

The reconciliation of transnational economic, social and cultural human rights *via* the common interest

1 Introduction

In general, human rights obligations are restricted to states' actions within their own territory in relation to their own citizens and residents.¹ However, article 55(c) of the Charter of the United Nations refers to the promotion of 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion', while article 56 affirms that '[a]ll Members pledge themselves to take joint and separate action, in cooperation with the Organisation, for the achievement of the purposes set forth in article 55'. Thus, states must promote human rights both individually and jointly.² Furthermore, the Vienna Declaration affirms that the promotion and protection of human rights is a legitimate concern of the international community.³ Therefore, the implementation of human rights is clearly not a purely domestic matter. This is also evident from the horizontal operation of human rights between states as it is actually states which are the principal addressees of international human rights law. Inter-state complaint procedures⁴ are used to 'act in the common interest of protecting human rights'.⁵ Furthermore, jurisprudence,⁶ international treaties, soft law, and customary

¹Skogly *Beyond national borders: States' human rights obligations in international cooperation* (2006) at 6.

²Skogly n 1 above at 76 is of the opinion that the term 'jointly' has an extraterritorial dimension. Article 55 of the Charter implies that the promotion of human rights is a means of achieving international peace and security, since it states in 55(c) that its aims shall be promoted with a 'view to the creation of conditions of stability and well being which are necessary for peaceful and friendly relations among nations'.

³UNHCR The Vienna Declaration and Programme of Action UN Doc A/CONF 157/23 par 4 (1993).

⁴This mechanism is not often used. Smith *Textbook on international human rights* (2007) at 140.

⁵Ulfstein 'Human rights, state complaints' in Wolfrum (ed) *The Max Planck encyclopedia of public international law* (2008) available at <http://www.mpepil.com/> (accessed 30 November 2011).

⁶It is not my intention to revisit the discourse in this regard. The jurisprudence of the European Court of Human Rights created confusion since the court in the *Bankovic* case adopted a restrictive approach to the interpretation of the jurisdictional clause in art 1 of the European Convention on Human Rights. See *Bankovic v Belgium et al* application 52207/99 admissibility decision (12 November 2001). This case has been widely criticised. See Gondek 'Extraterritorial application of the European Convention on Human Rights: Territorial focus in the age of globalisation?' (2005) 52 *NILR* at 349-387. After *Bankovic* the court seems to have followed a more articulated interpretation of art 1. See, for instance, *Öcalan v Turkey* (Merits) application 46221/99 chamber judgment (12 March 2003) and *Issa v Turkey* application 31821/96 ECtHR judgment (16 November 2004). The International Court of Justice jurisprudence affirms that states have certain extraterritorial human rights obligations based on 'effective control'. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 ICJ Rep 136. The court confirmed that the International Covenant on Economic, Social and Cultural Rights applies to the territories under its occupation, and that Israel is under an obligation 'not to raise any obstacle to the exercise of such rights in the fields where

international law provide examples of a progressive development of the extension of the scope of human rights obligations beyond state borders.⁷ In particular,⁸ the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁹ has interesting provisions which reveal that the ‘existence of extraterritorial obligations in relationship to international cooperation and assistance based on specific provisions of the Covenant [is] clear’.¹⁰

This phenomenon has given rise to the international law discourse on ‘transnational human rights obligations’,¹¹ which entails that states may have certain obligations to individuals in other states. These obligations relate not only to the horizontal relationship between states, but find vertical application between the state and individuals from another state or states. The transnational human rights obligations to protect¹² and to fulfil, are still viewed

competence has been transferred to Palestinian authorities’. See par 112.

⁷For a comprehensive discussion, see Skogly n 1 above at ch 4 7.

⁸For an overview of the extraterritorial application of the International Covenant on Civil and Political Rights (ICCPR), see McGoldrick ‘Extraterritorial application of the International Covenant on Civil and Political Rights’ in Coomans and Kamminga (eds) *Extraterritorial application of human right treaties* (2004) at 41 81.

⁹Article 2(1) contains the undertaking by each party ‘to take steps, individually and through international assistance and co operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant’. In relation to the right to an adequate standard of living, art 11(1) states that ‘parties will take appropriate steps to ensure the realisation of this right, recognising to this effect the essential importance of international co operation’. Article 11(2), which articulates the right of everyone to be free from hunger, reads that parties ‘shall take, individually and through international co operation, the measures, including specific programmes, which are needed’. Article 15(4) also underscores the importance of international cooperation as it reads that ‘the States Parties to the present Covenant recognise the benefits to be derived from the encouragement and development of international contacts and co operation in the scientific and cultural fields’.

¹⁰Skogly n 1 above at 98. She is of the opinion that the obligations relate to the substantive content of the rights in the Covenant as well as the obligations in Part IV. For a discussion of the comments by the Committee on Economic, Social and Cultural Rights, see also Künnemann ‘Extraterritorial application of the International Covenant on Economic, Social and Cultural Rights’ in Coomans *et al* (eds) *Extraterritorial application of human right treaties* (2004) at 208 211. Article 4 of the Convention on the Rights of the Child is also relevant as it reads that ‘With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co operation’ and art 24(4) reiterates the need for international cooperation pursuant to the realisation of the rights in the Convention. Article 22 of the United Nations Declaration on Human Rights also stresses the need for international cooperation concerning the realisation of the right to social security.

¹¹Several other terms have been used, such as ‘international’, ‘transborder’, ‘transboundary’ or ‘extraterritorial’. See Gibney, Tomasevski and Vedsted Hansen ‘Transnational state responsibility for violations of human rights’ (1999) 12 *HHRJ* at 267.

¹²Skogly n 1 above at 69. This implies an obligation on states to regulate the activities of third parties subject to their jurisdiction or control. This issue applies to the activities of corporations that operate internationally.

as part of *de lege ferenda*, whereas the obligation to respect¹³ constitutes *de lege lata*.¹⁴

However, scholars have indicated a need for the development of the obligations to fulfil and protect in an era of globalisation and interdependence.¹⁵ The obligations to fulfil remain the most controversial issue as these obligations imply that states have an international obligation to undertake positive measures in order to fulfil economic, social, and cultural rights¹⁶ in other states, *inter alia*, through offering them financial support. The emergence of such a vertical relationship may face obstacles from the international legal order. It is important to bear in mind that, in general, international law it is the primary objective of territorial jurisdiction to avoid conflicts of extraterritorial jurisdiction in the promotion of sovereign equality¹⁷ and non-intervention.¹⁸ Accordingly, the development of human rights obligations which states are required to fulfil, may conflict with the sovereign equality of states. Therefore, the discourse on the fulfilment of transnational human rights obligations invokes the need for the reconciliation of sovereignty with the implementation of transnational human rights obligations in the current era of globalisation.¹⁹ Ultimately, the challenge is to ‘make the ICESCR fit the era of globalisation: to reach beyond traditional concepts of state sovereignty in order to provide

¹³See for a discussion Skogly n 1 above at 66. This refers to the basic obligation not to interfere or to deprive individuals of their enjoyment of human rights. In the context of the current discussion this implies that states should not impair the enjoyment of human rights in other states. These obligations are primarily negative.

¹⁴See Coomans ‘Some remarks on the extraterritorial application of the International Covenant on Economic, Social and Cultural Rights’ in Coomans *et al* (eds) *Extraterritorial application of human rights treaties* n 10 above at 183 199.

¹⁵Coomans ‘Application of the International Covenant on Economic, Social and Cultural Rights in the framework of international organisations’ (2007) 11 *Max Planck UNYB* at 390. The obligation to respect entails the (negative) duty not to interfere with the enjoyment of human rights. The obligation to protect refers to protection against third parties over which the state has jurisdiction.

¹⁶Hereafter ESCRs.

¹⁷Article 2(1) of the UN Charter. See Beckmann and Fassbender ‘Article 2(1)’ in Simma *et al* (eds) *The Charter of the United Nations: A commentary* (2002) (2ed) at 68.

¹⁸Article 2(7) of the UN Charter. See Nolte ‘Article 2(7)’ in Simma *et al* n 17 above at 148.

¹⁹Globalisation entails certain consequences for international law. It is not my intention to present a comprehensive overview of this complex theme. For an extensive discussion, see Bederman *Globalization and international law* (2008). It must be borne in mind that various developments have occurred in international law during the current era of globalisation. See Mégret ‘Globalisation and international law’ in Wolfrum (ed) *The Max Planck encyclopedia of public international law* (2008) available at <http://www.mpepil.com/> (accessed 25 September 2011). In this regard I shall refer to the changing subjects and the objects of international law, the departure from dealing traditionally with inter state issues to distinctive global issues, the increasing importance of cooperation amongst actors and the importance of the human rights regime, which has the potential to alter the aspirations of international law in a cosmopolitan direction.

for international solidarity and achieve global justice'.²⁰

It is, therefore, the principal aim of this article to respond to this challenge and provide a conceptual understanding of sovereignty for the further development of transnational economic, social, and cultural human rights obligations which must be met. The reconciliation of the emergence of the common concern of mankind/humankind²¹ on the basis of the common interest in international environmental law and sovereignty, has provided a similar challenge. I have previously addressed this challenge, and indicated that common concern may mould sovereignty in response to the needs of the international community. It is for this reason that I examine the implications of this notion for transnational human rights obligations *via* reference to the discourse in international environmental law. In this process, I discuss the content and scope of the common interest and the common concern. Accordingly, I focus on the legal implications of these notions and determine to what extent this impacts on sovereignty, reciprocal obligations between states, and the legal recognition of subjects of international law. I also consider the role of the moral principle of 'solidarity' pursuant to a more equitable distribution of the burden-sharing of common obligations. Furthermore, I ascertain how these progressive developments may be relevant to the discourse on transnational human rights obligations. I conclude the article with closing remarks and indicate that the emergence of the common concern may respond to the stated challenge concerning the transnational human rights obligations to fulfil ESCRs. This is indicative of a progressive development towards a departure from an overly state-centred international law, to a structure that affirms the participation of other actors within the international community in the well-being of current and future generations.

2 Common interest and the common concern of mankind

2.1 Introduction

The Preamble to the 1992 United Nations Framework Convention on Climate

²⁰Coomans n 14 above at 184. The main focus of this article will be on ESCRs as contained in this Convention. This does not detract from the fact that other universal human rights treaties are linked with the enjoyment of ESCRs. The most prominent example is the right to life in art 6 of the ICCPR.

²¹I shall refer to mankind in order to be consistent. The notion can be found in several international documents, such as the UN General Assembly resolution 43/53 of 1988, the UN General Assembly resolution 44/207 of 1989, Noordwijk Declaration of the Conference on Atmospheric Pollution and Climate Change, United Nations Framework Convention on Climate Change of 1992 (UNFCCC), and the Convention on Biological Diversity of 1992 (CBD). See also Biermann 'Common concern of mankind: The emergence of a new concept of international environmental law' (1996) 34 *AVR* at 426 and 431. See also Timoshenko 'Responses to environmental challenges: UNEP experience' in Al Nauimi *et al* (eds) *International legal issues arising under the United Nations as decade of international law* (1995) 154 170.

Change, acknowledges ‘that change in the Earth’s climate and its adverse effects are a common concern of humankind’, whereas the Convention on Biological Diversity of the same year, affirms that ‘the conservation of biological diversity is a common concern of humankind’. According to Brunnée, the common concern of mankind is a facet of ‘common interest’. In this regard, the common interest refers to the survival of humankind. In some instances ‘common interest’ may result in an international law rule that entails certain duties. ‘Common interest’ serves as a driving force in the development of rules.²² It is, therefore, the common interest that gives rise to common concern. The common interest of all states makes cooperation crucial, and, accordingly, highlights the interdependence of states.²³ Common interest is the product of coinciding individual state interests, which means that it reflects egocentric, rather than altruistic, features. This implies that individual state interests must coincide before the common interest will arise. This may, however, prove to be difficult in the international arena, which is characterised by heterogeneous states with differential interests.

It is important for the current discussion to recognise two important issues. Earlier treaties do not refer explicitly to the common concern but they do follow the common concern regimes.²⁴ Furthermore, the ‘concern’ element does not carry with it any proprietary meaning, but relates to both the causes and the responses to common concerns. The existence of a common concern is not dependant on the inclusion of this notion in a treaty, but does simplify the achievement of consensus on whether an issue constitutes a common concern, and clarify the legal consequences attached to this designation. Consequently, the fact that human rights treaties do not include a reference to this notion, does not mean that human rights are precluded. The fact that common concern does not have proprietary connotations, implies that it is not impossible to apply this concept to the current discussion on transnational human rights obligations to fulfil ESCRs.

This discourse is not purely academic. The plight of environmentally displaced persons (EDPs)²⁵ provides a concrete example of the transnational application

²²Brunnée “‘Common interest’ echoes from an empty shell? Some thoughts on common interest and international environmental law’(1989) 37 *ZaöRV* at 791 808. However, common interest is the product of the coinciding individual state interests, which implies that it is characterised by egocentric (anthropocentric) rather than altruistic features.

²³Scholtz ‘Collective (environmental) security: The yeast for the refinement of international law’ (2008) 19 *Yearbook of International Environmental Law* at 150.

²⁴Convention for the Protection of the World Cultural and Natural Heritage of 1972 and the Montreal Protocol on Substances that Deplete the Ozone Layer of 1987. See Brunnée ‘Common areas, common heritage and common concern’ in Bodansky *et al* (eds) *The Oxford handbook of international environmental law* (2007) at 550 573 and 565.

²⁵See Scholtz ‘Environmentally displaced persons, climate change and the AU: The day after no tomorrow?’ (2010) 35 *SAYIL* at 35 55.

of the human rights' framework on the basis of a common concern. A home state may be barred from taking action to fulfil the ESCRs of its emigrant citizens in other states. Furthermore, EDPs may not successfully claim the fulfilment of ESCRs from third states for having contributed to climate change through the emission of greenhouse gasses.²⁶ It is in this regard, that the common concern may offer a potential solution. The fact that the preamble to the UNFCCC recognises the consequences of climate change – such as environmental displacement – as a common concern, may provide a point of departure for the development of the transnational fulfilment of ESCRs (as response measures) in relation to EDPs.²⁷

2.2 *CCM and its consequences in international environmental law*

2.2.1 Towards the custodial element of sovereignty

The meeting of the Group of Legal Experts to Examine the Concept of the Common Concern of Mankind in Relation to Global Environmental Issues, made it clear that common concern does not imply a departure from state sovereignty in that states retain permanent sovereignty over natural resources.²⁸ It is important to bear in mind that permanent sovereignty is viewed as a component of custodial state sovereignty, which is the economic face of sovereignty.²⁹ Common concern clearly entails implications for sovereignty since the notion also applies to certain resources located in the territory of individual states. Common concern arises irrespective of trans-boundary harm. In this regard, Boyle has made it clear that common concern provides the international community with a 'legitimate interest in resources of global significance and a common responsibility to assist in their sustainable development'.³⁰ The existence of the common interest, therefore, challenges the notion of sovereignty, and may accordingly result in its adaptation.³¹ It is accordingly important to reflect on this issue.

²⁶Beyerlin 'Environmental migration and international law' in Hestermeyer *et al* (eds) *Coexistence, cooperation and solidarity Liber Amicorum Rüdiger Wolfrum volume I* (2011) 319-332 at 328.

²⁷It is not my intention to dissect this issue in detail. A forthcoming publication will deal with the transnational application of human rights to EDPs in the African context.

²⁸Report of the Meeting of the Group of Legal Experts to Examine the Concept of the Common Concern of Mankind in Relation to Global Environmental Issues. See Horn 'The implications of the concept of common concern of mankind on a human right to a healthy environment' (2004) 1 *MqJICEL* at 237.

²⁹Perez *Cooperative sovereignty: From independence to interdependence in the structure of international environmental law* (2000) at 97.

³⁰Birney, Boyle and Redgwell *International law and the environment* (2009) at 130.

³¹See Tierney 'Questioning authority: The normative challenge in forging an international community' in Tierney *et al* (eds) *Towards an international legal community? The sovereignty of states and the sovereignty of international law* (2006) at 1-16.

I have previously discussed the influence of common concern on the notion of permanent sovereignty in the context of global environmental degradation.³² I have coined the notion of ‘custodial sovereignty’ in terms of which a state is the custodian of its global environmental resources.³³ Other states have an expectation that the relevant state will protect its resources for mankind as a whole. The other states have a duty to support the custodial state in fulfilling its obligations. The custodial state may exploit its resources, but is restricted in doing so by the expectations and interests of other states. Underlying the notion of custodial sovereignty, are two fundamental elements. The first element involves the common (global) responsibility of all states for the protection of global environmental resources. The second element involves the differentiated responsibilities of a state’s contribution to the protection of these resources.

2.2.2 Differential burden sharing for common well-being

Custodial sovereignty requires differential treatment.³⁴ It must be borne in mind that CCM makes provision for fair and equitable burden-sharing. In terms of the Hague Recommendations on International Environmental Law, ‘costs should be shared equitably among states, taking into account historic responsibilities and present technical and financial capabilities’.³⁵ This implies that the legal obligations that address the common concern are differential.³⁶ It is for this reason that certain legal obligations that relate to the common concern are guided by the common but differentiated obligations principle.³⁷

³²Scholtz ‘Custodial sovereignty: Reconciliation of sovereignty and global environmental challenges amongst the vestiges of colonialism’ (2008) 55 *NILR* at 323.

³³These resources are *renewable* natural resources of which a part or the whole of the resource is located in the territory of a state, but which is needed and enjoyed by the whole of mankind. It must be borne in mind that my discussion of custodial sovereignty relates to global environmental resources and not the global commons. The notion of the common concern of mankind is applicable to global environmental resources and the common heritage of mankind relates to the latter. The main difference between the two areas is the fact that states cannot make territorial claims to these areas. However, several similarities are also evident. The management of the areas imposes shared responsibilities on states to the benefit of mankind. The areas must also be preserved for future generations.

³⁴French ‘Developing states and international environmental law: The importance of differentiated responsibilities’ (2000) 49 *ICLQ* at 35 and 46.

³⁵Paragraph 3 of ‘The Hague recommendations on international environmental law of 16 Augustus 1991’ in Bilderbeek (ed) *Biodiversity and international law: The effectiveness of international environmental law* (1992) at 194 202.

³⁶For an analysis of differential treatment, see Rajamani *Differential treatment in international environmental law* (2006).

³⁷This principle has been the source of contention in international law. For a comprehensive overview, see Stone ‘Common but differentiated responsibilities in international law’ (2004) 98 *AJIL* at 276 and Scholtz ‘One environment, different countries: A discourse on common but differentiated responsibilities’ (2008) 33 *SAYIL* at 113 136. Article 3(1) of the UNFCCC refers to the common but differentiated responsibilities and respective capabilities (CBDRRC) principle. The Kyoto Protocol follows the blueprint of the UNFCCC as the central obligations

The principle which most clearly reflects the essence of differential treatment in international environmental law, is the principle of common but differentiated responsibility.³⁸ This principle entails two main elements. Firstly, it concerns the common responsibility of states for the protection of the environment. This refers to the shared obligations of states towards the protection of an environmental resource. Secondly, it concerns the acknowledgement of different circumstances, such as the contribution of states to an environmental problem and the ability to address the ensuing threat. The differential responsibility is translated into differential obligations for states. The differentiated obligations may relate to the special requirements of developing countries (for financial resources) and developed countries (the expectation that developing countries protect global environmental resources), as well as differential circumstances (the existence of global environmental resources in developing countries).

Cullet views differential treatment ‘as the instances where the principle of sovereign equality is sidelined to accommodate extraneous factors, such as divergences in levels of economic development or unequal capacities to tackle a given problem’.³⁹ Consequently, the common interest invokes a departure from the traditional reciprocal international legal obligations between states. This does not imply a departure from sovereign equality as the fundamental constitutional principle between states. Differential treatment provisions rather constitute an exception – on the basis of state consent – to traditional reciprocity.⁴⁰ However, this exception may be seen as a pointer to the fact that sovereign equality, too, may also be subject to change.

2.2.3 Evaluation of common concern, custodial sovereignty, and lessons for the current discussion

Custodial sovereignty should not be viewed as heralding the demise of sovereignty. Sovereign equality plays an important role as it also affords protection to less powerful states in the sense that it guarantees the juridical equality of developing states.⁴¹ States, therefore, retain the primary responsibility for their territories. However, custodial sovereignty acknowledges that the common concern around global environmental problems, requires an adaptation of sovereignty if it is to respond to the needs

of the Protocol are applicable to Annex I countries. See art 3 of the Protocol.

³⁸Cullet ‘Differential treatment in international law: Towards a new paradigm of inter state relations’ (1999) 10 *EJIL* at 549 and 577.

³⁹*Id* at 551.

⁴⁰Several other exceptions exist, such as art 27(3) of the UN Charter. See Simpson *Great powers and outlaw states. Unequal sovereigns in the international legal order* (2004) at 48.

⁴¹See the ‘Declaration on Principles of International Law Concerning Friendly Relations and Co operation Among States in accordance with the Charter of the United Nations’ (hereafter the Friendly Relations Declaration). UN GAR 2625 (XXV) of 20 October 1970.

of the international community. The increasing interdependence between states and the need to cooperate in addressing the common concern, necessitates an adaptation of sovereign equality. It is, therefore, not sufficient for sovereignty to focus on the independence of states. Sovereignty should take heed of the transformation of an international law of co-existence, into a law of co-operation.⁴² Furthermore, scholars have recently recognised signs pointing to a shift towards an international community with community interest.⁴³ Custodial sovereignty is appropriate for the constant adaptation of international law in response to globalisation. It is suitable to accommodate the factual and legal interdependence of states and the recognition of the participation of non-state actors in international law. Furthermore, custodial sovereignty gives expression to the pursuit of material equity through international cooperation as reflected in articles 55(a)(b) and 56 of the UN Charter. Therefore, the acceptance of custodial sovereignty does not imply a radical alteration of international law, but rather accounts for the dynamic development of international law and as such strengthens international law.

Custodial sovereignty entails that, in the exercise of their permanent sovereignty, individual states are restricted by the common interest.⁴⁴ They are custodians of the international community, which must act in accordance with the common concern of mankind. Sovereignty must, therefore, be exercised for the benefit of mankind – made up by current and future generations. This means that sovereignty must be exercised in the interest of the survival of humankind. The notion of the common concern furthermore introduces a temporal aspect as custodial sovereignty implies a responsibility towards current and future generations.

What does this mean for the observance of transnational human rights obligations in the context of the current discussion? It has already been indicated that it is questionable whether the observance of human rights currently constitutes a common interest that may give rise to the common concern. The designation of the causes and response measures of climate change in the Preamble of the UNFCCC, may create a link for the transnational application of human rights in relation to EDPs. Furthermore, paragraph 4 of the Vienna Declaration and Programme of Action⁴⁵ may constitute a point of departure for such a future development. It is on this basis that the emergence of custodial sovereignty may provide insight into how to

⁴²Friedmann *The changing structure of international law* (1964) at 249.

⁴³Simma 'From bilateralism to community interest in international law' (1994) 250 *Recueil Des Cours* at 217.

⁴⁴I have not considered the emergence of the international community in relation to sovereignty in my previous publications.

⁴⁵This paragraph affirms that human rights are seen as a legitimate concern of the international community.

reconcile transnational human rights and sovereignty. Custodial sovereignty affirms the notion that modern international sovereignty does not only consist of international external sovereignty,⁴⁶ but also has an internal dimension.⁴⁷ The overlap between external and internal sovereignty is clear: the internal element is primarily directed at the inhabitants of a state; whereas the external element is directed against other participants within the international community. The implication of the existence of custodial sovereignty in an emerging international community, means that the external element of sovereignty remains important as it protects the state and its inhabitants against outside interference. It acts as a shield against unwarranted foreign intervention. Sovereignty, therefore, fulfils an important role in guarding against the imperialist motives of the powerful. However, sovereignty may not be used as an excuse for non-fulfilment of ESCRs. Custodial sovereignty provides a useful link between the internal and external dimensions of modern international sovereignty. It must be borne in mind that international law implies external sovereignty, and *vice versa*.⁴⁸ The international law limitations on internal sovereignty have also become 'constitutive limitations to internal sovereignty'.⁴⁹ Sovereignty, therefore, is also made up of rights and obligations, such as the transnational human rights obligations of states under international law. However, the obligations of states are not to be seen as constraints on state sovereignty, but rather its integral nuts and bolts.⁵⁰ Obligations constitute sovereignty in conjunction with rights, and sovereignty is also the source of rights and duties for states. The dynamic aspect of factual reality may spark the development of different rights and obligations, and this will influence the notion of sovereignty. The prominence of human rights in international law, has given rise to changes in the notion of sovereignty. The need for its universal promotion through transnational obligations, may accordingly adapt sovereignty in line with the requirements of the international community. This implies a sovereignty aligned with dynamic circumstances. Sovereignty may, accordingly, respond to the common interest, such as the survival of mankind. This does not lead to the 'erosion' or 'demise' of sovereignty, but rather to its strengthening in response to the needs of the international community. In this way states can act as custodians of the well-being of human individuals and of sovereignty. Custodial sovereignty recognises the internal and external rights and obligations of states. Therefore, the internal obligations of a state relate primarily to the inhabitants of a

⁴⁶This relates to the equal inter state rights and duties.

⁴⁷This refers to the international rights and duties of a state regarding its ultimate authority and competence over people and things in its territory See Besson 'Sovereignty' in Wolfrum (ed) *The Max Planck encyclopedia of public international law* (2008) available at <http://www.mpepil.com/> (accessed 30 November 2011).

⁴⁸*Ibid.*

⁴⁹*Ibid.*

⁵⁰I therefore feel that it is incorrect to refer to the 'erosion' of sovereignty.

custodial state and is external to the international community. However, it is also true that the internal responsibility of states is also of concern to the international community as it relates to the promotion and protection of the common interest. This implies that the international community of states also incurs a legitimate interest in relation to the internal responsibilities of states. Therefore, sovereignty exhibits a relational or interactive nature. The internal element of sovereignty is, therefore, exercised primarily for the benefit of the inhabitants of the state, and the state bears the primary responsibility for the promotion of the welfare of its inhabitants through domestic structures. States still have exclusive claims over their territories in terms of their territorial integrity and political independence. The acceptance of custodial sovereignty does not introduce either an era of non-territorial governance, or the end of territorial sovereignty. The emergence of a common interest in relation to the internal obligations of a state may, indeed, see the recognition of a common concern and the acceptance of obligations in terms of a treaty. The custodial element of sovereignty may accordingly necessitate differential obligations in the pursuit of international cooperation.

The emerging international moral principle of solidarity offers a source for differential treatment provisions.⁵¹ Solidarity entails that states must be held responsible for the external effects of their policies. Thus, states should conduct their policies in a way that takes the interests of the international community into account. Not only should they avoid any action or actions that may cause substantial injury to other states, but they should also undertake jointly or separately, positive measures to promote the benefit of the international community. Furthermore, the principle of solidarity may aim to ameliorate the inequalities of particular states over others. This implies that in aiming to realise a common goal, some states may have to contribute more than others.

Solidarity finds practical application through differential treatment provisions.

⁵¹ Paragraph 6 of the UN Millennium Declaration (General Assembly resolution A/55/L.2 of 18 September 2000) affirms that solidarity is one of the 'fundamental values to be essential to international relations in the twenty first century'. This paragraph also defines solidarity in terms of burden sharing. On the topic of solidarity, see Macdonald 'Solidarity in the practice and discourse of public international law' (1996) 8 *PILR* at 259. Wolfrum 'Solidarity amongst states: An emerging structural principle of international law' in Dupuy *et al* (eds) *Völkerrecht als Wertordnung Festschrift für Christian Tomuschat* (1995) at 1087. I do not perceive solidarity as a legally binding principle. See Dann 'Solidarity and the law of development' in Wolfrum and Kojima (eds) *Solidarity: A structural principle of international law* (2010) at 55-77. It serves rather as a moral driver for the development of measures that reflect solidarity. International environmental law contains various examples of the influence of solidarity. See Riemer *Staatengemeinschaftliche Solidarität in der Völkerrechtsordnung* (2003) at 160. For an overview of solidarity in the context for the call for a New International Economic Order, see Scholtz 'A sustainable and equitable legal order' in Benidickson *et al* (eds) *Environmental law and sustainability after Rio* (2011) at 119-137.

This does not mean that it excludes reciprocity. Reciprocity, however, does not imply equal obligations. Reciprocity may, for instance, rather entail that developing countries have the duty to use assistance efficiently.

Thus, solidarity may be an important principle in the international community which cooperates as a consequence of the shared desire to promote transnational human rights. It does not disregard the importance of the primary responsibility of states for the protection and promotion of human rights as regards their citizens and residents. This primary responsibility also entails that states must first use their resources to fulfil the needs of their own residents in accordance with their own resources. They will contravene their primary obligations when they use their resources to fulfil the needs of people in other states, and then lack the means to take care of their own. Solidarity results in burden-sharing among the participants in the international community, and affirms a shared responsibility for the promotion of human rights.

A shared responsibility in terms of the universal promotion of human rights, may be abstracted, *inter alia*, from the Declaration on the Right to Development.⁵² Furthermore, the Millennium Development Goals (MDGs) in the Millennium Declaration also provide examples of burden sharing⁵³ based on a shared responsibility in relation to developmental goals.⁵⁴

This reference to the MDGs, does not imply that the Goals and the ESCR frameworks are identical.⁵⁵ It is, however, interesting to refer to the MDGs as one of the Goals is to develop a global partnership for development.⁵⁶ It is, therefore, suggested that the responsibility for achieving the Goals should be internationalised, in the sense that other states should assist developing states

⁵²General Assembly resolution 41/128 of 1986. For a discussion see Chowdhury *et al* *The right to development in international law* (1992). This document is, however, contested by developed countries and it is questionable whether it creates concrete legal obligations. Bulajic *Principles of international development law: Progressive development of the principles of international law relating to the new international economic order* (1993) at 33.

⁵³Burden sharing in the declaration is based on some measure of reciprocity. For instance, the declaration exhorts providers of assistance 'to grant more generous development assistance, especially to countries that are genuinely making an effort to apply their resources to poverty reduction'. See par III Item 15.

⁵⁴Paragraph 6 includes shared responsibility as one of the fundamental values, which means that 'responsibility for managing worldwide and economic and social development ... must be shared among the nations of the world'. This paragraph also refers to the central role that the UN should play in this regard as the most universal and representative organisation'. For a discussion of the legal status of this declaration, see Alston 'Ships passing in the night: The current state of the human rights and development debate seen through the lens of the millennium development goals' (2005) 27 *HRQ* at 771.

⁵⁵The MDGs relate most closely to the ESCRs, but the former are more limited.

⁵⁶MDG 8.

to meet the Goals, where the latter show that they are unable to do so.⁵⁷ Although Alston indicates that such an international obligation does not yet exist, he does not exclude the possibility that further developments⁵⁸ may provide a basis for the development of such a customary law obligation.⁵⁹

Shared responsibility is important in that it implies that the responsibilities of richer states are limited through the division of obligations.⁶⁰ It is accordingly important to develop the exact responsibilities of states in order to ensure that the division does not cause confusion and uncertainty as to obligations.⁶¹ International organisations, in particular the UN, have an important role to play in coordinating the residual responsibility of the international community.

2.2.4 Spawning new subjects: A departure from state-centered law?⁶²

Another interesting aspect of the common concern is that it does not apply to states, but to mankind. Mankind includes all of the members of the human species as a whole, and encompasses present and future generations, and as such invokes intergenerational and intra-generational equity.⁶³ It has been suggested that the inclusion of this notion in several international instruments implies that ‘mankind’ is an emerging subject of international law.⁶⁴ It is, however, difficult to consider future generations as (partial or full) subjects of current international law with the capacity to have international rights and/or duties.⁶⁵ This, however, does not mean that such a development is unthinkable in the future, and that the notion does not have the potential to expand the

⁵⁷See Alston n 91 above at 775.

⁵⁸The Millennium Declaration was followed by the Monterrey Consensus of the International Conference on Financing Development (Report of the International Conference on Financing for Development, Monterrey, Mexico 18–22 March 2002 A/CONF 198/11). See also the Paris Declaration on Aid Effectiveness of 2 March 2005.

⁵⁹Alston n 91 above at 777–778. It is not my intention to prove the existence of such an obligation, but rather to discuss the conceptual framework for such a development.

⁶⁰Gibney remarks that: ‘This return to universal principles should not be read to mean that all states (particularly Western states) are responsible for all things for all people’. Gibney *International human rights law returning to universal principles* (2008) at 3. See, for an analysis, Shue ‘Mediating duties’ (1988) 98 *ETHICS* at 687.

⁶¹‘Development compacts’ may provide an example of a mechanism that may be used to ensure clarity concerning the division of obligations. This proposal was made by Arjun Sengupta (independent expert on the right to development). See Sengupta ‘Development cooperation and the right to development’ available at www.harvardfxbcenter.org/resources/workingpapers/FXBC_WP12Sengupta.pdf (accessed 30 November 2011).

⁶²This dichotomy has been criticised by several eminent scholars. See Higgins n 48 above at 39. See further Schreuer ‘The waning of the sovereign state: Towards a new paradigm for international law’ (1993) 4 *EJIL* at 447.

⁶³Trindade n 52 above at 281.

⁶⁴*Ibid.*

⁶⁵See Malhotra ‘A commentary on the status of future generations as a subject of international law’ in Agius *et al* (eds) *Future generations and international law* (1998) at 39–49.

recognition of the international legal personality of international law players.⁶⁶ The concept and meaning of international legal personality has undergone various changes: the number of recognised subjects of international law has been expanded,⁶⁷ and it is not impossible to establish among the living some form of representation for mankind.⁶⁸ For example, the position of the individual in international law has seen remarkable changes with the advent of international criminal law, humanitarian law, and human rights law. The recognition of the status of certain non-state actors, such as non-governmental organisations, is a topical debate in international law.⁶⁹ It must be borne in mind that non-state actors play an important role in various aspects of international law.⁷⁰ Human rights and international environmental law are the two fields in which NGO participation is most common.

The notion of the common concern of mankind may serve as a catalyst for the further expansion of legal subjects in international law. This is feasible in that the concern of mankind may give rise to legal obligations and rights applicable not only to states, but also to non-state actors, and which fulfil an important role in the pursuit of the common interest of constituents of mankind. This, however, does not mean that states have become irrelevant: they have an important role to play in international law, and they will most probably remain the primary actors of international law. The expansion of legal personality does not alter this position, but rather envisages a complementary role for other actors.

Furthermore, the recognition of the common concern and the expansion of legal subjectivity may impact on the role of states. I am of the opinion that the common concern may initiate a process in terms of which states exercise functional rather than discretionary powers.⁷¹ Functional powers entail that

⁶⁶The ICJ has established the possibility that non state entities may also be subjects of international law. See *Reparations for injuries suffered in the service of the United Nations*, Advisory Opinion 1949 ICJ Rep 173. This decision also provides for full and partial legal personality for subjects. Only states have full legal personality.

⁶⁷For a comprehensive overview of the topic, see Portmann *Legal personality in international law* (2010).

⁶⁸See *Minors Oposa v Secretary of the Department of Environmental and Natural Resources* (1993) 33 *ILM* at 173.

⁶⁹See in general Klabbers '(I can't get no) recognition: Subjects doctrine and the emergence of non state actors' in Petman *et al* (eds) *Nordic cosmopolitanism: Essays in international law for Martti Koskenniemi* (2003) at 351-370.

⁷⁰See, for an overview, Alston *et al* (eds) *Non state actors and human rights* (2005). It is of particular interest to observe the rise of international NGOs. Martens 'Examining the (non) status of NGOs in international Law' (2003) 10 *IJGLS* at 1 and 4. See Yamin 'NGOs and international environmental law: A critical evaluation of their roles and responsibilities' (2001) 10 *Recueil Des Cours* at 149.

⁷¹See for the distinction between discretionary and functional powers Dupuy 'Humanity and the environment' (1991) 2 *CJIELP* at 201 and 203.

states are restricted in their actions by the rules enacted in the interest of mankind. This implies that states are the agents of mankind and must facilitate solutions for the greater good of mankind.

Ultimately, common concern may imply a progression towards a departure from an overly inter-state-centred international law, to a structure that accommodates the proliferation of other participants, which may promote the well-being of mankind. This view takes account of the artificial construct of state borders, and reflects the interconnected nature of all human beings in the shared biosphere.

Common concern accordingly provides a conceptual basis for the role of states as primary, but not exclusive, agents for the promotion of the well-being of mankind. It serves as a catalyst for the acknowledgement of the recognition of other participants in the international community in various positions in international law, whether as full or partial subjects, or as mere role players. The discussion above does not imply that the common concern has already sparked a development which is indicative of the transformation of an inter-state law towards an international order that serves the well-being of individuals.⁷² Common interest and the common concern, however, contribute to progressive transformation in order to ensure that it gains further ground in international law. The discussion also does not imply that sovereign equality – which serves as the constitutional premise of the international legal order – has been replaced with a new *Grundnorm*.⁷³ States are still responsible for the public order in their territories.

3 Conclusion

In this article I have attempted to address the reconciliation of the potential development of transnational human rights obligations to fulfil ESCRs with the notion of sovereignty in the context of the current era of globalisation. This discussion has drawn lessons from a discourse in international environmental law concerned with the reconciliation of the common concern of mankind and sovereignty in the context of global environmental degradation. I have

⁷²Clapham 'The role of the individual in international law' (2010) 21 *EJIL* at 25 30.

⁷³Tomuschat 'Obligations for states without or against their will' (1993) 241 *Recueil Des Cours* at 162. Some scholars may view this as evidence of the manner in which sovereignty is being 'humanised' as it should serve the interests of humanity. For a recent analysis of the humanisation of sovereignty, see Peters, 'Humanity as the A and Ω of Sovereignty' (2009) 20 *EJIL* at 513. I have made use of some of the interesting arguments raised by Peters in the following paragraphs. According to Peters the humanisation of sovereignty entails that sovereignty is a second order norm 'which is derived from and geared towards the protection of basic human rights, needs, interests, and security'. Trindade refers to the 'humanisation of International Law', which introduces the new *jus gentium*, the 'International law for mankind'. See Trindade n 52 above at 280.

indicated that the emergence of a common concern in relation to ESCRs may provide a conceptual basis for the reconciliation of sovereignty and the progressive development of transnational ESCRs. The plight of EDPs may serve as a concrete example of how the common concern may serve as a vehicle for the application of transnational ESCRs in response to forced migration as a consequence of climate change. It is for this reason that I have explained the consequences of the common concern.

The common concern of mankind in the international community may spark the further development of the legal recognition of other participants of the international community, who fulfil an important role in the promotion and implementation of ESCRs. In this regard, the common concern imports a temporal aspect. The international community includes future generations and the participants of the community need to represent these interests. Furthermore, common concern has several important consequences for statehood. It implies that the powers of states may change in time towards functional powers, which will result in states losing discretionary power when dealing with issues of common interest. This means that sovereign statehood must also adapt to the needs of the international community.

It is my view that it is unnecessary to find an alternative to sovereignty. Common concern, and accordingly the needs of the international community, are moulding sovereignty in order to respond to the challenges of globalisation. The functional powers of the state confer custodianship on states. This means that sovereignty embodies custodial elements. The state still has the primary obligation to fulfil the ESCRs of its inhabitants and may guard its citizens against the imperialist actions of other states. However, the custodial element implies that the state acts as a custodian for the international community in fulfilling the common concern. Furthermore, common concern requires equitable burden-sharing in the common goal of the fulfilment of ESCRs.

My discussion vindicates sovereignty and affirms that sovereignty entails rights and obligations for states. The impact of the current phase of globalisation may result in a change in the rights and obligations of states, which may in turn lead to a revision of sovereignty. Sovereignty may, therefore, be adapted in accordance with the needs of the international community.

Thus, the common concern may provide a basis for the development of duties to promote transnational ESCRs. The rights holders and duty bearers need to be clarified as does the content of the rights and duties. Differential treatment provisions in international environmental law may serve as examples of the division of the responsibilities for the universal promotion of ESCRs among

states. Ultimately, my discussion indicates how it is possible to develop an application of ESCRs that transcends borders in pursuit of global justice on the basis of solidarity. It is only in this way that human rights will have a true universal application, and will contribute to the affirmation of the next progressive phase in the development of international law, in that ‘we have outlived the phase in the development of international law when the law could properly be envisaged as the rules governing the mutual relations of sovereign States’ and if we are to ‘lay a firm foundation for future development’ international law must be ‘regarded as the common law of mankind in an early phase of its development’.⁷⁴

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