice*, 43 INT, & COMP. L.Q 241, 245 (1994).
[16] MALCOLM EVANS, INTERNATIONAL LAW 244-285 (4th ed. 2014).
[17] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1987) § 402(2); Harvard Research Project, *supra note* 14, at 445.
[18] M. Cherif Bassiouni, *The Sources and Content of International Criminal Law: a Theoretical Framework*, *in* 1 INTERNATIONAL CRIMINAL LAW 12 (M. Cherif Bassiouni, ed., 2d ed. 1999).

victim is a citizen of the state.[19] This principle is also closely related to sovereignty, in the sense that a sovereign must defend its citizens' interests not only within its territory but also outside national boundaries.[20] However, it should be noted that the passive personality principle is very controversial among international law scholars.[21]

The protective principle: A state court can establish jurisdiction over incidents, which affect vital security and state interests or the operation of governmental functions, even if they occur outside the sovereign's territory.[22]

The universality principle: Universal jurisdiction is traditionally defined as "a legal principle allowing or requiring a state to bring criminal proceedings in respect of certain crimes irrespective of the location of the perpetrator or the victim."[23] The main rationale underlying the principle of universal jurisdiction is the understanding that certain crimes are so atrocious as regards the international community that states have a responsibility – or even an obligation – to bring the perpetrators to justice, regardless of the location of the crime or the perpetrator.[24] This rationale is a "natural" one since it considers the law of nations to be based on certain values and principles, the infringement of which constitutes an offense against humanity, which is *malum in se* (i.e., inherently wrong by nature).[25]

Historically, the application of universal jurisdiction can be traced back to the 10th century,[26] where states have exercised universal jurisdiction over pirates on the high seas, regardless of their nationality or the location of the crime.[27] Piracy was recognized as "punishable in the tribunals of all nations" due to the major threat it posed to maritime trade

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[19] M. TRAVERS, LE DROIT PENAL INTERNATIONAL LAW 73 (1920); Beckett, *The Exercise of Criminal Jurisdiction Over Foreigners*, 6 BRIT. Y.B. INT'L L. 44, 55, 57 (1925).
[20] Geoffrey R. Watson, *The Passive Personality Principle*, 28 TEX. INT'L L. J. 1, 18 (1993).
[21] Harvard Research Project, *supra note* 14, at 579.
[22] See Nusselein v. Belgian State, 17 I.L.R. 136 (Belg. Court of Cassation 1950); Public Prosecutor v. L., 18 I.L.R. 206 (Neth. Supreme Court 1951); IAN CAMERON, THE PROTECTIVE PRINCIPLE OF INTERNATIONAL CRIMINAL JURISDICTION (Dartmouth Publ'g Co. Ltd., Aldershot, Brookfield, U.S. 1994).
[23] Randall, supra *note* 3.
[24] PUBLIC INTERNATIONAL LAW IN A NUTSHELL 172 (Thomas Burgenthal & Harold G. Maier eds., St. Paul: W. 1990); INGRID DETTER, LAWS OF WAR 425 (Cambridge Univ. Press 2000).
[25] Amnon Reichman, *Universal Jurisdiction in National Courts – Undermining Sovereignty or a New World Order?*, 17 I.D.F. L. REV. 49, 57, (2004) (Heb.) [hereinafter: "Reichman"].
[26] Stanislaw E. Nahlik & Lauri Hannikainen, *Peremptory Norms (jus cogens) in International Law: Historical Development, Criteria, Present Status.*, 84 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 779 (1990).
[27] Yana Shy Kraytman, *Universal Jurisdiction – Historical Roots and Modern Implications*, 2 BRUSSELS JOURNAL OF INTERNATIONAL STUDIES 94, 97 (2005).

and difficulties concerning prosecution and capture.[28] Thus, pirates became *hostis humani generis*,[29] and states accepted universal jurisdiction over piracy.[30]

The evolution of universal jurisdiction reached a turning point in the years after World War II, especially with the International Military Tribunal at Nuremberg. Many believe that the Nuremberg trials were the foundations of the modern application of universal jurisdiction.[31] The United States Secretary of War, Justice Robert Jackson, said in his opening statement: "Civilization asks whether the law is so laggard as to be utterly helpless to deal with crimes of this magnitude by criminals of this order of importance."[32] This spirit of universality, along with the fact that this was the first time a non-national court prosecuted "criminals for crimes committed in that particular area,"[33] makes the Nuremberg trials the first modern application of universal jurisdiction.

Another significant milestone in modern universal jurisdiction is the *Eichmann* case, which confirmed the conviction of Adolph Eichmann for crimes against humanity, war crimes and crimes against the Jewish people (genocide) during World War II.[34] The judgment of the Supreme Court of Israel affirmed the soundness of universal jurisdiction in international law as an important tool for the international community to pursue justice.[35] The Supreme Court established jurisdiction notwithstanding the fact that the crimes were committed outside the territorial boundaries of Israel, and at a time when Israel was not a state. The court reasoned that states who prosecute perpetrators for crimes under international law act as *guardians of international law* and as agents on behalf of the entire international community: [36]

> Not only do all the crimes attributed to the appellant bear an international character, but their harmful and murderous effects were

[28] *United States* v *Smith*, 18 U.S. 153, 156 (1820) (declaring that piracy is "an offence against the universal law of society") [hereinafter "Smith"].
[29] Latin for "enemy of mankind".
[30] Smith, *supra note* 27, at 98.
[31] Henry T. King, Jr., *Universal Jurisdiction: Myths, Realities, Prospects, War Crimes and Crimes Against Humanity: The Nuremberg Precedent*, 35 NEW ENGLAND LAW REVIEW 281, 281-282 (2001).
[32] Justice Robert Jackson, Opening Statement at Nuremburg Trials, reprinted in TELFORD TAYLOR, THE ANATOMY OF THE NUREMBURG TRIALS 171 (1992) [hereinafter "Jackson"].
[33] Jackson, *supra note* 31, at 283.
[34] Attorney-General of the Government of Israel v. Eichmann (Israel Sup. Ct. 1962), Int'l L. Rep., vol. 36, 277 (1968) (English translation) [hereinafter "Eichmann Case"].
[35] Amnesty International, The Eichmann Supreme Court Judgement: 50 Years On, Its Significance Today 5 (2012) [hereinafter "Amnesty International"].
[36] Amnesty International, *supra note* 34, at 304.

> so embracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a *guardian of international law* and an agent for its enforcement, to try the appellant. That being the case, no importance attaches to the fact that the State of Israel did not exist when the offences were committed.

The doctrine of universal jurisdiction has continued developing since the Eichmann trial and is still being shaped today.[37]

C. The Clash Between Sovereignty and Universal Jurisdiction – Can the Two Coexist?

The basic presentation of the two concepts sheds light on the potential tensions between them. These tensions are emphasized in view of the *Lotus* case,[38] which affirmed the principle of sovereignty in modern international law and linked it to territoriality:[39]

> Now the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense *jurisdiction is certainly territorial*; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from convention [*emphasis added*].

Thus, the *Lotus* case set the default principle of jurisdiction, namely territoriality, and linked it closely to the idea of sovereignty. Given this, exercising jurisdiction is equivalent to exercising sovereignty. As a result, any extraterritorial jurisdictional exception to the default territoriality principle contradicts sovereignty and requires a firm theoretical basis.

Stated differently, any state exercising jurisdiction outside its territory will unavoidably come into conflict with jurisdictions of other states, leading to a potential

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[37] For a more detailed review of the development of universal jurisdiction, see: Petra Baumruk, *The Still Evolving Principle of Universal Jurisdiction*, Dissertation Thesis 42-62 (Charles University in Prague Faculty of Law) (2015).
[38] The Lotus Case (France v. Turkey), P.C.I.J. Reports, Series A, No. 10 (1927) [hereinafter "Lotus"].
[39] Lotus, *supra note* 38, at 18-19.

infringement of their sovereignty. As we have seen, the first four principles of jurisdiction are theoretically linked to state sovereignty and thus are mostly justified. However, at first glance, the fifth principle of jurisdiction – i.e., universal jurisdiction – seems to lack a sufficient theoretical basis as to its interrelations with the concept of sovereignty. Therefore, one can claim that universal jurisdiction undermines sovereignty because of its inconsistency with the basic principles regarding independence.

This tension between universal jurisdiction and sovereignty leads to the main research question of this paper, namely whether universal jurisdiction necessarily undermines sovereignty, or perhaps a new perception of sovereignty obliges the application of universal jurisdiction by state courts.

II. Alternative Conception of Sovereignty – Sovereignty as Trusteeship

In light of the discussion regarding the interrelations between sovereignty and universal jurisdiction, it is now clear that the theoretical desirability of universal jurisdiction depends on the concept of sovereignty on which one relies. Accordingly, this chapter introduces an alternative conception of sovereignty, namely the theory of Sovereignty as Trusteeship. Versions of the trusteeship concept can be traced back as early as the 16th century,[40] but in recent years it has enjoyed renewed discussion among legal scholars, particularly by Prof. Eyal Benvenisti and the GlobalTrust Project.[41]

A. Introduction to the Trusteeship Concept

The theory of sovereignty as trusteeship of humanity seeks to provide an alternative to the solipsistic idea of Westphalian sovereignty, which perceives the sovereign as the absolute authority in both internal and external affairs. As outlined above, the modern roots of the solipsistic vision of sovereignty were expressed in the *Lotus* case, which asserted that as a starting point, sovereigns are free from any obligations or limitations.[42]

According to the trusteeship model, the solipsistic vision of sovereignty does not fit the shrinking, globalized contemporary world.[43] Benvenisti analogizes the modern

[40] Andrew Fitzmaurice, *Sovereign Trusteeship and Empire*, 16 Theoretical Inquiries in L. 447 (2015).
[41] Global Trust Project – Sovereigns as Trustees of Humanity, http://globaltrust.tau.ac.il/.
[42] Lotus, *supra note* 38, at 18-19.
[43] Sovereigns as Trustees, *supra note* 5.

international arena to a "densely packed high-rise that is home to two hundred separate families."[44] In the past, the traditional concept of sovereignty held water due to long distances between nations and the rarity of cross-border externalities.[45] The modern reality is otherwise: due to increasing interdependencies between them, states no longer act as coherent entities affecting only their citizens, but rather are part of a complex global network of interrelating states, NGOs and global governance bodies, affecting various stakeholders around the world. Moreover, the state itself is no longer harmonized, given the fact that different authorities represent conflicting interests and operate simultaneously. As a result, the modern global reality entails various regulatory sovereign decisions that affect foreign stakeholders. However, the affected stakeholders lack the voice and the capability to influence and shape these decisions.

Consequently, according to the concept of sovereigns as trustees, sovereign states should not be accountable only to their citizens, nor should they be perceived as only granting rights and powers. Instead, they should embrace a broader view of accountability, recognizing their role as Global Trustees, in some circumstances, pn behalf of foreign stakeholders. Realistically, Benvenisti's approach seeks not to sacrifice the internal interests of a sovereign state for the benefit of foreign interests, but merely to take those interests into account in the sovereign's decision-making process. In other words, the principle of "charity begins at home" is firm and abiding, but alongside it, the sovereign is subject to several minimal "other-regarding" obligations.

B. Normative Justifications for the Concept of "Sovereigns as Trustees"

Benvenisti grounds the theory of sovereigns as trustees in three distinct normative justifications, with the aim of establishing a moral imperative upon states to comply with some minimal "other-regarding" obligations.[46] In this subchapter, I shall briefly present these normative justifications.

The Self-Determination Argument: Traditionally, sovereignty is proudly perceived as the ultimate expression of personal and collective self-determination, hence granting people the freedom to be the authors of their own lives, as well as the ability to influence the government and exercise their "voice" in relevant decision-making processes. However, this

[44] Id. at 295.
[45] Id. at 299.
[46] Sovereigns as Trustees, *supra note* 5, at 301.

approach faces a significant challenge in light of today's "sovereignty-based global system,"[47] where various democratic deficits in the domestic decision-making process impede the ability of individuals to exercise "self-authorship."[48] Those deficits stem from three main factors: *First*, the ease with which people, goods, services and capital can move nowadays exacerbates the gap between the influence of those who can afford free movement and those minorities that have limited mobility to begin with. Consequently, an asymmetrical representation of interest groups arises regarding policy decisions, thus undermining peoples' ability to exercise self-determination. *Second*, as explained above, in today's modern global reality there is a grave misfit between the populations affected by certain regulatory decisions (i.e., foreign stakeholders) and the population which affects those exact regulatory decisions (i.e., domestic voters).[49] *Third*, international fragmentation pursued by a handful of powerful states makes it difficult for small and medium-sized states to act collectively in order to shape their destinies. The fragmentation tactics often include "divide and rule" techniques, such as the "large number of narrow agreements" approach, which enables one powerful state to negotiate simultaneously – and most importantly, separately – with several medium-sized states, hence preserving leverage over each state through the prisoner's dilemma mechanism.[50] The abovementioned democratic deficits undermine an authentic exercise of self-determination. Hence, minimal obligations to mind the interests of foreign stakeholders may restore the prominence of self-determination as a justification of sovereignty.

The Equal Moral Worth Argument: The Universal Declaration of Human Rights anchored a longstanding moral intuition in stating that "All human beings are born free and equal in dignity and rights."[51] Therefore, in addition to the classical principal-agent model of governments being accountable to their citizens, over the years there has been growing receptiveness towards an approach according to which states bear some inherent obligations towards humanity as a whole. This natural-right approach was articulated sharply by Vattel: "[N]ature, or rather […] its Author, […] has destined the earth for the habitation of mankind; and the introduction of property cannot have impaired the right which every man has to the

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[47] Eyal Benvenisti, *Why International Organizations are Accountable to You? Global Governance Bodies as Trustees of Humanity* 1, 21(forthcoming) [hereinafter "*Global Governance Bodies as Trustees of Humanity*"].
[48] Sovereigns as Trustees, *supra note* 5, at 301 (referring to JOSEPH RAZ, THE MORALITY OF FREEDOM 204 (1986)).
[49] Sovereigns as Trustees, *supra note* 5, at 304.
[50] Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595 (2007).
[51] Universal Declaration of Human Rights, Art. 1, G.A. Res. 217A (III) (Dec. 10, 1948) [hereinafter "Universal Declaration of Human Rights"].

use of such things as are absolutely necessary – a right which he brings with him into the world at the moment of his birth."[52]

The Exclusive Power over Portions of Earth Argument: This argument draws on the state of nature, asserting that the allocation of portions of the earth to countries is merely artificial and instrumental.[53] Hence, states have no inherent right to the portion of earth which they control. Instead, they are obligated to use the resources under their control efficiently and in consideration of humanity as a whole.[54] In other words, "no state may regard its exclusive control over a portion of global resources as given."[55]

Benvenisti uses these justifications to establish minimal "other-regarding" obligations, which apply regardless of the existence of reciprocal commitments by means of a treaty.[56] To summarize this subchapter, according to the theory of sovereignty as trustees, "the competency of contemporary sovereigns to manage public affairs within their respective jurisdictions carries with it a corollary duty to take account of external interests and even to balance internal against external interests."[57]

C. Minimal "Other-Regarding" Obligations

I shall briefly present the minimal obligations imposed upon states according to the sovereigns as trustees theory. Importantly, these obligations are strongly interrelated and mainly procedural, thus relying on a tradition of global administrative law and principles of natural justice.

The obligation to consider the interests of foreign stakeholders: Policymakers should take into account foreign interests in the decision-making process of regulatory decisions that might affect those foreigners. In practice, Benvenisti embraces a minimal idea of "Due Respect,"[58] meaning that a state should consider internalizing potential foreign losses in the

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[52] EMERICH DE VATTEL, THE LAW OF NATIONS 229, 231 (Joseph Chitty trans., T & J.W. Johnson & Co. 1883) (1758).
[53] Sovereigns as Trustees, *supra note* 5, at 309.
[54] Id. at 312.
[55] Eyal Benvenisti, *The Normative Basis for the Law Regulating Global Governance Institutions* 26 (from "The Law of Global Governance" GlobalTrust Working Paper 4/2014, available online at: http://globaltrust.tau.ac.il/publications/.
[56] Sovereigns as Trustees, *supra note* 5, at 301.
[57] Global Governance Bodies as Trustees of Humanity, *supra note* 47.
[58] Sovereigns as Trustees, *supra note* 5, at 314.

sense of being informed of them (instead of being under an absolute obligation to balance the foreign interests against its own).[59]

The obligation to provide "voice" to the affected foreign stakeholders: Authentic fulfillment of the first obligation requires states to provide "voice" to affected foreign stakeholders, even after a policy decision has been made, as well as to provide reasoning for the decision in issue.[60]

The restricted Pareto principle: This obligation is of a restrictive nature, and it stems from the realistic approach taken by the theory in acknowledging that sovereigns are not yet ready to take upon themselves losses for the benefit of others. Therefore, the endpoint of a decision-making process that followed the first two obligations shall adhere to the restricted Pareto principle, i.e., integrate other-regarding interests to the extent that national interests sustain no (or very little) loss.[61]

Note that Benvenisti's approach seeks not to go against the centrality of the sovereign.[62] To the contrary, the theory of sovereigns as trustees acknowledges the intrinsic value of the sovereign as the key player in accommodating both domestic and foreign interests.

III. State Courts as Trustees of Humanity: Towards a New Approach to Universal Jurisdiction

Thus far, we have reviewed the necessary introductory information regarding the interrelations between sovereignty and universal jurisdiction, as well as the theory of sovereigns as trustees. We can now turn to the main research question of this article: Does universal jurisdiction necessarily undermine sovereignty, or could it be the case that a new perception of sovereignty obliges the application of universal jurisdiction by state courts?

Shifting our conception of sovereignty from the solipsistic approach to the Global Trustees vision enables us to fragmentize the sovereign state into different authorities and examine the role each authority plays in the state's obligation to "other-regardingness." In this chapter, I shall perform such an exercise with regard to state courts.

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[59] Id.
[60] Id. at 318.
[61] Id. at 320.
[62] Id. at 300.

Acting as the judicial organ of the sovereign, state courts have great impact over the ability of the sovereign to fulfill its role as a trustee of humanity. The reason for this is twofold, and it combines two concepts discussed thus far, namely the theory of sovereigns as trustees and the principle of universal jurisdiction.

As I will now show, the combination of globalization processes in the judiciary sphere together with the implications of the failure to apply the principle of universal jurisdiction creates a strong case in favor of state courts applying universal jurisdiction.

A. Increasing Influence of State Courts in the Global Context

Globalization processes have significantly affected the interrelations between domestic and international law. In the past, when the Westphalian solipsistic vision of sovereignty prevailed, domestic and international law were two separate fields of law, adjudicated in different tribunals and by different practitioners.[63] Therefore, state courts had few dealings with transnational matters, and their influence was mainly limited to their jurisdictional territory.

The modern reality is substantially different. Frictions between international and domestic law occur on a daily basis. Accordingly, the modern lawyer is equipped with two sets of arguments, international and domestic, and international law is no longer considered a taboo that applies only to inter-state relations, but rather a necessary tool of modern jurisprudence.[64] As Lord Bingham described it:[65]

> Times have changed. To an extent almost unimaginable even thirty years ago, national courts in this and other countries are called upon to consider and resolve issues turning on the correct understanding and application of international law, not on an occasional basis, now and then, but routinely, and often in cases of great importance.

This phenomenon stems from several factors that are relevant for our purposes. First, the continuous improvement in the mobility of people, goods, services and capital leads to an

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[63] Ralf Michaels, *Globalization and Law: Law Beyond the State, in* LAW AND SOCIAL THEORY 289-303 (Reza Banakar & Max Travers eds., 2d ed. 2013).
[64] Anthea Roberts, *Comparative International Law? The Role Of National Courts In Creating And Enforcing International Law*, 60 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY ICLQ 57 (2011).
[65] Lord Bingham, 'Foreword,' in S Fatima, *Using International Law in Domestic Courts* (Hart Publishing, Oxford, 2005).

increase in private transnational law disputes, as well as inter-state litigation, involving parties from different states.[66] In the criminal context, today's mobility allows criminals to flee areas of war easily and to avoid prosecution in their home countries. Second, the realities of communications and social media have increased awareness of a variety of issues around the globe, and in turn led to the judicialization of nearly every part of our lives. In the face of decreasing public trust in governments,[67] courts are increasingly perceived as the last frontier of justice.[68] Third, whether reacting to those globalization processes or creating them, domestic courts themselves rely on and cite their foreign counterparts, as well as various international tribunals. In doing so, some courts are acting as if they were a part of a net of interrelated courts engaged in an ongoing interjudicial dialogue towards preserving global justice.[69]

This course of argument was sharply articulated by Israeli Supreme Court Justice E.E. Levy in one of his judgments:[70]

> Transnational crime has existed since the dawn of history. However, the phenomenon grew stronger with the development of means of communication and commerce between states. The more the world became a "global village," the criminal craft, which needs convenient means of communication, transportation, and shipping, became easier. […] In the past, the dominant approach drew exclusively from the principle of state sovereignty. The attitude today is that the penal law no longer looks solely upon what is done inside the country. *The legal system does not act in a vacuum. It has some level of responsibility toward other systems.* […] *Not only is it inappropriate for a state, as a society in the community of civilized nations, to seclude itself within the narrow boundaries of its sovereignty; such*

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[66] A.M. Slaughter "A Global Community of Courts" 44 Harv. Int'l L. J. (2003) 191; .S.B. Burbank "The World in Our Courts", 89 Mich L. Rev. (1991) 1456

[67] OECD Report, Trust in Government, available online at http://www.oecd.org/gov/trust-in-government.htm (stating: "Trust in government is deteriorating in many OECD countries").

[68] Kathleen Hall Jamieson & Michael Hennessy, *Public Understanding of and Support for the Courts: Survey Results*, 95 THE GEORGETOWN L. J. 899 (2007).

[69] Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AMERICAN JOURNAL OF INTERNATIONAL LAW 241, 243 (2008); Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 133-36 (2002); KENT ROACH, THE SUPREME COURT ON TRIAL: JUDICIAL ACTIVISM OR DEMOCRATIC DIALOGUE (2001).

[70] C.A 4596/05, *Rosenstein (Ze'ev) v Israel*, Appeal judgment, para. 30, 39 to Honorable Judge Levy's Judgement [hereinafter "Rosenstein Case"].

> *behavior is likely to lead to severe consequences from the standpoint of its internal interests as well* [emphasis added].

B. State Courts' Potential Role in the Global Trustees Framework

Besides the general influence of state courts in the global context, they potentially may have a fundamental role in the sovereign's obligations as a Global Trustee, especially in the context of universal jurisdiction and criminal law.

Assume that the perpetrator of a serious crime had fled the country in which the crime was carried out, and none of the classical criteria for adjudicatory jurisdiction applies.[71] In those circumstances, the domestic court of the country to which the perpetrator had fled faces a choice whether or not to apply universal jurisdiction and adjudicate the case.

This choice entails grave consequences that might affect the ability of a sovereign to exercise its role as a Global Trustee. Primarily, failure to adjudicate serious crimes will deny voice to the affected foreign stakeholders, namely the victims of the crime and the country of origin as a whole. The reason for this is that a judicial process – especially a criminal one – provides the victims of the crime, as well as the society in the country of origin, with a platform to exercise their voice and to seek justice. Even if victims do not exercise their voice directly as witnesses, their interests would presumably be represented – to some extent – by the court, as well as by the prosecution. Furthermore, the existence of this type of judicial process has value not only regarding the interests represented directly in it or its outcome, but rather in the sense that a judicial process may ignite a public debate and raise awareness of certain issues, providing another platform for foreign stakeholders to exercise their voice.

A utilitarian notion accompanies this voice-based vision, maintaining that the application of universal jurisdiction "[…] over the relevant crimes […] will provide more deterrence, retribution and condemnation of the crimes, and more incapacitation and perhaps even rehabilitation of perpetrators, than would otherwise exist."[72] This utilitarian end would, in turn, fulfill a broader understanding of "other-regardingness" by Global Trustees.

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[71] See discussion in chapter II.B for adjudicatory jurisdiction principles.

[72] Madeline Morris, *Universal Jurisdiction in a Divided World: Conference Remarks*, 35 NEW ENGLAND LAW REVIEW 337, 338 (2001).

There is, then, a strong practical case in favor of envisioning state courts as trustees of humanity, playing a key role in the Global Trustees framework. I shall now turn to ground this practical case with normative justifications.

C. The Normative Basis for Considering State Courts as Trustees of Humanity

In order to envision state courts as trustees of humanity, it is necessary to justify the supposed infringement of sovereignty, which occurs when state courts use universal jurisdiction to adjudicate a crime committed by a foreign perpetrator in the absence of an alternative basis for jurisdiction. In other words, besides the aforementioned *practical* reasons in favor of envisioning state courts as trustees of humanity, one must justify the *moral* obligation of courts to act as trustees of humanity. In this subchapter, I shall turn to such an exercise by drawing on Benvenisti's normative justifications for the sovereigns as trustees framework, while making necessary changes in order to apply them to state courts.

C.1. "Self-Determination" as a Ground for Considering State Courts as Trustees of Humanity

As explained above,[73] sovereignty has always been perceived as the realization of the right of people to self-determination. At first glance, universal jurisdiction seems to impede the people's right to sovereignty and self-determination, by allowing courts to establish jurisdiction notwithstanding the jurisdiction of a different state. However, a closer examination reveals that self-determination itself obliges the application of universal jurisdiction in some circumstances.

The right to collective self-determination does not enjoy a priori supremacy over other rights, such as the right to life and freedom of speech.[74] Therefore, when state courts face a decision whether to grant jurisdiction over a foreign perpetrator based merely on universal jurisdiction, they shall inquire whether the perpetrator's country of origin truly exercises collective self-determination. If the answer to this question is negative, meaning the country of origin does not intend to pursue the perpetrator, then the state court has a legitimate reason (and sometimes obligation) to try the perpetrator.

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[73] See discussion in chapter III.B.
[74] Reichman, *supra note* 24, at 76.

Amnon Reichman explained this course of argument using the following example.[75] Country A cannot use a "sovereignty-based" argument against the actions of Country B when Country B, through its legal system, is, in fact, protecting the rights of the citizens of Country A. This is because Country A enjoys the status of a sovereign only in order to protect those rights. If indeed Country A uses its sovereignty in a way that harms the rights the realization of which entitles Country A to its sovereign power, then the veil of sovereignty shall be lifted, in order to help the people whose rights are not respected by the government authorities in Country A.

Thus, a coherent approach to self-determination obliges the application of universal jurisdiction by state courts in some circumstances.

C.2. "Equal Moral Worth" as a Ground for Considering State Courts as Trustees of Humanity

The argument from equal moral worth to support envisioning state courts as trustees of humanity relies – like its "sovereign" counterpart –[76] on the Universal Declaration of Human Rights and a "natural-right" approach. The Universal Declaration of Human Rights states that "All are equal before the law and are entitled without any discrimination to equal protection of the law."[77] Moreover, it states that "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."[78] Therefore, state courts – like sovereigns – bear a certain amount of responsibility towards humanity as a whole. In particular, the equal moral worth of people shall justify the use of universal jurisdiction to adjudicate crimes against humanity (in some circumstances, which I will discuss below). Under these conditions, to paraphrase the *Eichmann* case statement regarding sovereigns, state courts act as "guardian[s] of international law and agents for enforcement."[79]

Importantly, by analogy to the theory of sovereigns as trustees, my proposal to envision state courts as trustees of humanity does not aspire to weaken domestic courts, but

[75] Reichman, *supra note* 24, at 76.
[76] See discussion in chapter III.B.
[77] Universal Declaration of Human Rights, *supra note* 50, Article 7.
[78] Id., Article 8.
[79] Eichmann Case, *supra note* 33 (referring to MORRIS GREENSPAN, THE MODERN LAW OF LAND WARFARE 503 (1959)).

rather to strengthen them, in acknowledgment of their institutional advantage in balancing conflicting state interests.

To briefly sum up, thus far we have established a practical as well as normative case in favor of envisioning state courts as trustees of humanity. In doing so, we have shown how the application of universal jurisdiction by state courts can be perceived as an obligation towards humanity. In the following chapter, I shall delineate the circumstances in which this new "minimal obligation" arises.

IV. TOWARDS A NEW MINIMAL OBLIGATION – THE APPLICATION OF UNIVERSAL JURISDICTION BY STATE COURTS

The following factors are influential as to the question when an obligation to apply universal jurisdiction by state courts arises.

The Crimes in Subject are of Great Magnitude (War Crimes, Crimes against Humanity, etc.): The minimalistic nature of the obligation of state courts to apply universal jurisdiction is expressed primarily by the realization that it arises only when the crimes in subject are grave and affect the international community as a whole. This is where the idea of trusteeship of humanity and accountability towards others appears in full glory. Thus, in cases of gross violation of human rights, the tendency will be towards ending impunity and requiring state courts to apply universal jurisdiction.[80]

The Complementarity Principle: As with the ICC's jurisdiction,[81] the obligation of state courts to apply universal jurisdiction arises only when the country with the closest connection to the crime in subject has no intention or capability of adjudicating the crime at issue.[82] An example of this principle is the obligation of states to defer to a request for extradition when a closely related country asks to adjudicate the case and can do so fairly.[83] Only when a closely related country to the case does not aspire to carry out a fair trial can a

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[80] Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CALIFORNIA LAW REVIEW 449, 485 (1990).
[81] Rome Statute of the International Criminal Court, Article 17(1), July 17, 1998, 37 I.L.M. 999 (1998); Christine Van Den Wyngaert & Guy Stessens, *The International Non Bis In Idem Principle: Resolving Some of the Unanswered Questions*, 48 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY ICLQ 779 (1999).
[82] Mohammad. El Zeidy, *A New Machinery to Implement International Criminal Law*, 23 MICH. J. INT'L L 869 (2002).
[83] HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 258-259 (TRANSLATED BY A.C CAMPBELL, NEW YORK, 1901).

foreign court lift the veil of sovereignty, apply universal jurisdiction, and fulfill its role as a trustee of humanity. In other words, the obligation of a foreign state court to act as a trustee of humanity in circumstances of impunity and jurisdictional vacuum is merely residual to the fundamental obligation of every state to assure the proper functioning of its judicial system.

The Restricted Pareto Principle: As in Benvenisti's framework of sovereigns as trustees, state courts – when acting as trustees of humanity – shall take into account the interests of foreign stakeholders to prosecute a perpetrator only to the extent that the sovereign sustains no (or very little) loss. Potentially, state courts might have a variety of reasons not to adjudicate a case by means of universal jurisdiction. For example, they might consider the political relations between the two states at issue, and conclude that exercising universal jurisdiction over a foreign national will impede the diplomatic ties between the countries drastically. Alternatively, when two states are engaged in a political or armed conflict of any kind, any exercise of universal jurisdiction will be perceived as a false trial. In these types of situations, the sovereign's political and diplomatic interests outweigh the interests of the foreign stakeholders.

Importantly, as in Benvenisti's framework of sovereigns as trustees, this obligation applies regardless of whether other courts reciprocate. Nevertheless, "reciprocity or the lack thereof could be a relevant consideration for [courts] to take into account in determining how to act."[84]

Clearly, the abovementioned factors are not exhaustive. They merely serve as a starting point towards a more comprehensive doctrine of universal jurisdiction in state courts, to be developed by an inter-judicial dialogue.

V. CONCLUSION

We began our inquiry by reviewing two influential concepts in the literature of international law, namely state sovereignty and universal jurisdiction. As the introductory presentation has shown, these two concepts are in a long-drawn-out theoretical conflict. In light of this conflict, the main research question set by this paper was whether universal jurisdiction necessarily undermines sovereignty or perhaps a new perception of sovereignty obliges the application of universal jurisdiction by state courts.

[84] Sovereigns as Trustees, *supra note* 5, at 314.

This paper has attempted to show that the latter part of the research question is true, namely that it is possible to establish a theoretical framework that will enable the coexistence of state sovereignty alongside universal jurisdiction and reconcile the theoretical differences between the two. In order to do so, I introduced the theory of sovereigns as trustees of humanity as an alternative to the traditional Westphalian view of state sovereignty. Arguing that it is necessary to adjust the traditional concept of sovereignty to the modern globalized reality, I applied the theory of sovereigns as trustees to state courts, particularly in the context of universal jurisdiction.

My proposed theoretical framework drew on the theory of sovereigns as trustees as well as globalization processes, particularly in the judicial sphere, aiming to show that state courts should be perceived as trustees of humanity. In order to establish a new minimal obligation, namely the obligation of state courts to apply universal jurisdiction, the argument in favor of envisioning state courts as trustees of humanity proceeded in two steps. The first step was practical, relying on the ongoing convergence of international and domestic law to show that "*the penal law no longer looks solely upon what is done inside the country. The legal system does not act in a vacuum. It has some level of responsibility toward other systems*."[85] Thus, legal globalization processes and inter-judicial dialogue serve as a catalyst for the implantation of the perception of state courts as trustees of humanity. The second step of the argument was normative. Drawing on the normative grounds of the sovereigns as trustees framework, I have made necessary changes and argued that self-determination, as well as equal moral worth, requires state courts – in some circumstances – to apply universal jurisdiction and act as trustees of humanity To complete the picture, I then began the delineation of the circumstances in which the proposed minimal obligation arises.

To conclude, the purpose of the proposed theoretical framework is to serve as an intermediary between proponents of state sovereignty on the one side, and advocates of universal jurisdiction on the other side, and to demonstrate that these two concepts could (and should) coexist.

[85] Rosenstein Case, *supra note* 69.