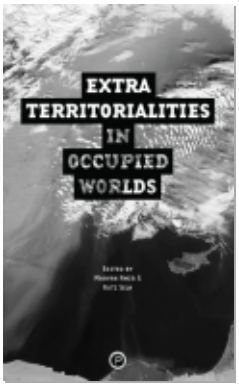
Extraterritorialities in Occupied Worlds

Ruti SelaMaayan Amir



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Extraterritorial State Action in the Global Interest: The Promise of Unilateralism

Cedric Ryngaert

Advocates of "global justice" or "cosmopolitanism" propound that ethical duties are universal, and apply regardless of nationality, citizenship, race etc. In pure cosmopolitanism, individuals owe ethical duties towards other individuals who are worse off, wherever on earth they may be. Individual agency is not particularly practical, however. Therefore, global justice advocates have proposed to mediate individuals' ethical duties via institutions, in particular international (governmental) organizations.[1] In this institutional view, international organizations ought to be oriented towards furthering cosmopolitan ideals and tackling collective action problems, such as protecting human rights and the environment, guaranteeing collective security, and ensuring distributive justice, in particular alleviating world poverty.[2] Some such institutions, such as the United Nations, have been duly created. But because of design faults, political unwillingness, or resource limits, they have not been able to deliver on the promises they initially held: human rights are still trampled on, corruption remains rampant, and global warming continues unabated.

International institutions' failure to adequately tackle collective action problems invites the question of whether instead, "bystander" states should not assume their cosmopolitan responsibility, apart from catering to the

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1 E.g., Michael J. Green, "Institutional Responsibility for Global Problems," *Philosophical Topics* 30, no. 2 (Fall 2002): 79, 85–6.

2 Simon Caney, *Justice Beyond Borders: A Global Political Theory* (New York and Oxford: Oxford University Press, 2005), 159. See on poverty in particular Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms*, 2nd ed. (Cambridge: Polity Press, 2008).

needs of their own citizens. Contemporary political theorist Simon Caney, in any event, is of the view that individual states do have global responsibilities: while they are free to pursue their own ends and to discharge their "contractual" duties towards their own citizens, they should do so "within the context of a fair overall framework," i.e, "a set of parameters defined by a theory of justice."[3] These words echo international lawyer Emmer de Vattel's statements in his classic treatise *Le droit des gens* (*The Law of Nations*, 1770): while a nation is under an obligation to preserve itself and its members,[4] it also has duties for the preservation of others, and to contribute to the perfection of other nations.[5] In this contribution, I examine an aspect of this state cosmopolitanism, namely the question whether states can *unilaterally extend their jurisdiction* to address global ills. Put differently, I inquire how a state can apply *its own laws* to address globally undesirable situations that arise (largely) *extraterritorially,* i.e., outside their territorial borders. Well-known instances of such unilateral jurisdiction are the US Department of Justice's indictment of corrupt FIFA officials, Spanish Investigating Judge Garzon's attempts to have former Chilean dictator Augusto Pinochet extradited to Spain to stand trial for international crimes, and the European Union's move to subject foreign air carriers to the EU's own stringent climate change legislation to the extent that they frequent EU airports.

Such an inquiry requires that we confront the centrality of the principle of sovereignty in modern international law, while keeping our eyes open for more global justice-friendly semantic understandings which the principle may have taken on (Section 1). Such an inquiry also invites us to ascertain the existence of common values or interests which states acting unilaterally/extraterritorially supposedly vindicate on behalf of an alleged "international community" (Section 2). The legitimacy of such action obviously suffers if the state only promotes its own idiosyncratic values. But even where values are more or less universally shared, the question remains whether individual states rather than international institutions should be entrusted with cosmopolitan jurisdictional powers. Can benevolent hegemons be trusted, or does trusteeship risk degenerating into imperialist imposition (Section 3)?

3 Ibid., 139–40.
4 Emer de Vattel, *Le droit des gens* (Paris: Guillaumin, 1863), Book I, Ch. II, para. 16–18.
5 Ibid., Book II, Ch. I, para. 1–6. Justifying the latter duties toward others, he approvingly cites the Roman orator Cicero, who said in *De Officiis* that "[N]othing is more agreeable to nature, more capable of affording true satisfaction, than, in imitation of Hercules, to undertake even the most arduous and painful labours for the benefit and preservation of all nations."

While acknowledging the risk of self-serving behavior, this contribution is inclined to support benevolent unilateralism, as the alternative — no action — may be worse. It argues that the justification of such unilateralism should be sought in the substantive values it furthers rather than in tired "anti-commons" legal formalisms (Section 4).

1. COSMOPOLITAN STATE JURISDICTION: FROM TERRITORIAL SOVEREIGNTY TO CORRECTIVE JUSTICE

Advocates of the unilateral cosmopolitanism posit that states *can*, and perhaps *should* assume responsibility for, and on behalf of all members of a perceived international community *irrespective of artificially created national borders*. Its adherents should not fail to realize that this — laudable — position is in apparent tension with a principle on which the entire temple of contemporary international law has been built: the principle of *territorial sovereignty*. The pedigree of this principle can be traced from the Peace of Westphalia of 1648, a series of treaties which ended the Thirty Years' War and introduced the concept of co-existing states with full internal and external sovereignty, until the present times.[6] Territorial sovereignty implies that final political authority and jurisdiction is exclusively vested in a territorially delimited political community, and that no other authority has a legal say (*juris dicere*) over this community.[7] The role of international law is simply to ensure that this sovereignty is not trampled on, and that the territorial state-based system survives. In practice, state sovereignty has at times been violated when one state reasoned that respect for another state's sovereignty was not in its interest — which may lead one to question indeed whether sovereignty is not just organized hypocrisy. But it remains an enduring "cognitive script" that guides the actions of participants in international relations,[8] and requires them to at least pay lip-service to the principles of non-intervention and territoriality.

6 See for a historical account: Derek Croxton, *Westphalia: The Last Christian Peace* (New York: Palgrave Macmillan, 2013); and for a discussion of the influence of the Peace until the 20th century: Leo Gross, "The Peace of Westphalia, 1648–1948," *American Journal of International Law* 42 (1948): 20.

7 See also Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton: Princeton University Press, 1999), 11.

8 Ibid., 69 (arguing that sovereignty — while being organized hypocrisy in his opinion — has proved remarkably "durable in the sense that it has affected the talk and conception of rulers since at least the end of the 18th century, despite substantial changes in the international environment").

The law of jurisdiction, with which we are concerned here, is closely related to the principle of territorial sovereignty, and may even be co-extensive with it. It contains rules of the road that limit the reach of a state's prescriptive, adjudicatory and enforcement jurisdiction to the state's territorial boundaries, with some limited exceptions to protect and punish its own nationals (personality principle), its political independence (protective principle), and certain enemies of mankind (universality principle). The basic rule of territoriality, and the limited extraterritorial exceptions to it, are geared towards *protecting the sovereignty and self-interest* of states.[9] Jurisdictional rules may also be inspired by a utilitarian rationale based on efficiency and procedural economy,[10] and, as such, prevent courts and prosecutors from wasting scarce state resources to address problems that are another state's concern. The presumption against extraterritoriality as it is applied in the US — a canon of statutory construction pursuant to which the US Congress is presumed not to legislate extraterritoriality — appears to be largely based on this rationale.[11]

Such understandings of jurisdiction — which consider *states*, with *territorial* boundaries, as the primary units of analysis — are not particularly amenable to cosmopolitan action. For cosmopolitans indeed, *individuals*, making up an *international community* with common values, are the focus of attention.[12] Nevertheless, in recent international law scholarship and prac-

9 This applies both in a positive and a negative sense: states are allowed to unilaterally project their power, but when so doing, they should not unduly interfere in other states' affairs. Theoretically, reciprocity ensures that states will by and large respect the requirement of non-interference, although in reality, as a result of disparities of power, strong states have an incentive to extend their jurisdiction to the detriment of other states' sovereignty, without being hampered by a concern over adverse foreign reactions (notably the US, European states and the EU have been at the vanguard of exercising "extraterritorial" jurisdiction).

10 Adeno Addis, "Community and Jurisdictional Authority," in *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization*, ed. Gunther Handl, Joachim Zekoll, Peter Zumbansen, (Boston and Leiden: Martinus Nijhoff, 2012), 16–17, appears to consider this efficiency-based rationale to be the main informant of the norms of jurisdiction, stating that "jurisdictional norms emerge for the purpose of maximizing aggregate social welfare."

11 Cedric Ryngaert, *Jurisdiction in International Law*, 2nd ed. (New York: Oxford University Press, 2015), 69–70.

12 Cosmopolitans do not necessarily deny the existence, or use of states, but for them, states only have instrumental value, insofar as they contribute to the primary cosmopolitan ideal of realizing the worth of every human being. See Roland Pierik and Wouter Werner, "Introduction," in *Cosmopolitanism in Context: Perspectives from International Law and Political Theory* (Cambridge and New York: Cambridge University Press, 2010), 4–5. Note that non-cosmopolitan moral philosophers, however, may well ascribe moral value to (territorially delimited) states. See e.g., Mervyn Frost, *Ethics in International Relations* (Cambridge: Cambridge University Press, 1996), 155 ("sovereign states and the system of sovereign states are necessary to the flourishing of individuals"). A similarly "Hegelian" view is even embraced by John Rawls, whose theory on — national — justice cosmopolitans have applied to international relations. In one of his last works, *The Law of Peoples* (Cambridge, MA: Harvard University Press: 1999), Rawls adheres to a society of states approach to

tice, sovereignty has lost some of its discursive power, and considerations of humanity have instead risen to prominence.[13] This humanity-centeredness has also found its way to the law of jurisdiction, part of which has become based on the rationale of *corrective justice*, i.e., on the cosmopolitan notion that states owe ethically-based duties towards citizens of other nations.[14] This ethical imperative has *already* grounded legal principles that allow, and — under certain circumstances — even *require* states to exercise so-called "universal jurisdiction" over a number of treaty- and customary law-based international crimes, such as war crimes and torture,[15] in the absence of any territorial or personal link of the crime or the presumed offender with the asserting state.[16]

The incorporation of the obligatory dimension of this imperative — jurisdiction as a duty of states rather than just a discretionary choice that is *restricted* by international law — has been hailed as a shift in jurisdictional thinking. It points to a reconceptualization of the regulation of jurisdiction, in Mills" words, "a not merely a "ceiling," defining the maximum limits of state power, but also [...] as a "floor," reflecting minimum requirements for the exercise of regulatory power by states in order to satisfy their international obligations."[17]

One could envisage that this notion of jurisdiction as corrective, cosmopolitan justice may also inform and justify jurisdictional assertions beyond

international morality, considering peoples organized in states as the primary units of analysis. This is reminiscent of the work of Frost and Hedley Bull, the main representative of the so-called English school in international relations, who similarly regarded the state-based system as the best system to realize justice. See Hedley Bull, *The Anarchical Society: a Study of Order in World Politics* (New York: Columbia University Press, 1977) 287–8. Pierik and Werner have incisively observed that Rawls's approach is very much in keeping with the Westphalian structure of current international law: it gives pride of place to state sovereignty, self-determination, and the principle of non-intervention (ibid., 8).

13 See Theodor Meron, *The Humanization of International Law* (Boston and Leiden: Martinus Nijhoff, 2006); Ruti G. Teitel, *Humanity's Law* (New York: Oxford University Press, 2011).

14 Addis, "Community and Jurisdictional Authority," 17.

15 See, e.g., Article 7(1) of the *UN Torture Convention.*

16 States may however require the presumed offender's posterior territorial presence for jurisdiction to be triggered. Also the operation *aut dedere aut judicare* clause that features in a number of international conventions is based on the presence of the offender within the territorial jurisdiction of the state, as States Parties to such conventions only have the choice to extradite or prosecute the presumed offender when the latter is present in their territory in the first place. See e.g., Article 5(2) *UN Torture Convention* (1984) ("Each State Party shall [...] take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him [...]").

17 Alex Mills, "Rethinking Jurisdiction in International Law," *British Yearbook of International Law* 84 (2014): 187, 209–12 (also stating at p. 212 that "the fact that (particularly positive) jurisdictional obligations have been recognized with growing frequency and scope supports the thesis of a broader shift in international law").

the sphere of international criminal law. To bring about a more just world, in keeping with the tenets of institutional cosmopolitanism set out above, states may wish to regulate corporations' overseas business practices that adversely affect human rights or the environment, or violate global anti-corruption standards; they may fine foreign-flagged vessels docking in their ports, even in relation to activities on the high seas (e.g., illegal or unsustainable fisheries, or pollution of the marine environment); they may restrict or prohibit the importation of goods of which the foreign production process runs afoul of human rights standards or contributes to global warming; they may use remote technology to address global Internet criminality; or they may extend their data protection laws to data processed abroad.[18] When states—or regional organizations such as the European Union—thus flex their muscles, they exercise unilateral jurisdiction to protect some notion of "global values" or "the common interest." In so doing, they compensate for the lack of international progress on governance challenges regarding global public goods, values, and interests. As is known, such progress requires the participation of all, or at least a substantial number of members of the international community.[19]

Admittedly, unilateral action may appear to be only a second-best option compared to consent-based, and supposedly more legitimate multilateral action. However, as Voltaire famously noted in his memoirs, *le mieux est l'ennemi du bien* ("the perfect is the enemy of the good"). Therefore, one could posit that states may exercise unilateral action to further the global interest, at least strategically, to up the ante until adequate multilateral action is taken. In that sense, unilateralism could be considered as temporary mechanism of pressure.

Empowering individual states to further the global interest in fact sits well with our current pluralistic and pluri-centric world, where different centers of power take experimental bottom-up global action, thereby providing best practices and inspiration for others to follow. The sociologist Saskia

18 These are, as it happens, the PhD topics of seven of my PhD researchers on two five-year projects funded by the European Research Council and the Dutch Organization for Scientific Research (2013–2018).

19 Nico Krisch, "The Decay of Consent: International Law in an Age of Global Public Goods," *American Journal of International Law* 108, no. 1 (2014): 1. This may not apply to single-best effort global public goods, for the realization of which no aggregate effort is required, e.g., geo-engineering techniques in which only one state, or a small group of states invests, but that may deliver benefits for the entire international community.

Sassen's work on global cities comes to mind here.[20] Moreover, some cosmopolitans themselves, wary of a Leviathan-like supreme world government responsible for dispensing global justice,[21] have admitted that "there is a case for different institutions operating at different levels," which has the advantage of preventing the centralization of coercive power.[22] They may have in mind, in the first place, different international organizations addressing different policy issues, and keeping each other in check. But there is no reason to exclude individual states from this pantheon. In fact, Kant saw *separate states* rather than international organizations as the cosmopolitan duty-bearers in *Perpetual Peace*.[23] Also Rawls defended the society of states in his approach to justice in *The Law of Peoples* (although then he famously went on to doubt the possibility of global justice and solidarity within a society of states that do not all share a liberal justice outlook).[24] And Bartelson, one of the leading contemporary sovereignty theorists, foregrounded the role of states as *media* and instruments of global justice in *Sovereignty as Symbolic Form*:

> [T]he universalistic visions invoked to justify the projection of [...] governmental strategies into the global realm today operate under the assumption that the international system of states is the only available medium for realizing such visions in the near future."[25]

20 Saskia Sassen, *The Global City: New York, London, Tokyo* (Princeton: Princeton University Press, 2013). This work chronicles how New York, London, and Tokyo became command centers for the global economy and in the process underwent a series of massive and parallel changes. What distinguishes Sassen's theoretical framework is the emphasis on the formation of cross-border dynamics through which these cities and the growing number of other global cities begin to form strategic transnational networks.

21 See already Immanuel Kant, *Perpetual Peace: A Philosophical Sketch* (1795), reprinted in *Kant: Political Writings*, ed. Hans Reiss (Cambridge University Press, 1991), 102 (submitting that "laws progressively lose their impact as the government increases its range, and a soulless despotism, after crushing the germs of goodness, will finally lapse into anarchy").

22 Caney, *Justice Beyond Borders*, 163.

23 Robert Howse and Ruti Teitel, "Does Humanity-Law Require (or Imply) a Progressive Theory of History? (and Other Questions for Martti Koskenniemi)," *Temple International and Comparative Law Journal* 27, no. 2 (2013): 377, 383 (writing that "according to Kant, we need the state as well as an order of cosmopolitan right where individuals can claim, as humans, to be treated in a certain way regardless of territorial boundaries," citing Kant's emphasis on the republican federation in Perpetual Peace); Thomas Pogge, "Cosmopolitanism and Sovereignty," *Ethics* 103 (Oct. 1992): 48–75.

24 Rawls, *The Law of Peoples*.

25 Jens Bartelson, *Sovereignty as Symbolic Form* (London and New York: Routledge, 2014), 78.

Ultimately, as the state remains a — or even *the* — central actor in international law-making and -implementation, one has to make do with states as the primary cosmopolitan actors.[26]

Practically speaking, when acting in a cosmopolitan manner, states recast global problems in local terms in order to take advantage of local political or social resources,[27] e.g., by locally suing foreign corporations participating in a global antitrust conspiracy, by prosecuting corporations engaging in foreign corrupt practices or foreign human rights violations, or by prosecuting individuals who committed atrocities abroad. These states do not act on their own account, but as agents of the international community.

2. States Vindicating Common Interests: A Vainglorious Quest for an Objective "International Community"

When a state desires to tackle global problems through the exercise of unilateral jurisdiction, from a justice perspective they may obviously want to ensure that others view these problems as global too, lest such jurisdiction be seen as illegitimate, self-serving, and intruding on other states' justified policy choices. It can be posited that the justification of a unilateral/extraterritorial measure hinges on the international community's recognition of the object of regulation (e.g., a stable climate, human rights, sustainable fisheries, a corruption-free world...), and thus on *internationally shared values*. When the international community has recognized an object as in need of protection, the assumption is that states may be justified in protecting this good unilaterally,[28] as they are, *arguendo*, just vicariously enforcing community

26 Roland Pierik and Wouter Werner, "Can Cosmopolitanism Survive Institutionalization?," in *Cosmopolitanism in Context: Perspectives from International Law and Political Theory* (Cambridge and New York: Cambridge University Press, 2010), 283 (noting also that "international treaties that embrace cosmopolitanism endow States with the primary task of guarding the interests of individuals and global society as a whole").

27 Hannah L. Buxbaum, "National Jurisdiction and Global Business Networks," *Indiana Journal of Global Legal Studies* 17 (2010): 165, 167.

28 Cf. Appellate Body Report, United States — Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (12 October 1998), para. 31 (observing that extraterritorial trade measures could in principle be justified when the measure concerns a shared resource, of which the value of its protection is as such recognized by the international community: "[g]iven the recent acknowledgement by the international community of the importance of concerted bilateral or multilateral action to protect living natural resources, and recalling the explicit recognition by WTO Members of the objective of sustainable development in the preamble of the WTO Agreement, we believe it is too late in the day to suppose that Article XX(g) of the GATT 1994 may be read as referring only to the conservation of exhaustible mineral or other non-living natural resources. Moreover, two adopted GATT 1947 panel reports previously found fish to be an "exhaustible natural resource" within the meaning of Article XX(g). We hold that, in line with the principle of ef-

values. The international dimension encourages[29] and "multilateralizes" unilateral action, and nuances its interventionist character. Unilateralism and multilateralism should therefore not necessarily be seen as opposites: contextualized unilateralism may in fact resemble multilateralism, where the unilaterally acting actor enforces multilaterally shared norms and values.[30]

The persuasiveness of this thesis is obviously a function of the actual existence of such shared norms, and of an international community of which the state purportedly is a guardian. It is an understatement in this respect that this notion of "international community" — an "imagined community" of principle that transcends borders and of which the members do not know each other[31] — is a particularly elusive one. Still, the notion is widely used in progressive international legal scholarship, where it denotes a community premised on common international interests that prevail over individual state interests. In international law, the best-known contemporary proponent of the international community and its interests is arguably former International Court of Justice judge Bruno Simma, who defined international community interests as a "consensus according to which respect for certain fundamental values is not to be left to the free disposition of States, individually or inter se, but is recognized and sanctioned by international law as a matter of concern to all States."[32] This definition, which harks back to

fectiveness in treaty interpretation, measures to conserve exhaustible natural resources, whether living or non-living, may fall within Article XX(g)" (footnotes omitted). See also Friedl Weiss, "Extra-Territoriality in the Context of WTO Law," in *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization*, ed. Gunther Handl, Joachim Zekoll, Peter Zumbansen, (Boston and Leiden: Martinus Nijhoff, 2012), 481 (observing in respect of Article XX(g) GATT that trade-restrictive environmental measures adopted pursuant to multilateral environmental agreements easier to justify than fully unilateral measures).

29 Cf. Daniel Bodansky, "What's in a Concept? Global Public Goods, International Law, and Legitimacy," *European Journal of International Law* 23 (2012): 651, 660 (citing the transformative effect of a characterizing an obligation as an international one: "The existence of an international obligation [...] gives domestic actors both within and outside government a 'hook' for their arguments").

30 Pierik and Werner, "Can Cosmopolitanism Survive Institutionalization?," 286, relying on Jack M. Balkin, "Nested Oppositions," *Yale Law Journal* 99 (1990): 1669 (drawing attention to the specific context in which conceptual opposites receive their meaning, and arguing that "in certain contexts concepts may appear to be radically opposed, while in others they may look quite similar").

31 Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London and New York: Verso Books, 2006); Addis, "Community and Jurisdictional Authority," 20. It is pointed out that the very fact the its members do not know each other has been used to discredit the notion of international community. See Pierik and Werner, "Introduction," 9–10 (citing the critique of cosmopolitanism that "humanity as a whole too large and abstract to evoke genuine passions of unity, loyalty and obligation").

32 Bruno Simma, "From Bilateralism to Community Interest in International Law," in *Recueil des Cours* (*Collected Courses of the Hague Academy of International Law*) (The Hague: Martinus Nijhoff Publishers, 1997), 217, 233 (also expressly including environmental protection as a community interest). See against consensualism also ICJ, *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* (Advisory Opinion), Declaration of Judge Simma (speaking

such ethically-inspired international lawyers as Suarez, Grotius, Vattel, and Lauterpacht, who assumed the existence of an "international society" with a "general interest," brackets the principle of state consent and signals that the notion of international community has natural law roots.[33]

The problems with natural law are well-known: universal morality is arguably subjective, and enables powerful states to articulate a particularist view of it, while downplaying the potential conflict between conceptions of natural law held by different actors.[34] Grotius himself, for that matter, opened his *Mare Liberum* (1609) with a vehement critique of the great maritime nations of the era, Spain and Portugal — whose hold on the oceans had

out against "anachronistic, extremely consensualist vision of international law, expressed in the Lotus judgment"). Also other ICJ judges have not shied away from referring to the "international community," including in their judicial opinions. Former ICJ Judge Mohammed Bedjaoui famously declared in the *Nuclear Weapons* advisory opinion that "[t]he resolutely positivist, voluntarist approach of international law [...] has been replaced by an objective conception of international law, a law more readily seen as the reflection of a collective juridical conscience and a response to the social necessities of States organised as a community." See ICJ, *Legality of Threat or Use of Nuclear Weapons* (Advisory Opinion), Declaration of Judge Bedjaoui, ICJ Reports 1996, 1345 (para. 13). Current ICJ Judge Cançado Trindade even has the habit of appending lengthy individual, and often dissenting opinions to ICJ judgments, in which he criticizes the majority for taking the interests of the international community, humanity, or justice insufficiently into account (see, e.g., ICJ, *Croatia v. Serbia*, 2015, diss op Cancado Trindade, para. 2: "I thus present with the utmost care the foundations of my own entirely dissenting position [...] guided above all by the ultimate goal of precisely the *realization of justice*"). In fact, many international lawyers have embarked on a reformist project to give the interests of the international community a more prominent place in the current legal system. Martti Koskenniemi, "International Law in a Post-Realist Era," 1 ("our discipline has implied a program for reforming the present international structures, perhaps to reflect better the 'interests of the world community'"). Note that a journal is also named after it: *International Community Law Review*.

33 See for probably the earliest legal articulation: See also F. Suarez, *Tractatus de Legibus ac Deo Legislatore* (1612), Book II, ch. 19, § 5 ("Mankind, though divided into numerous nations and states, constitutes a political and moral unity bound up by charity and compassion; wherefore, though every republic or monarchy seems to be autonomous and self-sufficing, yet none of them is, but each of them needs the support and brotherhood of others, both in a material and a moral sense. Therefore they also need some common law organizing their conduct in this kind of society"). See also Hersch Lauterpacht, *International Law: Being the Collected Papers of Hersch Lauterpacht. The law of Peace. International Law in General*, ed. E. Lauterpacht, vol. 2 (New York: Cambridge University Press, 1975), 88 (opining that the "relation of the state to the international community was not based on self-sacrifice nor blind acceptance of the overriding superiority of the general interest of the international society, but enlightened self-interest which admits the advisability in given circumstances, of the sacrifice of an immediate sectional interest for the sake of the general interest"). Note that Lauterpacht did not explicitly state that there is an international community that could be dissociated from the consent of states; rather he urged states to consensually abandon narrow state interests for the sake of the general interest.

34 Zygmunt Bauman, *Postmodern Ethics* (Oxford: Wiley-Blackwell, 1993), 42 (arguing that "there is more than one conception of universal morality, and that which of them prevails is relative to the strength of the powers that claim and hold the right to articulate it"); Immanuel Wallerstein, *European Universalism: the Rhetoric of Power* (New York: The New Press, 2006) 45 ("there are multiple versions of natural law that are quite regularly at direct odds with each other"); Koskenniemi, "International Law in a Post-Realist Era," 8–9 ("Even if we agreed on the need to understand the international in terms of interests, we would have difficulty in identifying the subjects whose interests count. Is it States, or perhaps 'peoples.' human beings or the global 'community'").

to be broken to advance the maritime interests of the Dutch United Provinces — on the ground that they mistook their particularist justice conceptions for universal justice.[35] Invoking humanity or objective justice may in fact just be a front for furthering one's own subjective preferences and interests.[36] Or as Proudhon and Schmitt have famously pointed out: "whoever invokes humanity, wants to cheat."[37] Thus, the question is whether global values can really exist in a non-egalitarian world, dominated by Western power in particular,[38] and characterized by very divergent value conceptions.

Cosmopolitan political theorists would counter this critique by positing that certain values are truly internationally shared: since there is a common human nature, there is often no principled disagreement regarding basic moral norms, which can be said to converge globally.[39] Communities may sometimes cherish other ideals, but this may be so because they face different scenarios and challenges,[40] or because they may be misled by self-interested rulers.[41] Even where some divergence is noticeable, cosmopolitan philosophers would argue that this can be accommodated within a culturally sensitive universalist framework that affirms a pluralism of values.[42]

35 Hugo Grotius, *Mare Liberum*, translated by Ralph van Deman Magoffin as *The Freedom of the Seas: A Dissertation by Hugo Grotius* (New York: Oxford University Press, 1916), 1 ("The delusion is as old as it is detestable with which many men, especially those who by their wealth and power exercise the greatest influence, persuade themselves, or as I rather believe, try to persuade themselves, that justice and injustice are distinguished the one from the other not by their own nature, but in some fashion merely by the opinion and the custom of mankind. Those men therefore think that both the laws and the semblance of equity were devised for the sole purpose of repressing the dissensions and rebellions of those persons born in a subordinate position, affirming meanwhile that they themselves, being placed in a high position, ought to dispense all justice in accordance with their own good pleasure, and that their pleasure ought to be bounded only by their own view of what is expedient. This opinion, absurd and unnatural as it clearly is, has gained considerable currency; but this should by no means occasion surprise, inasmuch as there has to be taken into consideration not only the common frailty of the human race by which we pursue not only vices and their purveyors, but also the arts of flatterers, to whom power is always exposed").

36 E.g., Bartelson, *Sovereignty as Symbolic Form*, 71 (pointing to the danger of universal thinking that "whatever is subsumed under the category of the global and its cognates will always necessarily reflect particularistic interests and identities, and will thus also represent imperial or hegemonic aspirations in disguise"); Ulrich Beck, "War is Peace: On Post-National War," *Security Dialogue* 36 (2005): 5, 15 (arguing that in so-called "humanitarian" military interventions, State interests may play a larger role than humanitarian concerns).

37 Carl Schmitt, *The Concept of the Political* (Chicago: University of Chicago Press, 2007), 54.

38 Wallerstein, *European Universalism*, 28 (noting that "we are far from yet knowing what [global universal] values are," which requires "a structure that is far more egalitarian than any we have constructed up to now"), observing at 51 that Europeans have considered their universalist claim as a scientific "assertion of objective rules governing all phenomena at all moments of time."

39 Caney, *Justice Beyond Borders* 45–6.

40 Ibid.

41 Ibid., 49 (pointing out that some disagreement arises from error, selfishness, and indoctrination, and that "values can be justified to all persons when those persons' reasoning is not distorted by self-interest, factual mistakes, complacency, and so on").

42 Ibid., 47 (citing Isaiah Berlin).

International lawyers steeped in the modern "positivist" tradition, however, have intuitive reservations about an instinctive reliance on a common human nature. In order to escape the risk of subjective determinations, they would demand evidence of officially sanctioned commonalities ("state practice") before they dare speak about "global values" or an "international community." When espousing this positivist mindset, an analysis of relevant state practice yields the conclusion that, indeed, some version of an international community, although a relatively thin one at that, could be witnessed, as states have entering into particular treaties affirming community interests that go beyond states' (joint) immediate interests: a substantial number of treaties and customary norms protect interests that are considered as common to humanity, such as human rights and the environment. These treaties and norms do not maximize states' interests, but limit their scope of action to the benefit of their true addressees: a global community consisting of individuals, the environment, and the global commons. The international community character of the pertinent treaties is reinforced by the fact that states parties to the relevant treaty may have been given the power to invoke the responsibility of the violating state on behalf of the international community, or at least of the collective state parties to that treaty.[43] This non-injured state's "cosmopolitan" right to unilaterally invoke another state's responsibility in respect of violations of obligations owed to the international community, is laid down as a secondary rule of international law in the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (2001).[44] These articles codify the *erga omnes* obligations pioneered by the ICJ in the *Barcelona Traction* case (Belgium v. Spain, 1970), in which the Court held—developing an idea enunciated by Kant in his *Perpetual Peace*[45]—that "the obligations of a State towards the international

43 Individuals and the environment do not often have the power or capacity to directly call to account state violators of obligations laid down in the treaty, although some human rights treaties, such as the European Convention on Human Rights, provide for standing of individuals before a supranational court.

44 Article 48(1)(b) of the Articles. This article provides that any State other than an injured State is entitled to invoke the responsibility of another State, among other scenarios, "if the obligation breached is owed to the international community as a whole." The Articles also make reference to the "international community" in Article 25(1) regarding necessity as a circumstance precluding wrongfulness: "Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of *the international community as a whole*." (emphasis added).

45 Kant, *Perpetual Peace*, 107–8 ("The peoples of the earth have [...] entered in varying degrees into a universal community, and it has developed to the point where a violation of rights in one part of

community as a whole" are "by their nature" "the concern of all States," and that, "[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*."[46]

This recognition of norms in which the "international community" and its constituent parts — states — have an interest, is surely a watershed in international law: it is an acknowledgment that international law is not just concerned with the interests of states but also those of individuals and the international community at large.[47] The doctrine of *erga omnes* enables states not injured by violations of international law (e.g., international human rights law) to act in a cosmopolitan fashion, and represent the international community through the mechanism of invocation of state responsibility. Regardless, the international community established by such obligations is necessarily a partial one. Given the abiding relevance of the principle of state consent to be bound by international legal norms, states are under no obligation to enter into treaties, or to accept the validity of a customary norm of the general international law in the common interest. Thus, legally speaking, the positivistic international community is a limited, consent-based one. As long as states do not formally sign up to legal commitments, they are not bound, and fellow states, posing as guardians of the international community cannot invoke their responsibility, since legally such an international community does simply not exist beyond the treaty or customary law regime.

This state of affairs may lead to serious collective action problems, where (major) states fail to join the protective legal regime, and global values accordingly do not enter the legal realm. Moreover, even the partial international community — or rather communit*ies* — established by law, are hardly beyond reproach when it comes to addressing collective action problems, for a variety of reasons. First, states joining treaty regimes protecting community interests often only pay lip-service to these interests; they may join out of reputational concerns rather than out of conviction.[48] Secondly, the *erga omnes* character of the community obligations in practice rarely has the consequence that bystander states invoke the responsibility of the violating

the world is felt everywhere").

46 ICJ, *Barcelona Traction (Belgium v. Spain)* (Second Phase), ICJ Rep 1970 3, para. 33.

47 Alex Mills, "Rethinking Jurisdiction in International Law," *British Yearbook of International Law* 84 (2014): 187, 213 (although not using the term *erga omnes* in this respect).

48 Andrew T. Guzman, "Chapter 3: Reputation," in *How International Law Works: A Rational Choice Theory* (New York: Oxford University Press, 2008).

state, for obvious political reasons.[49] Thirdly, invocation of responsibility, when it occurs, rarely has far-reaching consequences, as it is just a speech act naming and shaming an alleged violator.[50] It does not come with any enforcement powers, except retorsions, unfriendly but lawful measures that states can take anyway, even in the absence of a prior breach.[51] And fourthly, while the characterization of an obligation as *erga omnes* may foster the legitimacy of the exercise of unilateral jurisdiction over a violation of an obligation, it does not automatically confer a legal right on states parties to exercise extraterritorial jurisdiction over the violation, unless the treaty contains an explicit clause conferring extraterritorial/universal jurisdiction on the states parties (some treaties indeed feature such a clause).

A contradiction may thus be discerned: although *erga omnes* treaties appear to offer a high level of protection to community values, and give more states the right to address a breach, in practice fewer take the initiative — or, as Pauwelyn has observed, "the *actual* protection of international entitlements is [...] inversely related to how strongly international law *aims* or *pretends* to be protecting the entitlement."[52] This is not to say that the norms enshrined in these treaties are not enforced. Sometimes international courts have been established to bring states or individuals to account, such as the European Court of Human Rights, which offers direct standing to individual

49 Joost Pauwelyn, *Optimal Protection of International Law* (New York: Cambridge University Press, 2008), 190–1 (arguing that no one is willing to invoke the responsibility of others if they are not directly harmed, and that the ensuing collective action problem — no one protects the good — is the "result of the nature of the subject-matter"). See for a rare example of a state invoking another State's responsibility for violating *erga omnes* obligations, even before the International Court of Justice: ICJ, *Questions Concerning the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment of July 20, 2012 (Belgium invoking the international responsibility of Senegal for failing to comply with the duty to either prosecute or extradite a presumed torturer present on Senegal's territory).

50 Where a bystander State invokes another State's responsibility before an international court, however, the chances that change is brought about, are much higher, as non-compliance within binding decision has reputational repercussions for the State proved wrong by the decision. See on the role of reputation in inducing compliance with international law: Guzman, *How International Law Works*. For example, after the ICJ rendered its judgment in Belgium v. Senegal (ICJ, *Questions Concerning the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment of 20 July 2012), and found that Senegal had violated its obligations under the UN Torture Convention, Senegal established Extraordinary Chambers within its criminal justice system, so as to bring the presumed torturer to justice. See Statute of the Extraordinary African Chambers within the courts of Senegal created to prosecute international crimes committed in Chad between June 7, 1982 and December 1, 1990 (Unofficial translation by Human Rights Watch), available at http://www.hrw.org/news/2013/09/02/statute-extraordinary-african-chambers (accessed March 17, 2015).

51 Non-affected States cannot take countermeasures, only "lawful" measures. See International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001, Article 54. Contra: Christian Tams, *Enforcing Obligations Erga Omnes in International Law* (New York: Cambridge University Press, 2005), 250.

52 Pauwelyn, *Optimal Protection of International Law*, 194–5.

plaintiffs, or the International Criminal Court, which has an independent prosecutor who can start investigations. And obviously, reputational concerns and fear of sanctions may exert a pull towards compliance. But it remains that the international community obligations confirmed in such treaties are under-enforced.

Accordingly, the formal international community conception based on *erga omnes* obligations fails in its mission to protect international community interests and to address collective action problems — even those which the *erga omnes* regime was precisely supposed to address. It overestimates the potential of the invocation of state responsibility as a remedial mechanism and does not as such give states a mandate to exercise unilateral jurisdiction to protect the said obligations. And it is held hostage by the "anti-commons" principle of consent, which allows states *not* to subscribe to a globally desirable collective regime. In other words, we are confronted with the inherent limits of a purely positivist approach to international community interests: such an approach may fail to ground the exercise of states' unilateral jurisdiction in the common interest.

Faced with these limits, and in particular with the collective action problems relating to international community interests that have not (yet) risen to the level of international obligations, recent scholarship, borrowing from institutional economics, has cast the international community in non-legal *global public goods* (GPG) terms. GPGs could be defined as goods that are "non-rival" and "non-excludable," meaning that no-one can be excluded from their benefits and that consumption by one person does not diminish consumption by another. The provision of such goods in not self-evident, as prisoners' dilemmas may prevent necessary multilateral action from being taken. Where individual states take action, other states may tend to free-ride, i.e., fail to take action but hope to profit from other states' investment in providing GPGs. The potential for free-riding behavior may ultimately discourage individual state action. However, if such action could bring free-riders within the state's jurisdictional ambit through extraterritorial jurisdiction, GPGs could yet be provided, even without multilateral intervention. Accordingly, the GPG approach holds particular promise for legitimating unilateral action in the common interest, as the relevant question is not whether states have enshrined this interest in international law but rather whether it is *expedient* for such action to be taken so as to avert a perceived threat posed to the GPG. In GPG-inspired unilateralism discourse, the end — GPG protection — may

justify the means — nonconsensual action. State consent becomes less material, and unilateral action is hailed as a mechanism to compensate for multilateral regulatory failures,[53] and the lack of third-party enforcement in international law.[54]

GPGs have been defined rather broadly. Not only do they include common resources or goods that belong to "the common concern of mankind," such as the global climate, the ozone layer, the prevention of pollution, fish stocks, and biodiversity,[55] they may also cover such "values" as human rights, peace, and accountability for international crimes.[56] This may render them indistinguishable from "global problems," i.e., problems that concern the world at large, and "cannot be separated into different sub-problems that can be solved individually."[57] In this respect, Ralph Michaels has usefully categorized global problems as "global by nature" (e.g., climate change and other collective action problems that need to be solved by aggregate efforts of the international community), "global by design" (e.g., the globally accessible Internet), and "global by definition," even if these problems occur within one territory (e.g., crimes against humanity, which are directed at humanity at large, and thus at what it means to be an international community).[58] All these problems may arguably be amenable to the exercise of extraterritorial jurisdiction in the common interest.

53 Krisch, "The Decay of Consent," 2 (stating that unilateral action appears "more useful for problem solving and the effective exercise of power than formal institutions and the increasingly firm and demanding processes of multilateral treaty making"). Ibid., 4 ("consent-based structure presents a structural bias against effective action on global public goods, especially given the large number of foreign states today"); see also, but critically Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (New York: Oxford University Press, 2005), 87.

54 It is conspicuous that Pauwelyn, after concluding that third-party enforcement does not work, suggests as alternatives robust community enforcement, direct standing for private parties, international procedure against individual criminals, and domestic courts, but not unilateral action (Pauwelyn, *Optimal Protection of International Law*, 196–7).

55 UN General Assembly, Protection of global climate for present and future generations of mankind, UN Doc A/RES/43/53 (1988), para. 1 ("Recognizes that climate change is a common concern of mankind, since climate is an essential condition which sustains life on earth"); Frank Biermann, "'Common Concern of Humankind': The Emergence of a New Concept of International Environmental Law," *Archiv des Völkerrechts* 34 (1996): 426, 449; Thomas Cottier, "The Emerging Principle of Common Concern: A Brief Outline," Working Paper No 2012/20, NCCR Trade Regulation (2012). Compare with the "common heritage of mankind," a term used to denote in particular areas beyond national jurisdiction, such the deep seabed and the celestial bodies. See, e.g., Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, January 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205.

56 See with respect to peace Goldsmith and Posner, *The Limits of International Law*, 87.

57 Ralf Michaels, "Global Problems in Domestic Courts," in *The Law of the Future and the Future of Law*, ed. Sam Muller et al. (Oslo: Torkel Opsahl 2011), 167.

58 Ibid., 171 (stating that a crime against humanity "is by definition de-territorialized, simply because humanity transcends all territoriality," and terming it a "world event").

However collective action failures are precisely characterized, what unites these characterizations is that they consider state consent and inaction, and ultimately sovereignty, as threats to the realization and protection of GPGs, global interests, or global values.[59] It is believed that unilateral action may remedy these failures where one state (or group of states such as the EU) extends its jurisdiction to include within its ambit foreign-based persons subject to an unduly permissive regulatory regime in their home or territorial state. Such unilateral action could be based on a (territorial or personal) nexus with the asserting state (e.g., a foreign corrupt person wired the proceeds of his activities to a bank account located in the state), or on no nexus at all, but simply on the underlying global value or interest to be protected (e.g., a *génocidaire* is brought to trial in a state without the latter having any territorial or personal connection with the crime or the criminal).

Approaches based on GPGs or global problems attempt to bypass the subjectivity of natural law approaches to the common interest by casting global remedial action in terms of efficiency, welfare-enhancement, urgency, or even plain human or planetary survival. However, also these approaches cannot entirely escape the legitimacy problems coming with "subjective" unilateral action. Even where an objective, quasi-scientific consensus exists on the good to be protected, unilateral action can cause distributional effects that lack international legitimacy in the absence of multilateral consent. States exercising unilateral jurisdiction could thus single-handedly decide on a global distribution of resources, with major resource allocation shifts being brought about as a result of the choice for a specific jurisdictional trigger. For instance, a broadly defined territoriality principle which brings foreign economic operators within the ambit of the asserting state may shift important resources from these operators and their home states to the asserting state.[60] The danger is real here that individual states will in reality be self-serving, by bringing about inward shifts of international resources under cover of defending the global interest. Having calculated the efforts required to ad-

59 Also Martti Koskenniemi, "What Use for Sovereignty Today?," *Asian Journal of International Law* 1 (2011), 61 (writing that international lawyers have criticized sovereignty from a *functional* perspective on the ground that it fails to deal with global threats).

60 See, e.g., Joanne Scott, "The New EU 'Extraterritoriality,'" *Common Market Law Review* 51 (2014): 1343, with respect to the territorial extension of EU law (arguing that "the EU's choice of trigger bears deeply upon the distribution of the burden of complying with EU law and upon how easy this burden is to evade," and "also impacts significantly upon how great a contribution a measure may make to the attainment of its stated objectives as well as upon the distribution of the benefits that flow from EU law").

dress a global public good challenge, e.g., reducing greenhouse gas emissions, individual states may well impose disproportionate burdens on *foreign* operators and states, e.g., via market access requirements or criminal prosecution. Moreover, different global public goods and values may be in tension with each other.[61] For example, justice considerations, which are arguably served by prosecuting human rights offenders, even in the courts of bystander states, may be in tension with the imperative to create peace and reconciliation, which is arguably served by deferring or foregoing prosecution of high-ranking perpetrators with a vocal constituency. Climate change mitigation for its part, which militates in favor of important emissions reductions, even if unilaterally imposed via market access requirements, may be in tension with the right to social and economic development, which precisely militates against such reductions. Balancing conflicting public goods and values, as well as deciding on issues of burden-sharing, are inherent to global public goods or global problems-inspired unilateralism. They are essentially moral choices which states make in — what they believe is — the global interest.

3. THE COSMOPOLITAN STATE AS A BENEVOLENT HEGEMON

Where global problems have not been addressed by treaties or multilateral institutions, or where treaties or customary law have not conferred remedial jurisdiction on states to act in the global interest, pure positivism will equal defeatism. Those who believe in humanity's progress, however, do not consider such defeatism as a viable option in light of contemporary global justice and governance challenges. They have, as an alternative, explored the relaxation of the principle of state consent to the exercise of cosmopolitan jurisdiction. In so doing, they have in essence replaced positivism with naturalism as a legitimating doctrine. When advocating natural law, however rationally its contents may have been constructed, one should be keenly aware of the charges of subjectivism that have been leveled at it. These charges pertain particularly to the danger of unilateral hegemonic imposition of the values and norms of the powerful on the weak, with the former's life choices supplanting the latter's.

61 Bodansky, "What's in a Concept?," 651, 656 (submitting that "different actors will have different preferences about which norm to choose," and that every choice will accordingly have distributive consequences).

But is cosmopolitan unilateralism's goal of "serving humanity" really a thinly disguised attempt at realizing imperialist or hegemonic ambitions, i.e., at dominating a weaker group?[62] To answer this question, let us first reflect on what hegemony actually means. In our times, thanks to Marxist writers such as Gramsci and Laclau, it surely has acquired an imperialist connotation of one society exercising power over a subordinate society, with the former forcing the latter to adapt to its own wishes and its own benefit.[63] Etymologically speaking, however, the Greek word *hegemon* simply means "leadership" or "rule."[64] No one will gainsay that, in order to address global collective action problems, some leadership is needed. Such first movers may first want to push the envelope at the multilateral level, by convincing other *agora* participants of the need for international action. Yet when these efforts fail to bear fruit as a result of myopic anti-cosmopolitan sentiment harbored by those participants, unilateral action may be appropriate. Such action need not be hegemonic in the domination sense of the word, i.e., interfering on an arbitrary basis with the range of options available to another agent.[65] Indeed, cosmopolitan action is not aimed at subordinating foreign peoples. Instead, it has emancipatory and empowering potential, in that it is protective of the human rights of the world's downtrodden or of a neglected natural environment.[66]

62 Unilateralism indeed generally remains a suspect word, conjuring up images of subjectivism at best and colonialism at worst. See, e.g., Jürgen Habermas, "Interpreting the Fall of a Monument," *German Law Journal* 4 (2003): 701, 706 ("justification through international law can, and should be replaced by the unilateral, world-ordering politics of a self-appointed hegemon."); Pierik and Werner, "Introduction," 9–10, citing the concern that cosmopolitanism may risk "becoming part and parcel of imperialistic policies," and referring in this respect to Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (New York: Routledge, 2007). Note that the terms "imperialism" and "hegemony" have also been used in the context of extraterritorial jurisdiction, especially as exercised by the US. See Jeffrey Lena and Ugo Mattei, "U.S. Jurisdiction over Conflict Arising Outside of the United States: Some Hegemonic Implications," Hastings International and Comparative Law Review 24 (2001): 381, 382 ("[T]he expansionist thrust of the jurisdiction of U.S. courts [...] may be viewed as a sort of legal imperialism").

63 Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics* (New York and London: Verso, 1985).

64 In ancient Greek times "hegemony" was notably used to denote one city-state's exercise of leadership over a league of city-states. Sparta, for instance, was the hegemon of the Peloponnesian League (6th–4th century BCE), Athens was the hegemon of the Delian League (5th century BCE), and Macedonia was the hegemon of the League of Corinth (4th century BCE). See, e.g., *Encyclopaedia Britannica*, http://www.britannica.com/ (accessed March 19, 2015).

65 Bartelson, *Sovereignty as Symbolic Form*, 101.

66 Howse and Teitel, "Does Humanity-Law Require (or Imply) a Progressive Theory of History?," 377, 384–5 (admitting that one may perhaps discern kinds of hegemonic power structures underlying or supporting "law among liberal nations," but arguing that this need to be fatal to hopefulness concerning the direction of the cosmopolitan project, citing the empowering potential of cosmopolitanism is the most important point). Ibid., 385 (submitting that worrying on behalf of the non-West may in itself be "a form of neo-colonial condescension").

To counter the critique of sovereigntists — who would consider cosmopolitan action as intervening in other states' internal affairs — such action could even be said to *strengthen* and *restore* rather than undermine *sovereignty*. One may object that such a strategy necessarily embraces a truncated view of sovereignty that isolates desirable, individual autonomy-enhancing aspects of sovereignty (democracy, human rights, accountability, the ability to deliver public goods) from undesirable aspects (militarization, quest for great power status, beggar-thy-neighbor economic policies),[67] and in so doing reduce the very analytical purchase of the concept of sovereignty. At the same time, however, one can only concur with Bartelson's observation that sovereignty has no meaning apart from its actual function.[68] Sovereignty is no more than a social construct. In the contemporary era, epistemic forces have embedded it in a larger international governance project that requires state authority to be exercised "responsibly." While the international community may leave a margin of appreciation to states as to the implementation of responsible authority, the core contours of the concept are defined at the international rather than national level.

Because of capacity advantages, it is obviously more likely that powerful states will take the lead to exercise cosmopolitan jurisdiction. This need not disqualify them, however, as powerful states are not necessarily intent on just furthering their own interests. Powerful states could well be enlightened and, as benevolent hegemons, use their stronger enforcement capacities to protect international community interests. In fact, precisely because they have more power and capacity, in accordance with the principle of common but differentiated responsibilities, it may be *incumbent* on them to do more than others to further the global interest, and thus to behave in — what may just in appearance be — a hegemonic fashion.[69] Thus, the notion of "power" should not be reified, or negatively stereotyped as militating against cosmo-

67 Bartelson, *Sovereignty as Symbolic Form*, 80 (submitting that "recent strategies for interfering in the domestic affairs of states are justified on grounds that such interference is necessary to strengthen their sovereignty" and that the concept of sovereignty is disaggregated and unbundled "so that its unnecessary or destructive aspects can be eliminated, before the health and useful aspects can be glued back together and imposed on the target state").

68 Ibid., 10 (drawing on the linguistic turn in philosophy and social sciences and stating that "sovereignty is what we make of it through our linguistic practices, given the contextual constraints at hand").

69 Cf. Karinne Coombes, "Universal Jurisdiction: A Means to End Impunity or a Threat to Friendly International Relations," *The George Washington International Law Review* 43, no. 3 (2011): 419, 457 ("there is the danger that universal jurisdiction may be perceived as hegemonistic jurisdiction exercised mainly by some Western powers against persons from developing nations") (emphasis added).

politan action. Rather, as Howse and Teitel have observed, it may be a shifting reality, becoming intertwined with "humanity-law."[70]

The view that state power should be used to further the international, rather than just the national interest is not new. It was a wildly popular idea in dominant progressive internationalist circles in the US in the early 20th century, that came to be championed by the US President himself, Woodrow Wilson (in office from 1913 through 1921). Triggered by the cataclysm of the First World War, Wilson held in his 1914 4th of July address that a great nation such as the US should use its influence and power not for aggrandizement and material benefit only, but to improve the world ("it is patriotic to concert measures for one another").[71] For Wilson, confronted with similar global governance challenges more than 100 years ago, this task was not just a matter of political morality, but of plain historical necessity:[72] the very survival of mankind arguably depended on the US taking the lead. This Wilsonian view informed the multilateral establishment of the League of Nations, and later the United Nations, but also the taking of US unilateral action to spread global values such as democracy and human rights.[73]

I am the first one to admit that such action has sometimes been heavy-handed and that "humanity" has been used a pretext for naked power interventions. But as far as the exercise of cosmopolitan jurisdiction is concerned, I do not hesitate to submit that, in various respects, the US has done a great service to humanity by extending its laws to address such global ills as corruption (Foreign Corrupt Practices Act), racketeering (Racketeer Influenced and Corrupt Organized Act), antitrust conspiracies (Sherman Act), and human rights violations (Alien Tort Statute)—even if the presumption against extraterritoriality has sometimes militated against a wide reach of US legislation. Also the European Union and European states have been serving humanity by projecting their environmental legislation abroad (notably to counter global warming), and by prosecuting the vilest international criminals.

70 Howse and Teitel, "Does Humanity-Law Require (or Imply) a Progressive Theory of History?," 377, 396 (citing "the endlessly dynamic relation of law to social reality").

71 Woodrow Wilson, *4th of July address*, July 4, 1914, PWW 30:251.

72 Frank Ninkovich, *The Wilsonian Century* (Chicago: University of Chicago Press, 1999), 68–9.

73 Before Wilson took office, the US also acted unilaterally, notably in its Latin American backyard under the Monroe doctrine. As Ninkevich has pointed out, however, such interventions were justified by anxiety about European intervention, or by economic rhetoric, whereas the interventions authorized by the Wilson were justified on the ground that they spread law, order, and democracy (Ninkevich, *The Wilsonian Century*, 51–2).

Critics may go on to object that oftentimes the powerful are not very likely to exercise extraterritorial jurisdiction in the global interest *without some national interest being present*, and that this national interest rationale is bound to engender justified international suspicion. In the field of business and environmental regulation, for instance, states will typically exercise unilateral jurisdiction when (also) the integrity of domestic regulation is undermined, and domestic actors' rights and interests are affected by foreign activity, e.g., where foreign cartels are preying on domestic markets, or foreign companies import substandard products.[74] This focus on safeguarding the business opportunities of domestic operators tends to create an impression of self-centeredness, arbitrariness,[75] exclusivity to the detriment of less powerful actors,[76] domination,[77] or outright legal imperialism.[78] One should realize, however, that such action is not meant simply to advance, in some sort of zero-sum game, one state's national interest to the detriment of another state's national interest. Rather, it levels a playing field that has become unhinged as a result of globally undesirable lax foreign regulation that puts domestic operators, who had *already* become subject to stricter regulation, at a competitive disadvantage. For instance, in the environmental field, the EU, in response to market distortions and citizen pressure, has provided for such a high level of environmental protection,[79] also with respect to global environmental goods such as a stable climate, that EU-based businesses have lost economic opportunities, which can only be restored by either scaling back regulation, or by "extraterritorializing" regulation, i.e., subjecting foreign op-

74 Tonya L. Putnam, "Courts Without Borders: Domestic Sources of US Extraterritoriality in the Regulatory Sphere," *International Organization* 63, no. 3 (Summer 2009): 459, 468; Jonathan Turley, "When in Rome: Multinational Misconduct and the Presumption Against Extraterritoriality," *Northwestern University Law Review* 84 (1990): 598.

75 Anthony J. Colangelo, "A Unified Approach to Extraterritoriality," *Virginia Law Review* 97 (2011): 1019, 1107 ("Unlike international law, other nations may not have consented to, say, unilateral projections of U.S. securities or antitrust laws within their territories, and absent a U.S. nexus, the choice of U.S. law appears arbitrary.")

76 Krisch, "The Decay of Consent," 31 ("nonconsensualism [...] creates more exclusive decision-making structures that reduce the number of decision-makers"); Ibid., 39 (nonconsensualism "does away only with the consent of the less powerful, and it can easily become a tool of hierarchy and control").

77 Jeffrey A. Meyer, "Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law," *Minnesota Law Review* 95 (2010): 110–11 ("A superpower [the US] no longer bent on conquering more territory stands to benefit when it instead can unilaterally project its law and corresponding enforcement resources to regulate what people do in other countries").

78 Kal Raustiala, *Does the Constitution Follow the Flag? The Evolution of Extraterritoriality in American Law* (New York: Oxford University Press, 2009), 224 (submitting that extraterritorial jurisdiction "enabl[es] the United States to unilaterally manipulate legal difference so as to better serve its interests" while "enhancing American power and interests on the world stage").

79 Thanks to Natalie Dobson for pointing this out to me.

erators to EU law in the global interest. Surely, the latter option is preferable from an international community vantage point.

"Hegemonic" actors such as the US or the EU may thus have been *first movers* as far as globally desirable regulation is concerned, subjecting their domestic operators to strict rules regarding e.g., accountability for human rights violations, corruption, antitrust conspiracies, securities fraud, or climate change. They subsequently wish to cast the regulatory net wider, so as to allow their domestic operators to remain in business, and *at the same time* to more efficiently tackle global problems which may be exacerbated by businesses moving offshore to evade strict regulation. In this second stage, states "extraterritorialize" their laws, but in a manner that is less unilateral than may meet the eye.[80] Ultimately, they may just be enforcing shared values of, or challenges facing the international community, which, moreover, are often recognized by various binding or non-binding international instruments.[81]

4. REINTERPRETING STATE CONSENT: BEYOND FORMALISM

It will have become clear by now that the cosmopolitan action addressed in this contribution cannot be captured by orthodox legal positivism that puts a high premium on explicit state consent. However, neither is such action entirely subjective, pie-in-the-sky, or natural law based. True, where legal and political instruments do not confer extraterritorial jurisdictional authority on states to enforce the values enshrined in them, the exercise of such authority may transcend the explicit consent of states and thus undermine the main

80 Hannah L. Buxbaum, "Transnational Regulatory Litigation," *Virginia Journal of International Law* 46 (2006): 251, 255, 268, 298 (arguing that in "transnational regulatory litigation" cases, the US domestic regulatory law that is applied extraterritorially, e.g., regarding antitrust, securities, and corruption, "reflects an internationally shared norm"). But see opinion Justice Breyer in the *Hoffmann-LaRoche* case, *F Hoffmann-LaRoche Ltd v. Empagran SA*, 542 US 155, 169 ("where foreign injury is independent of domestic effects, Congress might have hoped that America's antitrust laws [...] would commend themselves to other nations as well [...] if America's antitrust policies could not win their own way in the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat").

81 See e.g., *UN* Convention against Corruption (New York 2004), UN General Assembly resolution 58/4 of October 31, 2003; OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Paris 1997); Kyoto Protocol to the un Framework Convention on Climate Change (1997); Convention on the Prevention and Punishment of the Crime of Genocide, UN General Assembly Resolution 260 (III) A (1948); Rome Statute of the International Criminal Court (1998). See as regards cooperation in the field of antitrust law: the International Competition Network, which counts 104 competition agencies from 92 jurisdictions (www.internationalcompetitionnetwork.org). For cooperative networks in the field of securities/capital markets regulation: International Organization of Securities Commissions (IOSCO), the Financial Stability Board (FSB), the Council of Securities Regulators of the Americas (COSRA), and the Financial Action Task Force (FATF).

tenet of positivism. But as this authority is not made out of thin air, but finds its normative basis in international instruments and broadly defined international norms and policies, it can still be traced back to the consent of states. Most assertions of extraterritorial jurisdiction indeed enforce values which the community of states have deemed worthy of protection: international crimes and human rights violations are proscribed by treaties and customary international law, anti-corruption conventions have been widely ratified, and global environmental goods (e.g., a stable climate, biodiversity) have been recognized by a host of legal and political instruments. State consent may possibly not extend to all procedural issues of enforcement, but the relevant issue is that it pertains to certain *substantive values*. So as to strengthen the impact of such values, and eventually the rule of law, states may surely place their legal enforcement machinery at the international community's disposal.

This view ties in well with recent anti-formalistic legal scholarship that emphasizes extra-positivist sources of international law authority, namely those based on substantive authority and effectiveness. Nijman and Nollkaemper put it as follows:

> Part of the answer [as to who or what validates non-positive law sources of international law] is found in the fact that deformalization is a parallel development to the emergence of common values. International law does not (only) find its authority in binding rules and principles, i.e., in conformity with the positivist model, but is in a way more substantive since it is grounded on international norms as keepers of universal common *values* rather than as binding rules of positive international law. In this role, (binding or non-binding) international norms have authority because of the values they represent [...].[82]

This reasoning allows us to justify unilateralism on the basis of a legalized form of Kantian, deontological ethics,[83] as an international norm arguably provides the requisite substantive authority for unilateral action. From a constructivist international relations perspective, such unilateralism may, theoretically at least, be likely to gain acceptance by states, as the existence

82 Janne Elisabeth Nijman and André Nollkaemper, "Beyond the Divide," in *New Perspectives on the Divide between International and National Law*, ed. Nijman and Nollkaemper (Oxford University Press, 2007), 353.

83 Immanuel Kant, *Groundwork of the Metaphysic of Morals* (Harper and Row Publishers, 1964).

of the international norm may serve a socializing function and influence the perception of legitimate behavior.[84]

I admit that it may happen that no international norm can be discerned, namely where prisoners' dilemmas have made any agreement on substantive norms well-nigh impossible. Assume, for instance, that an international agreement on tackling climate change fails to materialize, even if all scientific evidence shows that collective action should be taken to avert a catastrophe. If states take unilateral remedial action, such action may not be justified on the basis of codified internationally shared values, let alone on the basis of classic international law, as there is simply no substantive norm to be enforced. Such action could yet be legitimate, however, insofar as proof is adduced that the consequences of such action may be globally beneficial. This view approaches legitimacy not from a deontological, rule-based perspective (codified shared values), but rather from a *consequentialist* or *utilitarian* ethical angle, which takes into account an action's potential to enhance global welfare.[85] It is submitted that, given the challenges which humanity faces in terms of supplying global public goods and providing global justice, value-based *consequentialism* may in certain circumstances have to prevail over formal rules.[86] Such a position finds its conceptual roots in Max Weber's "ethics of responsibility,"[87] and in the legal *processes* emphasized by the New Haven policy-approach to international law.[88]

84 Jeffrey L. Dunoff and Mark A. Pollack, "International Law and International Relations: Introducing an Interdisciplinary Dialogue," in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, ed. Dunoff and Pollack (Cambridge University Press, 2013), 8–12. See for an exposition of the relationship between constructivism and international law in the same volume: Jutta Brunnée and Stephen J. Toope, "Constructivism in International Law," 119–45.

85 See notably the works of the 19th century British philosophers Jeremy Bentham and John Stuart Mill, e.g., Jeremy Bentham, *Introduction to Principles of Morals and Legislation* (printed for publication 1780, published 1789) and John Stuart Mill, *The Principles of Political Economy: With Some of Their Applications to Social Philosophy* (1848).

86 Contra Koskenniemi, "What Use for Sovereignty Today?," 65 (denouncing the anti-formalist nature of contemporary global law, which in his view does no longer protect formal sovereignty, but replaces it by "global systems of management" that renders everything "negotiable, revisable in view of attaining the right outcome").

87 Max Weber, "Politik als Beruf (1918/19)," in *Gesammelte politische Schriften*, 3rd ed. (Tübingen: J.C.B. Mohr, 1971), 550 ("You should resist evil with force, otherwise you are responsible for its getting out of hand.")

88 See for the seminal work of the New Haven School, emphasizing processes over formal rules: Myres S. McDougal and Harold D. Lasswell, "The Identification and Appraisal of Diverse Systems of Public Order," in *Studies in World Public Order* 3, ed. M.S. McDougal et al. (The Hague: Martinus Nijhoff, 1960). Contra: Martti Koskenniemi, *The Gentle Civilizer of Nations* (Cambridge: Cambridge University Press, 2001), 485 (decrying this instrumentalism that replaces formal law by a wider standard policy guideline and the "values of liberal democracy").

Admittedly, this position abandons explicit state consent in the strict positivist sense of the word. However, consequentialist action may find its legitimation in states' *constructive consent,* inferred from Rawls's method of the "veil of ignorance." Rawls's moral theory puts agents in an "original position" where "no one knows his place in society, his class position or social status; nor does he know his fortune in the distribution of natural assets and abilities, his intelligence and strength, and the like."[89] Personal tastes, self-interest, and power differentials disappear in this constellation, and genuine moral choices will be made. Just like individuals, ignorant of what position they will hold upon entering society, will not normally choose a slave-owning society (where they could well end up on the receiving end), ignorant states are unlikely to want to enter a society characterized by environmental disaster, international crimes, rampant corruption, and corporate abuses. One can instead presume that they would a priori give their *consent* to an international society that is based on some minimum rules of conduct. From this perspective, the empirical reality that states, for self-interested reasons, do not give their *actual* consent to the protection of a global value, nor of states' right to extraterritorially protect the value, is not decisive. Key is that in the original position, states, for reasons of rational morality, would have given their consent if their vision had not been clouded by particularist considerations.

Consent is, like sovereignty, an enduring cognitive script that may require some reinterpretation in light of current governance challenges. The reinterpretation that I have propounded here, based on the urgency of the challenges and the method of the veil of ignorance, allows international law to progressively develop beyond its rudimentary state. In the Grotian tradition, as also espoused by Hersch Lauterpacht, reason, ethics, and the law of nature may demand that international legal action be taken beyond the express will of states.[90] For our research object, this means that asserted hold-outs" resort to "reasons of state" so as to block the taking of necessary multilateral action in the common interest should not be rewarded. In order to respond to such multilateral blockage, the development of international law should arguably

89 John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1999), 118.

90 Hersch Lauterpacht, "The Grotian Tradition in International Law," *British Yearbook of International Law* 23 (1946): 1, 21–22, relying on Grotius's *De Jure Belli ac Pacis* ("The significance of the law of nature in the treatise is that it is the ever-present source for supplementing the voluntary law of nations, for judging its adequacy in the light of ethics and reason, and for making the reader aware of the fact that the will of states cannot be the exclusive or even, in the last resort, the decisive source of the law of nations.")

be geared toward relaxing the principles of non-intervention and territorial jurisdiction, so that unilateral action could more easily be taken.

5. CONCLUDING OBSERVATIONS

In this contribution I have supported the exercise of unilateral, extraterritorial jurisdiction by states in the common interest, on the ground that cosmopolitan consequentialism requires us to take substance rather than formality seriously. Therefore, classic international law notions such as "consent" and "sovereignty" are in need of reinterpretation so that they can facilitate and not inhibit the realization of global values and global public goods.

I am cognizant of the dangers of domination and abuse that go with an authorization to act unilaterally. But at the end of the day, allowing action in the common interest may surely be preferable to prohibiting altogether. States and regional organizations acting unilaterally in the common interest, as benevolent hegemons, may thus have to be applauded rather than criticized. Practice shows that such applause may be forthcoming indeed. For instance, when in 2015 US prosecutors indicted FIFA officials under US racketeering laws for accepting foreign bribes, international opinion was largely supportive of, and grateful to the US for cleaning up international football.[91] That being said, to counter the abuse of unilateralism, techniques that mitigate the impact of extraterritorial action on the addressees — foreign states, individuals, and operators — may have to be explored. This exploration is beyond the scope of this article, but it is tentatively suggested that, in light of democratic theory, foreign addressees' participation in the domestic design of such action may go quite some way to limit self-serving behavior,[92] and eventually reinforce the legitimacy of cosmopolitan extraterritoriality.

91 Anon., "The World's Lawyer: America's Legal Reach," *The Economist*, June 6, 2015; John Gapper, "America is the Best Referee to Discipline FIFA," *Financial Times*, May 27, 2015.

92 Eyal Benvenisti, "Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders," *American Journal of International Law* 107 (2013): 295.