Striking a balance between local and global interests: communities and cultural heritage protection in public international law

Starrenburg, S.H.

2 Universality in international law*

Universality has been intrinsic to the construction of the international legal project, although its precise incarnation has shifted across time. This chapter explores how international law regulates the protection of common interests through universalist legal concepts, and questions to what extent the role granted to the state is being challenged, both from the perspective of legal doctrine and developments in positive law. The overall goal of the chapter is thus to map the contours of the debate surrounding notions of universality within general international law, in order to situate similar developments in cultural heritage law within this broader lens in subsequent chapters.

In its first section, this chapter reflects on the numerous facets of the normative construction of the concept of 'universality' in international legal doctrine. The second section subsequently examines how various international legal regimes, such as human rights, international humanitarian law, international criminal law, space law, the law of the sea and international environmental law, give shape to these concepts of universality in positive law. The final section will discuss critiques of these notions of universality and common interest and their manifestation in positive law, as well as doctrinal arguments made by scholars in favour of the 'humanisation' of international law. The latter discussion is the counterpart of an increasing emphasis in international legal instruments upon the importance of participation in international governance, a trend which will be discussed in Chapter 6. Both developments appear to challenge the predominant role given to states in the guarding of common interests.

2.1 Doctrinal approaches to universality

It is almost a truism to state that international law has evolved from a body of law centred on regulating the coexistence of sovereign states to a body of law which seeks to facilitate the cooperation of states (and, in contemporary international law, a wide range of non-state actors as well) beyond purely bilateral or reciprocal interests: a 'body of legal rules regulating universal

* Sections of the present chapter have been published in Sophie Starrenburg, 'The Genealogy of the Concept of "Universality" within Cultural Heritage Law', in Amy Strecker and Joseph Powderly (eds), *Heritage Destruction, Human Rights and International law* (Brill 2023).

human concerns, the range of which is constantly extending'.[1] Part and parcel of this trend is the emergence of 'common interests' within international law,[2] although the precise definition of what constitutes a 'common interest' differs according to the perspective of the observer.[3] The term 'universality' is employed in the present chapter to denote the process whereby international legal instruments designate certain regulatory issues as being subject to the common interest of the international community.[4] In doing so, they transform these issues from issues within the sphere of a state's sovereign interest into issues subject to (universal) inter-state cooperation in the interest of the international community.[5] Without necessarily attaching any normative implications to this process, universality can thus be viewed as a paradigm which shapes the designation and legal treatment of common interests within international law.[6]

The term 'universality' has a broad range of connotations beyond doctrinal legal scholarship, for example in connection to cosmopolitan philosophies.[7] Similarly, ideas of universality can also be connected to developments in early modern international legal thought in Europe, such as ideas of 'universal reason' in the works of natural law scholars such as Vittoria, Suarez and

1 Wolfgang Friedmann, *The Changing Structure of International Law* (Columbia University Press 1964) 367; see also Alexandre Kiss, 'The Common Heritage of Mankind: Utopia or Reality' (1985) 15 International Journal 423, 426; Georges Abi-Saab, 'Whither the International Community?' (1998) 9 EJIL 248, 251.

2 Jonathan I Charney, 'Universal International Law' (1993) 87 AJIL 529, 529. Compare the concept of 'public interest', which is frequently invoked within domestic law: Christoph Bezemek and Tomas Dumbrovsky, 'The Concept of Public Interest' in Luboš Tichyì and Michael Potacs (eds), *Public Interest in Law* (Intersentia 2021).

3 See e.g. Bruno Simma, who defines 'community interests' from the perspective of the values which they embody, as 'a consensus according to which the 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': Bruno Simma, 'From Bilateralism to Community Interest' (1994) 250 *Recueil des Cours de l'Académie de Droit International* 217, 233. Compare the position of Giorgio Gaja, who defines general interest as an interest with 'a dimension that goes beyond the individual States or entities immediately concerned by a breach … A general interest need not be a universal interest, belonging to all States and other entities. It may exist only for some States: for instance, those that are party to a particular treaty. A general interest also need not belong to the international community': Giorgio Gaja, 'The Protection of General Interests in the International Community' (2014) 364 *Recueil des Cours de l'Académie de Droit International* 13, 21-2.

4 These regulatory issues can comprise a single tangible object, but can also refer to a collective of tangible objects (such as a plant or animal species) or intangible objects (such as international peace and security, the environment, or intangible cultural heritage).

5 See Friedmann (n 1).

6 Armin von Bogdandy and Sergio Dellavalle, 'Universalism and Particularism: A Dichotomy to Read Theories on International Order' in Stefan Kadelbach, Thomas Kleinlein and David Roth-Isigkeit (eds), *System, Order, and International Law: The Early History of International Legal Thought from Machiavelli to Hegel* (Oxford University Press 2017) 482; Simma (n 3) 233.

7 Roman Kwiecień, 'Universality and Coherence under the Experiences of the League of Nations' (2015) 17 International Community Law Review 175, 180-1.

Grotius.[8] For these scholars, the universal validity of international law was derived from it being grounded in the universal human experience, founded in reason. Laws formed in the image of this experience were by association universal, regardless of their actual geographical application.[9] While these discussions are beyond the scope of the present dissertation, critiques of natural law universalism are often also similar to those levied at modern incarnations of universalism: both notions purport to be 'abstract, neutral and universally applicable', when they in fact often only represent the views of a narrow section of international society.[10]

By contrast, in contemporary international legal doctrine 'universality' is often used to describe a factual situation in relation to the structure of the international legal order, the nature of its participants, and the type of norms within this legal order. Thus, in its most basic formulation, to recall the 'universal' status of international law is to state that international law is a legal system which has the potential to be binding on all states, given that (generally) any state can accede to a treaty and all states are in principle bound by customary international law.[11] Contemporary international law distinguishes itself from earlier legal systems which purported to be universal but were in fact limited in the scope of their potential application on the basis of criteria such as 'civilisation'.[12] The potentially global application of inter-

8 C Wilfred Jenks, *The Common Law of Mankind* (Stevens and Sons Limited 1958) 66.

9 Geoff Gordon, 'Universalism' in Jean d'Aspremont and Sahib Singh (eds), *Concepts for International Law* (Elgar 2019) 866; Emmanuelle Jouannet, 'Universalism and Imperialism: The True-False Paradox of International Law?' (2007) 18 EJIL 379, 381.

10 Jouannet (n 9) 380. More generally in relation to the notion of imperialism and international law, see e.g. Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004). On the exclusionary nature of the idea of the 'international community' in the works of jurists such as Grotius, see also William E. Conklin, 'The Exclusionary Boundary of the Early Modern International Community' (2012) 81 Nordic Journal of International Law 133.

11 See e.g. Jenks (n 8) 62; Friedmann (n 1) 365; Jouannet (n 9) 385-6. This is, of course, a narrow conceptualisation of who belongs to the 'universal': states, rather than other (international) legal persons such as peoples or individual human beings. This view can be further contested, not only in light of the continued relevance of regional norms of custom and treaty law, but also the fact that the power to create new international legal norms and the ability to accede to treaties remains limited to states, which were for a long time seen to be the only actors with 'complete' international legal personality.

12 'Contemporary' is used here to refer to the international legal order which emerged upon the conclusion of the Second World War with the creation of the United Nations. A remnant of the earlier approach can still be found in article 38(1)(c) of the ICJ Statute, which includes the 'general principles of law recognized by civilized nations' as amongst the sources of law to be applied by the Court; the phrase 'civilized nations' is generally considered to be obsolete in contemporary usage. However, for accounts complicating the orthodox view of the emergence of this 'standard of civilization' in international law and the self-appropriation of this standard by non-European states, see e.g. Anghie (n 10) 52 and further; Alexander Orakhelashvili, 'The Idea of European International Law' (2006) 17 EJIL 315;

national legal rules thus implies the normative validity of these rules as opposed to rules which find their origins in imperialist or colonial systems of power, underlining the universality of the international legal order.[13] Jenks thus lauds the transformation of the international legal community 'from a family of nations based primarily on Western Christendom into a universal world community'.[14]

Simultaneously, the assertion that contemporary international law has attained universal normative validity has been contested by Third World Approaches to International Law (TWAIL) and critical legal scholars, who view universalising trends in international law as an extension of imperial power relations.[15] Similarly, others have argued that imbued in the very notion of universalist ideas such as the 'international community' and 'common interests' is the exclusion of those who do not meet or agree with these standards;[16] a new incarnation of the 'standard of civilization', for 'even a universal community knows an outside, an environment against which it defines and delineates its identity'.[17]

Scholars speaking of the 'universality' of international law also use the phrase to denote that international law is not only potentially universal in its geographical scope: in relation to certain rights and obligations, such as *jus cogens* norms, all states are in fact bound.[18] As such, the modern international order is universal not only by virtue of its participants, but also in relation to the universal application of certain legal norms. Perhaps the most radical form of universality in this respect posits that there are norms which bind humankind as a whole.[19] On the one hand, orthodox international lawyers readily accept that certain international legal norms have emerged which create rights and duties for legal actors other than states, such as individuals; international criminal law and international human rights law are cases in point. Similarly, environmental law and human rights law have evinced a tentative recognition of diffuse global communities as rights-holders, such as future

Arnulf Becker Lorca, *Mestizo International Law: A Global Intellectual History 1842-1933* (Cambridge University Press 2015).

13 Jouannet (n 9) 385.

14 Jenks (n 8) 62.

15 Jouannet (n 9) 382. See further Section 2.3 below.

16 Andreas Paulus, 'International Community' in *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2013) par 1-2.

17 Ibid par. 3.

18 Bruno Simma, 'Universality of International Law from the Perspective of a Practitioner' (2009) 20 EJIL 265, 267-8; André Nollkaemper, 'Universality' in Rüdiger Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law* (Oxford University Press 2011) paras 1-7.

19 Simma, 'Universality of International Law from the Perspective of a Practitioner' (n 18) 267-268; Antônio Augusto Cançado Trindade, *International Law for Humankind* (2nd rev. edn, Martinus Nijhoff Publishers 2013).

generations.[20] Nonetheless, the view which posits humankind as an independent legal subject has remained controversial. Wolfrum thus argues that it is more appropriate to consider states as trustees or fiduciaries for humankind, rather than stating that humankind is an international legal person as such.[21]

While it is thus generally agreed that humanity is not an independent subject of international law, universalist legal concepts such as the 'international community' or the 'common heritage of mankind' – both of which will be discussed in section 2.2 below – nonetheless embody an important 'symbolic dimension'.[22] As Dupuy argues, the 'international community', while indeed fictional, is a 'very particular kind of fiction': a legal fiction which helps to constitute, at least in part, the contemporary international legal order.[23] Similarly, Tams argues that while international law alone does not make the international community, it does '[offer] the natural language in which many debates are conducted' on the nature of this international community, and can become the 'glue' that holds it together, by 'embodying

20 Such as in the context of climate change: see e.g. 'Maastricht Principles on the Human Rights of Future Generations' (*OHCHR*, 3 February 2023) <https://www.ohchr.org/sites/default/files/documents/new-york/events/hr75-future-generations/Maastricht-Principles-on-The-Human-Rights-of-Future-Generations.pdf>. However, it is important to note that the recognition of such rights remains heavily dependent on the formulation of environmental rights in specific jurisdictions. Their international legal status thus remains heavily contested and more within the realm of *lex ferenda* than *lex lata*: see e.g. Bridget Lewis, 'The Rights of Future Generations within the Post-Paris Climate Regime' (2018) 7 Transnational Environmental Law 69; Fons Coomans, 'Towards 2122 and Beyond: Developing the Human Rights of Future Generations' (2023) 41 Netherlands Quarterly of Human Rights 53. See also the recent reticence of the Committee on the Rights of Child to categorise the position of future generations in the context of climate change as one predicated on rights, instead framing it within the context of the principle of intergenerational equity: UN Committee on the Rights of Child, General Comment No. 26 (22 August 2023) UN Doc CRC/C/GC/26, para 11.

21 Rüdiger Wolfrum, 'Common Heritage of Mankind' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2009) paras 27-8; see also Ellen Hey, 'Interdependencies, Conceptualizations of Humanity and Regulatory Regimes' in Britta van Beers, Luigi Corrias and Wouter G. Werner (eds), *Humanity Across International Law and Biolaw* (Cambridge University Press 2014) 255. On the concept of the fiduciary state, see Eyal Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' (2013) 107 AJIL 295; Evan J Criddle and Evan Fox-Decent, *Fiduciaries of Humanity: How International Law Constitutes Authority* (Oxford University Press 2016).

22 Danièle Lochak, *Le droit et les paradoxes de l'universalité* (Presses Universitaires de France 2010) 233.

23 Pierre-Marie Dupuy, 'From a Community of States Towards a Universal Community?' in Riccardo Pisillo Mazzeschi and Pasquale De Sena (eds), *Global Justice, Human Rights and the Modernization of International Law* (Springer 2018) 48, 55. Villalpando similarly argues that 'there is a social and legal reality' behind the concept: Santiago Villalpando, 'The Legal Dimension of the International Community: How Community Interests Are Protected in International Law' (2010) 21 EJIL 387, 388.

decisions reached by the members of the community and helping to stabilize them'.[24] These views share certain affinities with constructivist philosophies of international law, which view legal norms and the international legal order from which they emanate as co-constitutive.[25]

'Universality' is also used in contemporary international legal doctrine as a starting point for normative arguments about the nature of the international legal order as a 'universal' legal order.[26] It is thus at times taken to refer to the argument international law is 'an organized whole, a coherent legal system',[27] an expression of 'international public authority',[28] akin to the arguments proposed by constitutionalist thinkers.[29] In this understanding, the development of the international legal order should be guided by the contours of domestic constitutional orders or administrative law.[30]

Along similar lines, 'universality' has become theoretical shorthand for the proposal that international law represents – or should represent – the common interests of the international community, broadly construed to extend beyond the community of states to also include other actors, such as individuals.[31] Some have argued that the growth of 'common interest' norms

24 Christian J. Tams, 'International Community' in Jean d'Aspremont and Sahib Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (Elgar 2019) 511.

25 See e.g. Nicholas Onuf, 'The Constitution of International Society' (1994) 5 EJIL 1; Jutta Brunnée and Stephen J. Toope, 'International Law and Constructivism: Elements of an Interactional Theory of International Law' (2000) 39 Columbia Journal of Transnational Law 19.

26 Sergio Dellavalle, 'Beyond Particularism: Remarks on Some Recent Approaches to the Idea of a Universal Political and Legal Order' (2010) 21 EJIL 765, 767.

27 Simma, 'Universality of International Law from the Perspective of a Practitioner' (n 18) 267. See also Kwiecień (n 7) 180-1.

28 This line of thought is frequently associated with German legal scholars from the public law tradition: Andrea Bianchi, *International Law Theories: An Inquiry Into Different Ways of Thinking* (Oxford University Press 2016) 44. See e.g. Armin von Bogdandy, 'General Principles of International Public Authority: Sketching a Research Field' in Armin Von Bogdandy and others (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer 2010); Armin von Bogdandy, Matthias Goldmann and Ingo Venzke, 'From Public International to International Public Law: Translating World Public Opinion into International Public Authority' (2017) 28 EJIL 115. See also Sarah Thin, 'Community Interest and the International Public Legal Order' (2021) 68 Netherlands International Law Review 35.

29 See e.g. Erika De Wet, 'The International Constitutional Order' (2006) 55 ICLQ 51; Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford University Press 2009); Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community* (Martinus Nijhoff 2009).

30 Benedict Kingsbury, Nico Krisch and Richard B. Stewart, 'The Emergence of Global Administrative Law' (2005) 68 Law and Contemporary Problems 15; Sabino Cassese, 'Global Administrative Law: The State of the Art' (2015) 13 International Journal of Constitutional Law 465.

31 Benedict Kingsbury and Megan Donaldson, 'From Bilateralism to Publicness in International Law' in Ulrich Fastenrath (ed), *From Bilateralism to Community Interest* (Oxford University Press 2011) 79; Kwiecień (n 7) 180-1; Thomas Hoffmeister and Thomas Kleinlein, 'Inter-

within international law suggests a shift from a state-centric body of law to a body of law focused on individual human beings,[32] a trend which we shall return to later in this chapter. Proponents of this line of thought argue in favour of a relativisation of the notion of international legal subjectivity and a move away from 'the "civilist", bilateralist structure of the traditional law … [towards] a true *public* international law',[33] in which obligations do not solely operate on a reciprocal basis between states but are 'owed to an international community of States and ultimately all humankind, and enforceable by (or on behalf of) this community'.[34]

Some scholars take this line of thought one step further, employing 'universality' to denote the position that international law reflects a certain degree of normative international consensus in the form of common values,[35] although such consensus might differ widely depending on the topic at hand.[36] Comparisons are frequently made here between the notion of 'international society' and a shift towards a true 'international community' based on shared values.[37] The degree to which these shared values are indeed

national Public Order' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2019).

32 Britta van Beers, Luigi Corrias and Wouter Werner, 'Introduction: Probing the Boundaries of Humanity' in Britta van Beers, Luigi Corrias and Wouter G. Werner (eds), *Humanity across International Law and Biolaw* (Cambridge University Press 2014) 1. This trend is also often described as the 'humanisation' of international law, a term popularised by Bruno Simma, Theodor Meron and A.A. Cançado Trindade; see Vassilis P. Tzevelekos, 'Revisiting the Humanisation of International Law: Limits and Potential' (2013) 1 Erasmus Law Review 62. See also Wolfgang Benedek, 'Humanisation of International Law, Human Rights and the Common Interest' in Wolfgang Benedek and others (eds), *The Common Interest in International Law* (Intersentia 2014).

33 Simma, 'Universality of International Law from the Perspective of a Practitioner' (n 18) 267-8. On the notion of 'publicness' and an 'international public legal order', see also Thin (n 28).

34 Kingsbury and Donaldson (n 31) 80. For an early formulation of this theory, see Philip C. Jessup, *A Modern Law of Nations: An Introduction* (The Macmillan Company 1948) 2. For well-known proponents of this idea, see Simma, 'From Bilateralism to Community Interest' (n 3) 233; Andreas Paulus, 'Whether Universal Values can Prevail over Bilateralism and Reciprocity' in Antonio Cassese (ed), *Realizing Utopia* (Oxford University Press 2012) 89.

35 Wolfgang Benedek and others, 'Conclusions: The Common Interest in International Law - Perspectives for an Undervalued Concept' in Wolfgang Benedek and others (eds), *The Common Interest in International Law* (Intersentia 2014) 219. See also Friedmann (n 1) 297; Christian J Tams, 'Individual States as Guardians of Community Interests' in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011) 380. Others explicitly deny that values are part of the elaboration of community interests: Villalpando (n 23) notes, for example, that '[t]he preservation of public goods derives from a utilitarian necessity … which … could be encouraged by a common ethical sense but is not necessarily related to it' (at 393).

36 Abi-Saab (n 1) 249. See also Tams (n 35) 506.

37 Drawing upon similar distinctions made by authors such as Hedley Bull, Louis Henkin, and more broadly the work of Ferdinand Tönnies: Paulus, 'International Community' (n 16) par 3; Abi-Saab (n 1) 249.

present is connected to the ability of international law to realise the protection of common interests; thus Friedmann writes that the success of a truly co-operative international law – as opposed to a law of mere coexistence – is dependent on the diversity of values held with regards to a given issue in which cooperation is necessary. A greater diversity of viewpoints will make it more difficult to cooperate and thus frustrate the development of international law beyond its traditional *do-ut-des* structure.[38] Similarly, Jouannet argues that if international law is to progress beyond merely respecting state interests towards the promotion of a common good, this development should necessarily be accompanied by the harmonisation of values.[39]

Others instead emphasise the importance of decision-making procedures in the elaboration of common interests rather than the harmonisation of values.[40] Thus Simma argues that it is precisely the diversity of values held across the globe which makes such procedures necessary: 'heterogeneity does not exclude the universality of international law, as long as the law retains – and further develops – its capacity to accommodate an ever larger measure of such heterogeneity', in particular through judicial dispute settlement mechanisms and international organisations.[41] Similarly, Benedek *et al.* suggest that, beyond basing common interests on ideas of common values, it is also possible to simply state that 'common interests are those that are backed by a communal legal spirit', as reflected in broad support for the topic in treaties or customary law. In doing so, these authors seek to depart from a factual perspective and to thereby remove the necessity of relying upon the identification of shared values in order to elaborate on the existence of common interests in international law.[42] Even if an issue has not yet been legislated at the international level, they argue that it is also possible to identify common interests on the basis of whether a particular interest 'can only be safeguarded through common action',[43] as is the case for issues such as climate change, which cannot be resolved by individual members of the international community but are nonetheless in their interest to protect.[44]

Along similar lines, certain scholars underline the possibilities of finding common ground in a diverse world. Thus Onuma argues in favour of a 'trans-civilizational' perspective of international law, distinguishing those ideas that are held universally across the globe (a position which he describes as true

38 Friedmann (n 1) 297.
39 Jouannet (n 9) 387.
40 Paulus, 'Whether Universal Values can Prevail over Bilateralism and Reciprocity' (n 34) 91. See also work of republican scholars such as Samantha Besson and Mortimer Sellers, focusing on questions of democratic legitimacy in international law.
41 Simma, 'Universality of International Law from the Perspective of a Practitioner' (n 18) 265.
42 Benedek and others (n 35) 220.
43 Ibid 220.
44 Abi-Saab (n 1) 251; Villalpando (n 23) 393.

'universality') from those 'which, in the eyes of their believers, are held to have universal value' (described as 'universalism').[45] In his view, true normative universality of international law can thus be reached through common dialogue between different groups within international society. Similarly, Yusuf posits that '[i]t is not a paradox to say that the universality of international law depends on diversity … universalization means borrowing and adapting concepts and principles from different legal traditions'.[46] Similarly to Onuma, he argues that diversity is thus not a barrier towards achieving universality, but a necessary condition for its success.[47]

2.2 Universality across international regimes

Having explored the various understandings of the notion of 'universality' in international legal doctrine, the following section asks how the concept has been expressed within positive law. Recalling the working definition of 'universality' provided at the beginning of the previous section – as the process whereby international legal instruments designate certain regulatory issues as being subject to the common interest of the international community – the following sections will firstly explore this idea in relation to general international law and subsequently in relation to a number of international legal sub-régimes, in particular with respect to what can be termed the law of the global commons: international environmental law, the law of the sea and space law. The next two chapters shall subsequently explore these same themes in depth in relation to cultural heritage law.

2.2.1 General international law

The notion of a 'common interest' arguably gained a foothold in contemporary positive international law with the creation of the United Nations (UN): the preamble of the Charter notes 'that armed force shall not be used, save in the

45 Yasuaki Onuma, *International Law in a Transcivilizational World* (Cambridge University Press 2017) 15. Onuma provides the example of the 'universal authority' of the Chinese emperor in pre-modern Chinese dynasties.

46 Abdulqawi A Yusuf, 'Diversity of Legal Traditions and International Law' (2013) 2 Cambridge Journal of International and Comparative Law 681, 683.

47 Contrast the position of certain critical legal scholars who argue that the Eurocentric nature of international law cannot be remedied by diversifying the actors involved in its elaboration, as this is embedded in the very legal structures of international law: see Ntina Tzouvala, 'The Specter of Eurocentrism in International Legal History' (2021) 31 Yale Journal of Law & the Humanities 413.

common interest'.[48] The existence of common interests is reaffirmed in the statement of the purposes of the United Nations in article 1, which holds that the UN shall 'be a centre for harmonizing the actions of nations in the attainment of these common ends',[49] namely the maintenance of peace and security, the development of friendly relations amongst states, and cooperation amongst states in solving international problems. The common interests identified in the UN Charter have since become increasingly diversified – in part through the broadening of the scope of action of the UN, and in part through the mushrooming of international agreements and organisations tasked with the protection of an ever-growing range of goals which have been identified as being in some way 'common', either to the community of states or humankind.

The 'international community' is also a recurring actor in the resolutions of UN bodies such as the General Assembly and the Security Council, having been invoked by different groupings of states for different reasons throughout the history of the organisation, as has been extensively charted in the work of Dupuy and Paulus on the history of these bodies.[50] The 1960s and 1970s saw the championing of the concept in particular by the newly independent states in documents such as the Tehran Declaration on Human Rights in 1968[51] and the Declaration on the Establishment of a New International Economic Order in 1974.[52] From the 1990s onwards, the concept shifted in politics, for example being invoked by the Security Council in the context of its resolutions on international peace and security.[53] The end of the Cold War saw the celebration of the 'timeless and universal' nature of the principles

48 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) XV UNCIO 335 (UN Charter). Kiss argues that we can look back even further in order to see the first inklings of community interest norms in public international law, for example in the development of treaties guaranteeing freedom of navigation of international watercourses and the abolishment of the slave trade: Kiss (n 1) 426.

49 Isabel Feichtner, 'Community Interest' in *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2007) para 15; Abi-Saab (n 1) 258-9.

50 Dupuy (n 23) 48-53; Andreas Paulus, *Die internationale Gemeinschaft im Völkerrecht: eine Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung* (C.H. Beck 2001).

51 The Declaration recognised 'that peace is the universal aspiration of mankind and that peace and justice are indispensable to the full realization of human rights and fundamental freedoms', calling upon members of the international community to fulfil their human rights obligations and recognising the Universal Declaration of Human Rights as stating 'a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family': Final Act of the International Conference on Human Rights (22 April-13 May 1968) UN Doc A/CONF.32/41, Proclamation of Tehran.

52 The General Assembly proclaimed 'the establishment of a new international economic order based on equity, sovereign equality, interdependence, common interest and cooperation among all States': Declaration on the Establishment of a New International Economic Order, UNGA Res 3201 (S-VI) (1 May 1974) UN Doc A/RES/3201 (S-VI).

53 Dupuy (n 23) 48-53; see UNSC Res 688 (5 April 1991) UN Doc S/RES/688 (Gulf War); UNSC Res 929 (22 June 1994) UN Doc S/RES/929 (Rwanda); UNSC Res 940 (31 July 1994) UN Doc S/RES/940 (Haiti); UNSC Res 1368 (12 September 2001) UN Doc S/RES/1368 (9/11).

embodied in the Charter,[54] as well as a call for inter-civilizational dialogue and a new emphasis on the 'common humanity' which united the members of the United Nations.[55] These statements were once again affirmed at the 60th session of the General Assembly in the World Summit Outcome, which further asserted the importance of 'common fundamental values' to the maintenance of international relations.[56]

As noted above, the normative action of the organs of the United Nations in pursuit of the common interests of the international community has been supported by the emergence of a wide range of treaty-based norms which do not concern 'the immediate interest of a state or states, but a more remote concern: a benefit for all humankind which can be obtained only by international co-operation and the acceptance of obligations by all governments, even if they receive no immediate return',[57] such as human rights and environmental protection. In many situations, an appeal to universality – or, more commonly, 'the interests of humanity' – is relied upon in order to justify international legislation on the subject, as we shall see in the sections below.[58] In doing so, these instruments transformed issues which had until then been considered only of interest from the perspective of morality (and hence within the realm of domestic jurisdiction or the *domaine réservé*) into issues of positive international law.[59]

It is against the background of this substantive expansion of international legal regulation in the twentieth century that several scholars have sought to create typologies of treaty obligations in order to capture the changing character of the international legal order.[60] Both McNair and Fitzmaurice proposed a typology of essentially three categories of treaties (with an additional, fourth, category being reserved for 'constitutive' treaties which establish international organisations).[61] The first category concerns the *traités-contrats*, 'treaties, bi-

54 United Nations Millennium Declaration, UNGA Res 55/2 (18 September 2000) UN Doc A/RES/55/2.

55 Global Agenda for Dialogue among Civilizations, UNGA Res 56/6 (21 November 2001) UN Doc A/RES/56/6, preamble.

56 2005 World Summit Outcome, UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1, para 4.

57 Kiss (n 1) 427.

58 Feichtner (n 49) para 5.

59 Hey (n 21) 244.

60 Although such attempts have also equally drawn critique: Oppenheim's *International Law* is pessimistic about the endeavour, noting that 'attempts at classification of the different kinds of treaties are of limited usefulness'. See Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law: Peace*, vol 1 (9th edn, Oxford University Press 2008) 1203.

61 McNair furthermore proposed an additional category, that of 'treaties having the character of conveyances … whereby one state creates in favour of another, or transfer to another, or recognizes another's ownership of, real rights, rights *in rem*', such as treaties of cession: Arnold D. McNair, 'The Functions and Differing Legal Character of Treaties' (1930) 11 British Yearbook of International Law 100, 101-2. Both of these categories – constitutive treaties and treaties having the character of conveyances, are beyond the scope of the present work.

lateral or multilateral, that are based on a reciprocal exchange of rights or benefits'.[62] This category of treaties is likened to domestic contracts, and involves the exchange of benefits between parties with opposed interests.[63] These treaties create bilateral relations between the contracting parties, regardless of the status of the treaty itself as bilateral or multilateral; the latter 'can be considered as a bundle of interwoven bilateral relationships dominated by the principle of reciprocity'.[64] Fulfilment of these obligations by the state is juridically dependent upon the actions of the state operating at the other end of the bargain.[65] Examples of this category include border agreements or the law of trade.[66]

The second category is that of 'interdependent' treaties, 'whose character make the performance of one party dependent on that of all the other parties'.[67] This intermediate category consists of treaty regimes reliant on 'global reciprocity', which establish obligations, 'the scrupulous performance of which by all states bound by them constitutes a condition *sine qua non* for the functioning of the system they set up'.[68] Such treaties are often established to attain a common interest of the international community, such as nuclear disarmament; however, what distinguishes these types of agreements from other agreements undertaken in the collective interest is their synallagmatic nature.[69]

62 Catherine Brölmann, 'Law-Making Treaties: Form and Function in International Law' (2005) 74 Nordic Journal of International Law 383, 387-8. See also Lea Brilmayer, 'From 'Contract' to 'Pledge': The Structure of International Human Rights Agreements' (2007) 77 British Yearbook of International Law 163, 164-5.

63 McNair (n 61) 105, quoting Lauterpacht, *Private Law Sources and Analogies of International Law* (1927) para 70. However, others have pointed out that the domestic law of contracts remains fundamentally different from the law of treaties: see e.g. Akbar Rasulov, 'Theorizing Treaties: The Consequences of the Contractual Analogy' in Christian J Tams, Antonios Tzanakopoulos and Andreas Zimmermann (eds), *Research Handbook on the Law of Treaties* (Elgar 2014).

64 Linos-Alexander Sicilianos, 'The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility' (2002) 13 EJIL 1127, 1132.

65 Brilmayer (n 62) 164-5.

66 Although there are some caveats in characterising trade law in this manner: some would argue, for example, that trade law and the development of the Bretton Woods system should also be seen as a common interest regime: see e.g. Christian Tietje and Andrej Lang, 'Community Interests in World Trade Law' in Eyal Benvenisti and Georg Nolte (eds), *Community Interests Across International Law* (Oxford University Press 2018) This demonstrates the limitations of relying upon the categorisation of treaty norms in order to assess the changing nature of contemporary international law: many common interest regimes thus continue to rely upon the reciprocal exchange of rights and obligations amongst the parties to a given treaty.

67 Brölmann (n 62) 387-8.

68 Sicilianos (n 64) 1134.

69 Ibid 1135.

The third category is that of *traités-lois* or law-making treaties.[70] For these treaties, 'the juridical force of the obligation is inherent, and not dependent on a corresponding performance by the other parties to the treaty . . . so that the obligation is of a self-existent character, requiring an absolute and integral obligation and performance under all conditions'.[71] This category is likened to legislation, in which performance by one party of the obligations flowing from the treaty does not necessarily lead to a direct benefit for the other parties beyond the realisation of 'a collective interest that transcends the individual interests of the contracting parties',[72] such as the protection of the environment or the realisation of human rights. In short, these treaties are considered to be non-synallagmatic;[73] they are not reducible to a so-called 'bundle'[74] of bilateral rights and obligations between the contracting parties. One can return here to the example of human rights treaties, of which it is commonly held that they do not protect the interests of states, but the rights of individuals under their jurisdiction.[75] It is for this reason that the growth of such 'non-bilaterisable' obligations is frequently associated with the emergence of common interests in international lawmaking.[76]

However, the statement that reciprocity no longer plays a role in relation to common interests is not uncontroversial. Klabbers, for example, reaffirms Lauterpacht's argument that the notion of consent stands at the heart of a treaty, regardless of its content. While the normative content of a so-called 'legislative' treaty might thus differ radically from traditional contractual treaties, both remain founded on the principle of consent.[77] Similarly, Simma and Paulus suggest that while the types of interests international law seeks to address have indeed changed over time, the legal nature of these norms

70 McNair (n 61); Brölmann (n 62) 387-8.

71 'Second Report on the Law of Treaties by Sir Gerald Fitzmaurice' (1957) UN Doc A/CN.4/107, as cited in Brölmann 387-8.

72 Joost Pauwelyn, 'A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?' (2003) 14 EJIL 907, 907.

73 Catherine Brölmann, 'Typologies and the "Essential Juridical Character" of Treaties' in Dino Kritsiotis and Michael J. Bowman (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge University Press 2018) 94.

74 Pauwelyn (n 72) 908.

75 Brilmayer (n 62) 164-5.

76 Thin (n 28) 52. See also Cottier, who argues that 'the essential element of reciprocity in terms of interests and benefits is lacking' with respect to common interest regimes; 'benefits are not directly mutual; obligations incurred are essentially one-sided': Thomas Cottier, 'The Principle of Common Concern of Humankind' in Thomas Cottier (ed), *The Prospects of Common Concern of Humankind in International Law* (Cambridge University Press 2021) 8.

77 Brölmann, 'Law-Making Treaties: Form and Function in International Law' (n 62) 398; Jan Klabbers, 'The Community Interest in the Law of Treaties: Ambivalent Conceptions' in *From Bilateralism to Community Interest* (Oxford University Press 2011) 772.

remain at their heart reciprocal.[78] This continued reliance on reciprocity remains crucial in light of the lack of centralised enforcement within international law; in this understanding, reciprocity is not a source of weakness of traditional international legal norms, but 'the principal leitmotiv, a constructive, mitigating, and stabilizing force'.[79] Given that it is not possible to fully delve into the role of reciprocity within contemporary international law,[80] in subsequent chapters the characterisation of an obligation as (non-)reciprocal is merely used to refer to the question whether the obligations contained in such a treaty amount to a mutual exchange of rights and obligations between the contracting states.

As such, many authors consider that the acknowledgement of common interests through the elaboration of legal norms for their protection arguably did not change the structure of international law as such: it remained (and some argue, still remains) centred around state sovereignty and state consent as a central organising factor.[81] That being said, some developments can be pinpointed within positive law which take the first steps towards a transformation from a wholly state-centric international community to one which takes into account certain common interests. This shift is thus often marked by the emergence of positive over negative obligations, which do not establish obligations of result but rather of means, often within an institutional framework which recognises the common but differentiated responsibilities of individual states; examples of such frameworks shall be discussed in the following sections.

A further example at the level of general international law of the emergence of considerations of universality in positive international law is the recognition of *jus cogens* norms and obligations *erga omnes*.[82] The development of these concepts by the International Court of Justice (ICJ) evinces a growing recogni-

78 Simma, 'From Bilateralism to Community Interest' (n 3); Bruno Simma, 'Reciprocity' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2008) para 6; Andreas Paulus, 'Reciprocity Revisited' in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011).

79 Simma, 'Reciprocity' (n 78) paras 1-2. See also Paulus, 'Reciprocity Revisited' (n 78) 115, 123-4, 126, 128.

80 See Arianna Whelan, *Reciprocity in Public International Law* (Cambridge University Press 2023).

81 Abi-Saab emphasises, for example, that the distinction between the laws of coexistence and cooperation are not based on the *ratione materiae* of the legal norms at stake but rather on the nature of the laws adopted. In other words, the distinction is thus 'not a division according to the objects of regulation, but according to the way in which regulation is approached': Abi-Saab (n 1) 250.

82 Ignacio De La Rasilla Del Moral, 'Nihil Novum Sub Sole Since the South West Africa Cases? On Ius Standi, the ICJ and Community Interests' (2008) 10 International Community Law Review 171, 191; Sandesh Sivakumaran, 'Impact on the Structure of International Obligations' in Menno T. Kamminga and Martin Scheinin (eds), *The Impact of Human Rights Law on General International Law* (Oxford University Press 2009).

tion of the existence of common interests within international law.[83] Thus the Court famously stated in *Barcelona Traction* that 'an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State'.[84] Already several decades earlier, it had hinted at similar consequences in its advisory opinion on *Reservations to the Genocide Convention*, where it famously noted that the convention possessed a number of 'special characteristics': in light of its subject-matter, 'the contracting States do not have any interests of their own; they merely have, one and all, a common interest', the result being that 'one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties'.[85] As such, the capacity of states to both make and object to reservations to the convention was altered in light of this object and purpose.[86] Since its dictum in *Barcelona Traction*, the Court has affirmed the existence of *erga omnes* obligation in relation to a number of norms,[87] such as the principle of self-deter-

83 Nollkaemper (n 18) paras 28-29. See e.g. *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* (Preliminary Objections) [1970] ICJ Rep 3; *East Timor (Portugal v. Australia)* [1995] ICJ Rep 90; *Armed Activities on the Territory of the Congo (New Application 2002) (Democratic Republic of the Congo v. Rwanda)* (Jurisdiction and Admissibility) [2006] ICJ Rep 6.

84 *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* (Preliminary Objections) [1970] ICJ Rep 3, para 33.

85 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15, at 23.

86 Alvarez, in his dissenting opinion, added the following on the nature of the 'new' type of treaty represented by the Genocide Convention: for one, 'they have a universal character; they are in, a sense, the *Constitution* of international society; the *new international constitutional law*. They are not established for the benefit of private interests but for that of the general interest; they impose obligations upon States without granting them rights, and in this respect are unlike ordinary multilateral conventions which confer rights as well as obligations upon their parties': *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Dissenting Opinion of M. Alvarez) [1951] ICJ Rep 15, at 40.

87 Marco Longobardo, 'The Standing of Indirectly Injured States in the Litigation of Community Interests before the ICJ: Lessons Learned and Future Implications in Light of The Gambia v. Myanmar and Beyond' (2021) 24 International Community Law Review 476, 484.

mination,[88] genocide,[89] torture,[90] and certain rules of international humanitarian law.[91]

Similarly, the 2001 Articles on the Responsibility of States for Internationally Wrongful Acts firmly established the possibility of non-injured states responding to breaches of common interest norms by invoking the responsibility of the state for an internationally wrongful act, if '[t]he obligation breached is owed to the international community as a whole'.[92] Recent developments at the International Court of Justice and elsewhere have further solidified the possibility of states seeking to enforce *erga omnes partes* norms even if they are not directly affected by the breach of the obligation in question, either through judicial proceedings or countermeasures of general interest (although the Court has yet to explicitly recognise the standing of non-injured states for non-treaty-based *erga omnes* obligations, as opposed to obligations *erga omnes partes*).[93] States are now also permitted to bring judicial claims on behalf of common interests before a wide range of other bodies besides the International Court of Justice, for example through inter-state procedures before regional and international human rights bodies.[94]

88 *Case Concerning East Timor (Portugal v. Australia)* (Judgment of 30 June 1995) [1995] ICJ Rep 90, para 29 (although the Court did decline to exercise its jurisdiction over the impugned violation of the right to self-determination of East Timor); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 155; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95, para 180.

89 *Armed Activities on the Territory of the Congo (New Application 2002) (Democratic Republic of the Congo v. Rwanda)* (Jurisdiction and Admissibility) [2006] ICJ Rep 6, para 64; *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)* (Judgment of 11 July 1996) [1996] ICJ Rep 595, para 31; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Judgment of 3 February 2015) [2015] ICJ Rep 3, para 89; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)* (Judgment on Preliminary Objections) [2022] para 107.

90 *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (Judgment of 20 July 2012) [2012] ICJ Rep 422, paras 68-9.

91 *Wall* Advisory Opinion (n 88) para 155.

92 UNGA Res 56/83 (28 January 2002) UN Doc A/RES/56/83, Annex, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, art 48(1)(b).

93 See e.g. *Questions Relating to the Obligation to Prosecute or Extradite* (n 90) (in relation to obligations *erga omnes partes*); *Chagos* Advisory Opinion (n 88) para 180; *Application of the Convention on the Prevention and Punishment of Genocide (The Gambia v. Myanmar)* (Application Instituting Proceedings and Request for Provisional Measures) General List No. 178 [2019]; *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and the Netherlands v. Syrian Arab Republic)* (Joint Application Instituting Proceedings) [2023]. See also Longobardo (n 87) 497; Denis Alland, 'Countermeasures of General Interest' (2002) 13 EJIL 1221, 1222.

94 However, many of these procedures have only rarely (or never) been used as states prefer to use diplomatic means to resolve such disputes: Tams (n 35) 384, 387-8.

As such, even though common interests no longer wholly fall within the realm of domestic jurisdiction,[95] individual states continue to play an important role in the monitoring and enforcement of these norms. This lends credence to theories which view state sovereignty as a form of trusteeship: given that the international community cannot necessarily act independently of the individual states of which it is comprised, the state 'is required to act as the custodian of the common interest, while the international community has the right to monitor the relevant state's exercise of responsible sovereignty and has the duty to assist'.[96] As we shall see in later chapters, this also constitutes the main method through which common interests are expressed within cultural heritage law regimes.

2.2.2 Answering to the international community: international human rights law

In the case of human rights, appeals to the common interest of the international community are most often made by recourse to ideals of the inherent dignity of human beings,[97] such as can be found in the preambles of instruments such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant of Economic, Social and Cultural Rights.[98] In this sense, international human rights instruments are often put forward as evidence of a trend moving away from bilateralism to common interests in international law, and the broadening of earlier approaches towards protecting common interests which focused on regulatory issues which are by their nature cross-border rather than wholly located within the territory of the state (such as watercourses or transboundary environmental pollution). While the concept of human rights – in particular its use in fora such as the UN Security Council – acknowledges the negative cross-border effects of human rights violations (such as global insecurity),[99]

95 Benedek and others (n 35) 225.

96 Ibid 224.

97 Although as de Feyter points out, human rights treaties are often not framed in the language of 'common interest': Koen de Feyter, 'The Common Interest in International Law: Implications for Human Rights' in Wouter Vandenhole (ed), *Challenging Territoriality in Human Rights Law: Building Blocks for a Plural and Diverse Duty-Bearer Regime* (Routledge 2015) 162-3.

98 van Beers, Corrias and Werner (n 32) 7-8. See also the work of Cançado Trindade, who argues that the notion of humanity and respect for human dignity permeates contemporary international law and works as a limiting force over the power of the state: Antônio Augusto Cançado Trindade, 'Some Reflections on the Principle of Humanity in its Wide Dimension' in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Elgar 2013); Trindade, *International Law for Humankind* (n 19).

99 E.g. UNSC Res 1296 (19 April 2000) UN Doc S/RES/1296; UNSC Res 1674 (28 April 2006) UN Doc S/RES/1674. For an overview of relevant practice, see Vera Gowland-Debbas, 'The Security Council as Enforcer of Human Rights' in Bardo Fassbender (ed), *Securing*

within human rights regimes proper the core focus is on the moral value of individual human beings (and sometimes, collectives) and their inherent dignity.

In the context of human rights law the term 'universality' also possesses a very specific connotation which differs from those surveyed in section 2.1, namely as part of the central proposition that international human rights are universal, indivisible, interdependent and interrelated.[100] To assert the universality of human rights in this context thus denotes the argument that human rights are the same for all human beings, without distinction, and that these rights are indeed universally possessed by all by virtue of one's humanity;[101] 'it signifies the rejection of the notion of "non-persons" or inferior human beings'[102] which is at the heart of many human rights violations.

This argument has several facets, similarly to the understandings of universality in general international law explored above: it can thus refer to the currently existing legal reality, in which these rights have been accepted by the majority of states through the vehicle of international human rights treaties. However, it can also imply the argument that these legally recognised human rights also carry universal *moral* validity.[103] It is the latter assertion which has been fiercely contested in practice and scholarship, in particular by those who argue that the phrase 'universal human rights' is meaningless, and human rights can only ever develop in culturally-bounded contexts, determined by national origin, religious beliefs, or cultural traditions.[104] Critics of the concept of universal human rights seek to point out the Eurocentric nature of their origin; their respondents have in turn sought to emphasise the global and cross-

Human Rights? Achievements and Challenges of the UN Security Council (Oxford University Press 2011).

100 World Conference on Human Rights, Vienna Declaration and Programme of Action (12 July 1993) UN Doc A/CONF.157/23, para 5. See also UN General Assembly, Report of the Special Rapporteur in the Field of Cultural Rights: Universality, Cultural Diversity and Cultural Rights (25 July 2018) UN Doc A/73/227.

101 Abdullahi A. An-Na'im and Louis Henkin, 'Islam and Human Rights: Beyond the Universality Debate' (2000) 94 Proceedings of the American Society of International Law 95, 95-6.

102 Eva Brems, *Human Rights: Universality and Diversity* (Martinus Nijhoff 2001) 4. See also Jack Donnelly, 'The Relative Universality of Human Rights' (2007) 29 HRQ 281.

103 Brems (n 102) 5-9. See also Louis Henkin, 'The Universality of the Concept of Human Rights' (1989) 506 Annals of the American Academy of Political and Social Science 10; Donnelly (n 102).

104 Nick Goetschalckx, 'The Mythic Universality of the Universal Declaration on Human Rights: Revisiting the Drafting History of the UDHR in Search of a Foundational Theory' in Jan Wouters and others (eds), *Can We Still Afford Human Rights? Critical Reflections on Universality, Proliferation and Costs* (Elgar 2020) 27-8. See also Michael Ignatieff, 'The Attack on Human Rights' in Robert McCorquodale (ed), *Human Rights* (Routledge 2003). For a canonical formulation of this view, see e.g. American Anthropological Association, 'Statement on Human Rights' (1947) 49 American Anthropologist 539.

confessional origins of the modern international human rights movement.[105] However, these arguments are however beyond the scope of the present work.

As noted above, human rights have undergone a far-reaching process of institutionalisation in which the state is required to answer to the international community – represented either by an assembly of its fellow states or members of expert bodies – for purported human rights violations within its jurisdiction. These legal developments pay tribute to the idea that the protection of human rights is too important to be left to the state alone, thereby transcending the interests of state sovereignty. Thus 2006 saw the establishment of the Human Rights Council under the auspices of the UN Charter; the Council is 'responsible for promoting universal respect for the protection of all human rights',[106] *inter alia* through the carrying out of a Universal Periodic Review of all human rights obligations and commitments of the Member States of the UN.[107]

The political approach adopted within the Council is supplemented by the work of the numerous Special Procedures established by the Council, as well as the UN human rights treaty bodies and several regional human rights courts. These judicial bodies moreover have jurisdiction to hear complaints brought by individuals with regards to potential human rights violations by states (albeit on the condition of state consent and generally also the requirement of the exhaustion of domestic remedies).[108] In doing so, they circumvent

105 Goetschalckx (n 104) 27-8; Brems (n 102) 8. Cf. Mark Goodale, 'The Myth of Universality: The UNESCO "Philosophers' Committee" and the Making of Human Rights' (2018) 43 Law & Social Inquiry 596; Mark Goodale, *Letters to the Contrary: A Curated History of the UNESCO Human Rights Survey* (Stanford University Press 2018).

106 UNGA Res 60/251 (3 April 2006) UN Doc A/RES/60/251, para 2.

107 ibid, para 5(e). See e.g. Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (Cambridge University Press 2015).

108 See e.g. Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR Optional Protocol) art 1; Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008, entered into force 5 May 2013) UN Doc A/63/435 (ICESCR Optional Protocol) art 1; International Covenant on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195 (ICERD) art 14; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (adopted 6 October 1999, entered into force 22 December 2000) 2131 UNTS 83 (CEDAW Optional Protocol) art 1; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT) art 22; Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 (ECHR) art 34; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (IACHR) art 44, 62; Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted 10 June 1993, entered into force 24 January 2004) OAU Doc OAU/LEG/EXP/AFCHPR/PROT (III), art 5(3), 34(6); African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 (African Charter) art 55, 56.

the necessity of relying upon states to enforce common interest norms, for example through diplomatic protection, countermeasures of general interest, or the bringing of a claim before inter-state dispute settlement bodies such as the International Court of Justice as a non-injured state.[109] These human rights institutions represent one of the few venues within which individuals have standing to represent their claims before an international judicial body, thereby (theoretically) relativising the central position of the sovereign state within the international legal order.

The nature of human rights obligations has also spurred on a number of normative developments within international law more broadly; these developments posit that the central importance of human rights should change the scope and operation of a number of orthodox international legal norms. Thus the emergence of concepts such as humanitarian intervention and the Responsibility to Protect (R2P) are premised on the importance of protecting human rights, if necessary at the expense of the principle of non-intervention and state sovereignty.[110] In certain circumstances it has also been argued that human rights obligations should assume a higher position in the hierarchy of norms: in situations of conflict between human rights and other legal norms, such as the law of state immunity, it is thus argued that human rights should take precedence.[111] In the realm of secondary norms, it has also been widely argued that the rules of treaty law should operate differently in the realm of human rights, in particular with respect to the rules concerning reservations and treaty interpretation.[112] While it is not possible to reflect on the political

109 However, see Longobardo (n 87) for a discussion of the revitalisation of the use of these bilateralist fora to enforce community interests. The recent cases of *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*; *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and the Netherlands v. Syrian Arab Republic)*; and *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)* are examples in point: the former two cases concern a case brought by a third-party state, whereas the latter saw numerous interventions from third-party states.

110 Although the precise scope of the violations which would permit intervention pursuant to the R2P doctrine remains contested; the 2005 World Summit Outcome Document thus limits the scope of the principle to 'genocide, war crimes, ethnic cleansing and crimes against humanity': 2005 World Summit Outcome, UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1, para 138. By contrast, the UNSG's 2005 report does include human rights within the scope of R2P: UN General Assembly, In Larger Freedom: Towards Development, Security and Human Rights for All, Report of the Secretary General (21 March 2005) UN Doc A/59/2005, paras 132, 135. See also Emma McClean, 'The Responsibility to Protect: The Role of International Human Rights Law' (2008) 13 Journal of Conflict and Security Law 123.

111 An argument which was notably rejected in *Jurisdictional Immunities of the State (Germany v. Italy, Greece intervening)* (Judgment of 3 February 2012) [2012] ICJ Rep 99, para 91.

112 On reservations, see HRC, General Comment No. 24 (4 November 1994) UN Doc CCPR/C/21/Rev.1/Add.6; *Loizidou v. Turkey*, App. No. 15318/89 (1995) para 70. See Liesbeth Lijnzaad, *Reservations to UN-Human Rights Treaties: Ratify and Ruin* (Martinus Nijhoff 1995); R. Baratta, 'Should Invalid Reservations to Human Rights Treaties be Disregarded?' (2000) 11 EJIL

and legal intricacies of these developments within the scope of the present work, they can be seen as the normative counterpart of the institutional trends outlined above.

2.2.3 Considerations of humanity: international humanitarian law and international criminal law

Along the same vein as international human rights law, international humanitarian law and international criminal law seek to establish the shared interest of the international community in preventing and punishing certain acts which are considered universally reprehensible (although the philosophical accounts as to *why* this is the case vary widely). Thus humanitarian law is structured around the core idea that states must take note of certain considerations of humanity during wartime, thereby minimising unnecessary suffering.[113] While some degree of disagreement remains with regards to the central position of this principle of humanity – the continued usage of the 'laws of armed conflict' as opposed to 'international humanitarian law' by certain key actors being illustrative of these underlying tensions[114] – provisions stipulating the contours of the principle of humanity are generally considered to constitute rules of customary international law in light of their fundamental nature.[115] Certain authors also argue that international humanitarian law,

413; Ineta Ziemele and Lâsma Liede, 'Reservations to Human Rights Treaties: From Draft Guideline 3.1.12 to Guideline 3.1.5.6' (2013) 24 EJIL 1135. More broadly on the impact of human rights law on the operation of secondary norms of international law, see Menno T. Kamminga and Martin Scheinin, *The Impact of Human Rights Law on General International Law* (Oxford University Press 2009).

113 As embodied, for example, in the Martens Clause: see Tamás Hoffmann, 'An Eternal Promise? – Three Sketches on the Universality of International Humanitarian Law' in Enikõ Dácz, Cristina Griessler and Kovács Henriett (eds), *Traum von Frieden – Utopie oder Realität?* (Nomos Verlag 2015) 239-40.

114 Ibid 237-8. This point is closely tied to ongoing debate as to the relationship between international humanitarian law and human rights law: see e.g. Anthony E. Cassimatis, 'International Humanitarian Law, International Human Rights Law, and Fragmentation of International Law' (2008) 56 ICLQ 623; Noëlle Quénivet, 'Introduction: The History of the Relationship Between International Humanitarian Law and Human Rights Law' in Roberta Arnold and Noëlle Quénivet (eds), *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Brill 2008); Terry D. Gill, 'Some Thoughts on the Relationship Between International Humanitarian Law and International Human Rights Law: A Plea for Mutual Respect and a Common-Sense Approach' [2013] Yearbook of International Humanitarian Law 251.

115 E.g. arts 4, 15 of Hague Convention (IV) Respecting the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 277; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entry into force 21 October 1950) 75 UNTS 287 (Geneva Convention IV) Common Article 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entry

with its relatively early development of concepts such as individual criminal responsibility for grave breaches of humanitarian law and establishment of a range of individual procedural and substantive rights can be seen as an early marker of a shift from a purely bilateral international legal system to a field of law shaped by the interests of the international community.[116]

Similar considerations played a role in the emergence of international criminal courts and tribunals and the new categories of crimes which these institutions were created to adjudicate, such as genocide and crimes against humanity.[117] However, in contrast to humanitarian law, international criminal law squarely focuses on the individual – as potential victim and perpetrator – as a subject of international law. In the process, the state generally takes a backseat, underlining the fact that the emergence of international criminal law is not due to any purported cross-border effects of the crimes which it purports to adjudicate, but should instead be seen as a codification of the interests of the international community.[118]

---

into force 7 December 1978) 1125 UNTS 609 (Additional Protocol II) preamble. The 'elementary principles of humanity' also figure in the jurisprudence of the ICJ: see e.g. *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)* (Judgment of 9 April 1949) [1949] ICJ Rep 4, at 22; *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)* (Judgment of 27 June 1986) [1986] ICJ Rep 15, paras 79, 218; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para 79. See e.g. Kjetil Mujezinovic Larsen, Camilla G Guldahl Cooper and Gro Nystuen (eds), *Searching for a Principle of Humanity in International Humanitarian Law* (Cambridge University Press 2013); Rene Urueña, 'Deciding What Is Humane: Towards a Critical Reading of Humanity as a Normative Standard in International Law' in Britta van Beers, Luigi Corrias and Wouter G. Werner (eds), *Humanity Across International Law and Biolaw* (Cambridge University Press 2014) 179; Heike Krieger, 'Rights and Obligations of Third Parties in Armed Conflicts' in Eyal Benvenisti and Georg Nolte (eds), *Community Interests Across International Law* (Oxford University Press 2018) 449-50.

116 Janina Dill, '"The Rights and Obligations of Parties to International Armed Conflicts": From Bilateralism but Not Toward Community Interest?' in Eyal Benvenisti and Georg Nolte (eds), *Community Interests Across International Law* (Oxford University Press 2018) 433, 439-40.

117 See Christopher MacLeod, 'Towards a Philosophical Account of Crimes Against Humanity' (2010) 21 EJIL 281; Luigi Corrias, 'The Inhuman Stain: Representing Humanity in International Criminal Law' in Britta van Beers, Luigi Corrias and Wouter G. Werner (eds), *Humanity Across International Law and Biolaw* (Cambridge University Press 2014).

118 The caveat to this statement is that it mainly applies in relation to the 'core' international crimes tried by the International Criminal Court, and not necessarily to broader categories of international crime which have been established by treaty (such as drug trafficking) or which can also be tried in domestic courts (such as piracy). See e.g. Christine Schwöbel-Patel, 'The Core Crimes of International Criminal Law' in Kevin Jon Heller and others (eds), *The Oxford Handbook of International Criminal Law* (Oxford University Press 2018) on the utility of the distinction between international criminal law and transnational criminal law. A further exception is of course also the recent addition to the subject-matter jurisdiction of the ICC, namely the crime of aggression: article 8bis(2) of the Rome Statute defines an 'act of aggression' as 'the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations': Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute).

Thus the Genocide Convention explicitly stipulates in its preamble that 'genocide has inflicted great losses on humanity', and that 'in order to liberate mankind from such an odious scourge, international co-operation is required'.[119] In its Advisory Opinion on *Reservations to the Genocide Convention*, the International Court of Justice furthermore explicitly stipulated that '[i]n such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest'.[120] Similarly, the preamble to the ILC's 2019 Draft Articles on Prevention and Punishment of Crimes Against Humanity recalls that 'throughout history millions of children, women and men have been victims of crimes that deeply shock the conscience of humanity', and that crimes against humanity are 'among the most serious crimes of concern to the international community as a whole'.[121] In its commentary to the Draft Articles, the Commission noted that when acts '[shocking] the conscience of humanity … because of their gravity, constitute egregious attacks on humankind itself, they are referred to as crimes against humanity.'[122]

More broadly, the rapidly proliferating international criminal courts and tribunals seek to '[represent] humanity as a whole' and to execute justice in its name.[123] Corrias and Gordon further argue that while these institutions claim to represent an already existing humanity with clearly fixed moral aims, they in fact 'call [this global public] into being' through their judgments, and thereby possess an important constitutive function.[124] Similarly, as Addis argues in relation to universal jurisdiction, international criminal law can be

119 Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entry into force 12 January 1951) 78 UNTS 277 (Genocide Convention) preamble, paras 2, 3.

120 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 23.

121 International Law Commission, 'Draft Articles on Prevention and Punishment of Crimes Against Humanity, with commentaries' (2019) UN Doc A/74/10. The Draft Articles were submitted to the UN General Assembly in 2019; the Sixth Committee subsequently decided in November 2022 to take the matter of a convention on crimes against humanity under consideration in 2023: UN General Assembly, Crimes Against Humanity (14 November 2022) UN Doc A/C.6/77/L.4.

122 Draft Articles on Prevention and Punishment of Crimes Against Humanity (n 121) 24.

123 L. D. A. Corrias and G. M. Gordon, 'Judging in the Name of Humanity: International Criminal Tribunals and the Representation of a Global Public' (2015) 13 Journal of International Criminal Justice 97, 98. See also Kai Ambos, 'Punishment without a Sovereign? The Ius Puniendi Issue of International Criminal Law: A First Contribution towards a Consistent Theory of International Criminal Law' (2013) 33 Oxford Journal of Legal Studies 293, 314; Nesam McMillan, *Imagining the International: Crime, Justice, and the Promise of Community* (Stanford University Press 2020).

124 Corrias and Gordon (n 123) 98.

seen as a 'process through which the identity of the international community is imagined and enacted'.[125]

In doing so, international criminal law represents a different approach to the notion of the 'universal' than is evident in other areas of international law, such as the law of the commons as discussed below. As the structure of international criminal law is explicitly focused on the *individual* and is indebted to domestic criminal law, the notion of universality is not reflected in the structure of international crimes per se (which is more the case for provisions managing, say, the deep seabed or outer space) but rather the justification for the existence of an international criminal judicial apparatus which, unlike domestic criminal law, is far from self-explanatory.[126] These justifications can range from the impact of the crime on humanity,[127] its gravity,[128] or its impact on international peace and security.[129]

Each of these strands can be seen in the statutes of the respective international courts and tribunals. Thus the preamble of the Rome Statute of the International Criminal Court (ICC) recalls how certain atrocities 'deeply shock the conscience of humanity', and that these crimes moreover 'threaten the peace, security and well-being of the world'. As a result, the goals of the Court are to prevent the impunity of those responsible for 'the most serious crimes of concern to the international community'.[130] Similarly, in the UN Security Council resolutions which called for the establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), the Security Council determined that the situation in Yugoslavia and Rwanda respectively '[constituted] a threat to international peace and security', thereby requiring the creation of an international criminal tribunal.[131] As we shall see in the following chapter, this logic is equally evident in the ways that international courts and tribunals

125 Adeno Addis, 'Imagining the International Community: The Constitutive Dimension of Universal Jurisdiction' (2009) 31 HRQ 129, 129.

126 See Ryan Liss, 'Crimes Against the Sovereign Order: Rethinking International Criminal Justice' (2019) 113 AJIL 727; Julia Geneuss and Florian Jeßberger (eds), *Why Punish Perpetrators of Mass Atrocities?* (Cambridge University Press 2020); Margaret M. deGuzman, *Shocking the Conscience of Humanity* (Oxford University Press 2020); Frédéric Mégret, 'The International Criminal Court: Between International *Ius Puniendi* and State Delegation' (2020) 23 Max Planck Yearbook of United Nations Law 161.

127 See Ruti Teitel, *Humanity's Law* (Oxford University Press 2011); Rustam Atadjanov, *Humanness as a Protected Legal Interest of Crimes Against Humanity: Conceptual and Normative Aspects* (Springer 2019); Liss (n 126) 740-3.

128 deGuzman (n 126).

129 For an overview, see Liss (n 126) 739; deGuzman (n 126) 64.

130 1998 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute) art 5.

131 UNSC Res 808 (22 February 1993) UN Doc S/RES/808; see also UNSC Res 827 (25 May 1993) UN Doc S/RES/827; UNSC Res 955 (8 November 1994) UN Doc S/RES/955.

approach issues of cultural heritage in their judgments concerning the destruction of cultural heritage, such as in the former Yugoslavia and Mali.

2.2.4 The law of the global commons: the law of the sea, space law, international environmental law

Early incarnations of the law of the global commons – in particular international environmental law – focused on minimising cross-boundary damage, embodied within the no-harm principle.[132] However, the initial concern with minimising such cross-boundary damage eventually morphed into a recognition of the need to protect the environment regardless of state boundaries on the basis of a range of justifications, ranging from the anthropocentric to the intrinsic. This resulted in the growth of international regulation of phenomena which are either wholly internal to state borders, or conversely located in areas beyond national jurisdiction; both areas historically fell outside the scope of international environmental regulation in light of the principle of state sovereignty.[133] The following sections will focus on two of the most notable doctrinal developments of universality in the law of the global commons: the common heritage of humankind and the principle of common concern. Both concepts have been widely deployed across a range of legal regimes, such as the law of the sea, space law, and international environmental law.

2.2.4.1 Common heritage of humankind

Some of the most far-reaching conceptualisations of universality within public international law can be found within the fields of environmental law and the law of the sea. Whereas, as noted above, in the case of human rights or humanitarian law universality is generally invoked to justify international regulation, in international environmental law and the law of the sea recourse to universality has concrete consequences for the form of protection employed, particularly in relation to the principle of the common heritage of humankind (CHH).

---

132 *Trail Smelter (United States, Canada)* (1938, 1941) 3 RIAA 1905, 1965: the Arbitral Tribunal famously held that, 'under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.' For more recent jurisprudence, see e.g. *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Judgment of 20 April 2010) [2010] ICJ Rep 14, para 101.

133 For an overview of these developments, see Nico Schrijver, 'Managing the Global Commons: Common Good or Common Sink?' (2016) 37 Third World Quarterly 1252.

The concept was most famously introduced in 1967 by Maltese ambassador Arvid Pardo in relation to the deep seabed and was rapidly (albeit controversially) endorsed by the General Assembly in 1970 in its Declaration of Principles Governing the Seabed.[134] The notion had emerged implicitly within the Antarctic Treaty System some ten years earlier; it was also the subject of discussions within the context of the law of the sea in 1958, where it failed to receive support.[135] It was subsequently codified (albeit with a great deal of resistance from a number of developed states) in the UN Convention on the Law of the Sea (UNCLOS) in 1982.[136] In parallel developments, it was also applied in relation to the moon and outer space,[137] and more indirectly to Antarctica.[138] It is generally argued that the principle of the common heritage of humankind can only be applied in areas beyond national jurisdiction,[139] although similar invocations of the interests of 'mankind' can be found in

134 Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, UNGA Res 2749 (XXV) (17 December 1970) UN Doc A/RES/2749 (XXV). Although the concept was circulating in various venues at the time (including in relation to the then-developing law of outer space by Armando Cocca), Pardo's declaration is generally viewed as the moment when the principle entered common discourse. On the development of the principle, see M.C.W. Pinto, 'The Common Heritage of Mankind: Then and Now' (2013) 361 *Recueil des Cours de l'Académie de Droit International* 13.

135 Antarctic Treaty (adopted 1 December 1959, entered into force 23 June 1961) 402 UNTS 71 (Antarctic Treaty) arts 1-4. On the Antarctic Treaty System, see Kiss (n 1) 428-9; cf. Jutta Brunnée, 'Common Areas, Common Heritage, and Common Concern' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2012) 563-4. On the law of the sea, see Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge University Press 1997) 216.

136 UN Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS) art 136. See Michael Bowman, 'Environmental Protection and the Concept of Common Concern of Mankind' in Malgosia Fitzmaurice, David M Ong and Panos Merkouris (eds), *Research Handbook on International Environmental Law* (Edward Elgar 2010).

137 Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, UNGA Res 1962 (XVIII) (13 December 1963) UN Doc A/RES/18/1962, para 1; Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (adopted 27 January 1967, entered into force 10 October 1967) 610 UNTS 205 (Outer Space Treaty) art 1; Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (adopted 5 December 1979, entered into force 11 July 1984) 1363 UNTS 3, art 11(1) (Moon Treaty). See also Ernst Fasan, 'The Meaning of the Term Mankind in Space Legal Language' (1974) 2 Journal of Space Law 125; Kiss (n 1) 431; Duncan French, 'Common Concern, Common Heritage and Other Global(-ising) Concepts: Rhetorical Devices, Legal Principles or a Fundamental Challenge?' in Michael Bowman, Peter Davies and Edward Goodwin (eds), *Research Handbook on Biodiversity and Law* (Elgar 2016) 342.

138 Antarctic Treaty, preamble.

139 Rüdiger Wolfrum, 'The Principle of the Common Heritage of Mankind' (1983) 43 ZaöRV 312, 313.

treaty regimes relating to resources within the national jurisdiction of states.[140]

While the CHH principle does not necessarily establish humankind as a legal subject, its emergence within international law does indicate that the interests of 'humankind' are not wholly subsumed within the interests of the international community of states: to the contrary, the principle is intended to reflect the aspirations and interests of humankind, broadly conceived as present and future generations of humankind, and thus transcend national self-interest.[141] However, 'humankind' cannot – in the current incarnation of international law – act independently of states and international organisations.[142]

There are a number of core elements of the concept of the common heritage of humankind. The first of these is the reservation of the protected area for peaceful use, a principle which can be found in relation to both the deep seabed as well as outer space.[143] Coupled with the requirement of exclusively peaceful use, the principle also entails the preservation of the protected area for future generations.[144]

Invocation of the common heritage of humankind also implies the necessity of international cooperation and common management of the protected resource.[145] Such common management can involve the regulation of the utilisation of the resource by a managing body, as is the case for the International Seabed Authority in relation to the deep seabed and was intended

140 Cottier *et al.* note: 'waterfowl are regarded as "an international resource"; the natural and cultural heritage are "part of the world heritage of mankind as a whole"; the conservation of wild animals is "for the good of mankind"; the resources of the seabed, ocean floor and sub-soil are "the common heritage of humankind"; and plant genetic resources are "a heritage of mankind"': Thomas Cottier and others, 'The Principle of Common Concern and Climate Change' (2014) 52 Archiv des Völkerrechts 293, 298-9.

141 Wolfrum, 'The Principle of the Common Heritage of Mankind' (n 138) 318; see also Christopher C. Joyner, 'Legal Implications of the Concept of the Common Heritage of Mankind' (1986) 35 ICLQ 190, 195; René Jean Dupuy and Daniel Vignes, *Handbook on the New Law of the Sea*, vol 1 (Martinus Nijhoff 1991) 579-81. Compare Fasan (n 137), who wrote optimistically in 1974 that 'mankind is just undergoing the painful process of becoming a new legal subject of international law' (at 131). Although this idea has not come to fruition in the years since, it does indicate the sense of potentiality which surrounded discussions about the common heritage of humankind in this era (the 1970s and 1980s).

142 Wolfrum, 'The Principle of the Common Heritage of Mankind' (n 138) 318-9.

143 See e.g. art 141 UNCLOS, art 3(1) Moon Agreement. Wolfrum, 'Common Heritage of Mankind' (n 21) para 26; Joyner (n 141) 191-2; Kiss (n 1) 440. Compare Nico Schrijver (n 135) who writes that arguably 'the deep sea-bed has not been completely demilitarized nor reserved for peaceful purposes only' (at 220).

144 Wolfrum, 'Common Heritage of Mankind' (n 20) para 26. As Schrijver (n 135) notes, '[w]hile the Moon Agreement explicitly refers to the interests of future generations, the Law of the Sea Convention does not, nor does it define "mankind". Nevertheless, it would seem to be in line with the spirit of the Convention to include not only present but also future generations as beneficiaries' (at 220).

145 Wolfrum, 'Common Heritage of Mankind' (n 21) para 26; Joyner (n 141) 191-2.

to be the case for the resources of the moon.[146] The tasks of such an international administrating body can involve the distribution of rights to exploit the resources of the area or resource.[147]

A further element of the common heritage of humankind principle is that of non-appropriation of the area or resources in question.[148] As Alexandre Kiss succinctly describes, 'common space areas would be regarded legally as regions owned by no one, though hypothetically managed by everyone. Sovereignty would be absent, as would all its legal attributes and ramifications.'[149] No entity can thus exercise ownership over an area which has been designated as the common heritage of humankind.[150]

A corollary of the principle of non-appropriation – and a particularly controversial element of the common heritage of humankind – is the sharing of benefits amongst all states:[151] such benefits can range from the sharing of scientific knowledge of the resource to sharing income derived from its exploitation (for example in relation to the mining of the deep seabed or the exploitation of the resources of outer space).[152] It was this element of the common heritage of humankind principle which was strongly advocated for by proponents of the New International Economic Order (NIEO) during the drafting of UNCLOS; these states viewed benefit sharing 'as a tool to redress the disparities between developing and developed states'.[153] However, the benefit-sharing principles which were established in UNCLOS underwent significant change with the adoption of the Agreement relating to the Implementation of Part XI in 1994,[154] which paved the way for the widespread adoption of UNCLOS by developed states. The changes made to the UNCLOS regime as

146 Wolfrum, 'Common Heritage of Mankind' (n 21) para 26. In relation to the moon, see art 11(5) Moon Agreement; see also art 137(1)-(2) UNCLOS.

147 Joyner (n 141) 191-2.

148 UNCLOS art 137. See also Schrijver (n 135) 218-9.

149 Joyner (n 141) 191-2.

150 Ibid 194.

151 Wolfrum, 'Common Heritage of Mankind' (n 21) para 26; Joyner (n 141) 191-2; Schrijver (n 135) 220.

152 Joyner (n 141) 191-2.

153 Stéphanie Kpenou, 'Fresh Water as Common Heritage and a Common Concern of Mankind' in Mara Tignino and Christian Bréthaut (eds), *Research Handbook on Freshwater Law and International Relations* (Elgar 2018) 7. However, as Ranganathan points out, developing states were initially not uniformly enthusiastic about applying the idea of the common heritage of mankind to the deep seabed: Surabhi Ranganathan, 'The Common Heritage of Mankind' in Jochen von Bernstorff and Philipp Dann (eds), *The Battle for International Law* (Oxford University Press 2019) 40.

154 Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (adopted 28 July 1994, entered into force 28 July 1996) 1836 UNTS 3 (Implementation Agreement).

a result of the Implementing Agreement attracted fierce critique from developing countries.[155]

Debates surrounding the principles of non-appropriation and benefit sharing illustrate that the ideological landscape of the common heritage of humankind remains highly changeable,[156] in particular between developed and developing states; the latter emphasise the importance of ownership truly being vested in humankind as a whole, with economic benefits of any exploitation also being distributed equitably.[157] A certain degree of uncertainty also remains with regards to the precise scope of the principle: while a number of core elements can be identified, others remain controversial.[158] That being said, the principle has nonetheless become firmly established and has indeed since then also been subject to evolutionary interpretations of its scope which emphasise its place within common interest norms within international law.[159]

Ultimately, the concept of the common heritage of humankind was (and remains) 'radical', as it sought 'to move the law from a competitive system that reflected the national interests of powerful states to one that requires global cooperation for the benefit of all humanity'.[160] There have been several attempts since 1982 to apply the concept to a wide range of issues, such as biodiversity, the protection of plant genetic resources, the prevention of climate change, the atmosphere, the protection of marine living resources in areas beyond national jurisdiction, and even cultural heritage, but none has been

155 R.P. Anand, 'Common Heritage of Mankind: Mutiliation of an Ideal' in R.P. Anand (ed), *Studies in International Law and History: An Asian Perspective* (Springer 2004) 196. See also Karin Mickelson, 'Co-opting Common Heritage: Reflections on the Need for South-North Scholarship' in Obijiofor Aginam and Obiora Okafor (eds), *Humanizing Our Global Order: Essays in Honour of Ivan Head* (University of Toronto Press 2003) 115; Edwin Egede, *Africa and the Deep Seabed Regime: Politics and International Law of the Common Heritage of Mankind* (Springer 2011) 65-6, who notes that the concept of communal ownership was not alien to African states participating in the drafting of UNCLOS.

156 Kiss (n 1) 438. See also Ikechi Mgbeoji, 'Beyond Rhetoric: State Sovereignty, Common Concern, and the Inapplicability of the Common Heritage Concept to Plant Genetic Resources' (2004) 16 LJIL 821, 826.

157 Joyner (n 141) 193. See also Schrijver (n 135), who notes that 'it could be said that most industrialized nations have preferred to establish an agency which would simply register claims of potential miners, allocate mining sites to them, and collect royalties and taxes', in contrast to the preferred regime of developing states (at 219).

158 Joyner (n 141) 191-2.

159 Karin Mickelson, 'Common Heritage of Mankind as a Limit to Exploitation of the Global Commons' (2019) 30 EJIL 635, 662; see in particular *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Request for Advisory Opinion Submitted to the Seabed Disputes Chamber)* (Advisory Opinion, 1 February 2011) ITLOS Reports 2011, 10.

160 Prue Taylor, 'The Concept of the Common Heritage of Mankind' in Douglas Fisher (ed), *Research Handbook on Fundamental Concepts of Environmental Law* (Elgar 2016) 306.

successful to date.[161] Several commentators have thus noted that the concept 'has gone out of fashion', partly due to its politicisation in the sphere of UNCLOS debates and the championing of the principle by the NIEO.[162] Nonetheless, it has remained a point of reference for discussion in the law of the sea, in particular with the re-emergence of debates surrounding the exploitation of the Area in the 2000s and 2010s,[163] and the adoption of a legally binding agreement under UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.[164]

2.2.4.2 Common concern

Because of the stalling of the growth of the common heritage principle, since the 1990s treaties have increasingly had recourse to the principle of common concern.[165] While both the CHH principle and common concern seek to

161 Ibid 306, 311-312, 325; Dire Tladi, 'The Common Heritage of Mankind and the Proposed Treaty on Biodiversity in Areas beyond National Jurisdiction: The Choice between Pragmatism and Sustainability' (2016) 25 Yearbook of International Environmental Law 113, 113-14; Mickelson, 'Common Heritage of Mankind as a Limit to Exploitation of the Global Commons' 637. However, the principle has also been included in the African Charter, article 22(1) of which provides that '[a]ll peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.' However, the right seems to be 'primarily rhetorical, as Ouguergouz notes: Fatsah Ouguergouz, *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (Martinus Nijhoff 2003) 332.

162 The 'New International Economic Order'. See Taylor (n 160) 323; Tladi (n 161) 113-14; Kiss (n 1) 437; French (n 137) 341; Brunnée (n 135) 563-4; Nico Schrijver, 'De teloorgang van het Gemeenschappelijk Erfgoed der Mensheid' (1999) 48 Ars Aequi 405. However, compare French, who draws attention to the advisory opinion of the ITLOS Seabed Disputes Chamber on *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*; he argues that the Chamber 're-envisions' the CHH principle (at 355-6).

163 See e.g. Ranganathan (n 153).

164 UN General Assembly, Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (19 June 2023) UN Doc A/CONF.232/2023/4 (BBNJ Agreement) art 7(b). See Tladi (n 161); Elizabeth M. De Santo and others, 'Stuck in the Middle with You (and Not Much Time Left): The Third Intergovernmental Conference on Biodiversity Beyond National Jurisdiction' (2020) 117 Marine Policy 1; A. B. M. Vadrot, A. Langlet and I. Tessnow-von Wysocki, 'Who Owns Marine Biodiversity? Contesting the World Order Through the 'Common Heritage of Humankind' Principle' (2022) 31 Environmental Politics 226.

165 See e.g. UNGA Res 43/53 (27 January 1988) UN Doc A/RES/43/53. However, as Cottier *et al.* note, the roots of the principle can be traced back '[a]s early as 1949, [when] tuna and other fish were considered to be "of common concern" to the parties to certain treaties by reason of their continued use by those parties': Cottier and others (n 140) 298. On the nature of common concern as a principle of environmental law, see Friedrich Soltau, 'Common Concern of Humankind' in Kevin R Gray, Richard Tarasofsky and Cinnamon Carlarne (eds), *The Oxford Handbook of International Climate Change Law* (Oxford University Press 2016) 204.

address the interests of the international community in areas or in relation to resources which transcend national interest,[166] common concern has had greater success in being incorporated into international environmental law, although its use is not necessarily any less controversial in practice than the common heritage principle.[167]

Unlike the common heritage of humankind, the notion of common concern is not limited to areas beyond national jurisdiction, and can equally apply within and beyond areas of national sovereignty – precisely those areas which the CHH principle has failed to find application, such as in treaties concerning biodiversity and climate change.[168] Examples of such common concern regimes are the UN Framework Convention on Climate Change (UNFCCC) and the Paris Agreement,[169] the Convention on Biological Diversity,[170] the International Treaty on Plant Genetic Resources for Food and Agriculture,[171] and the 2003 Intangible Cultural Heritage Convention.[172] Authors have argued for a range of additions to the common concern principle, such as forests,[173] freshwater resources,[174] plant biodiversity,[175] atmospheric degradation,[176] and even the responsibility to protect.[177]

166 Bharat H. Desai and Balraj K. Sidhu, 'Climate Change as a Common Concern of Humankind: Some Reflections on the International Law-Making Process' in Jordi Jaria-Manzano and Susana Borrás (eds), *Research Handbook on Global Climate Constitutionalism* (Elgar 2019) 155-6.

167 French (n 137) 342.

168 Brunnée (n 135) 564-5; see also Dinah Shelton, 'Common Concern of Humanity' (2009) 39 Environmental Policy and Law 83, 83.

169 United Nations Framework Convention on Climate Change (adopted 9 May 1992, entry into force 21 March 1994) 1771 UNTS 107 (UNFCCC); Paris Agreement (adopted 12 December 2015, entry into force 4 November 2016) 3156 UNTS 79 (Paris Agreement). On the notion of common concern in the climate change regime, see *inter alia* Jutta Brunnée, 'The Global Climate Regime: Wither Common Concern?' in Rüdiger Wolfrum and Holger Hestermeyer (eds), *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum* (Brill Nijhoff 2012).

170 Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79 (CBD).

171 International Treaty on Plant Genetic Resources for Food and Agriculture (adopted 3 November 2001, entered into force 29 June 2004) 2400 UNTS 303.

172 Convention for the Safeguarding of the Intangible Cultural Heritage (adopted 17 October 2003, entered into force 20 April 2006) 2368 UNTS 3.

173 Maša Kovic Dine, 'Consequences of the Recognition of Forest Protection as a Common Concern of Humankind for the Anthropocene' in Michelle Lim (ed), *Charting Environmental Law Futures in the Anthropocene* (Springer 2019).

174 See Edith Brown Weiss, 'The Coming Water Crisis: A Common Concern of Humankind' (2012) 1 Transnational Environmental Law 153; Kpenou (n 153).

175 Aline Jaeckel, 'Intellectual Property Rights and the Conservation of Plant Biodiversity as a Common Concern of Humankind' (2013) 2 Transnational Environmental Law 167.

176 Nadia Sánchez Castillo-Winckels, 'Why "Common Concern of Humankind" Should Return to the Work of the International Law Commission on the Atmosphere' (2017) 29 Georgetown Environmental Law Review 131.

The principle of common concern is generally used in situations where 'all states derive common benefits from protective action';[178] it 'stands for the proposition of a shared problem and shared responsibility, and for an issue which reaches beyond the bounds of a single community and state'.[179] The threat in question is often 'marked by [its] gravity and potential irreversibility of impacts',[180] and tends to relate either to harm to humanity (as in the case of intangible cultural heritage) or harm to the global environment (as in the case of climate change).[181] As Shelton notes, '[h]arm to a matter of common concern is often widespread and diffuse in origin, making it difficult if not impossible to rely on traditional bilateral norms of state responsibility to enforce international norms'.[182] It is generally argued that it is necessary to employ the common concern principle because 'the very structure of the international legal order is found to be wanting' in relation to the problem at stake.[183] Many issues of common concern are thus also linked to obligations *erga omnes*; in light of the importance of managing the threat posed by the common concern, such obligations in turn allow non-injured states to act in order to protect the common interest.[184]

One of the most important normative consequences of the identification of an issue as common concern is international cooperation,[185] often in the form of an institution established to manage the threat, rather than the establishment of a regime to share benefits as is the case for the CHH principle.[186] As Brunnée notes, while such institutions remain chiefly political creatures, 'they operate within a legal framework … placing constraint at some level upon impermissible action',[187] as well as facilitating the establishment of non-compliance procedures which foreground the necessity of judicial dispute settlement procedures, reflecting that the interest of states is to facilitate compli-

177 Krista Nakavukaren Schefer and Thomas Cottier, 'Responsibility to Protect (R2P) and the Emerging Principle of Common Concern' in Peter Hilpold (ed), *Responsibility to Protect: a New Paradigm of International Law?* (2014).

178 Brunnée, 'Common Areas, Common Heritage, and Common Concern' (n 135) 564-565. Although, as Shelton notes, '[t]he phrase "common concern of humanity" is rich in implications. As an international law term, it is notable, first for what it does not include, which is a reference to states': Shelton (n 168) 83.

179 Cottier and others (n 140) 301. Importantly, as Shelton notes: 'It is neither biological diversity nor the climate in isolation that are common concerns. It is rather the conservation of biological resources, and climate change and adverse effects therefrom, that are a common concern'. See Shelton (n 168) 85.

180 Soltau (n 165) 207-8.

181 Castillo-Winckels (n 176) 147.

182 Shelton (n 168) 83.

183 French (n 137) 335.

184 Ibid 350; Shelton (n 168) 86.

185 Brunnée, 'Common Areas, Common Heritage, and Common Concern' (n 135) 565-7; French (n 137) 350; Castillo-Winckels (n 174) 147.

186 Soltau (n 165) 206.

187 Brunnée, 'The Global Climate Regime: Wither Common Concern?' (n 169) 730-1.

ance – and thus the prevention of the manifestation of the threat posed by the common concern – rather than punishing non-compliance. These organs ultimately operate within the bounds of state sovereignty, but are structured in such a way 'as to maximize opportunities for collective action'.[188] Furthermore, while the participants in these cooperative mechanisms are normally limited to states, participation in the management of the common concern will ideally also involve non-state actors at all levels.[189] This broad degree of participation reflects that the common concern is indeed 'common' in the broadest sense of the term, extending beyond the interests of states to humanity as a whole (although numerous scholars draw into doubt whether such broad participation is actually achieved meaningfully in practice).[190]

Unlike the principle of common heritage, the use of the common concern principle generally does not imply specific obligations for states,[191] rather operating in such a manner that 'it signals that states' freedom of action may be subject to limits even where other states' sovereign rights are not affected'.[192] As Cottier *et al*. argue, the principle 'implies an agreement to recognise the very existence of a shared problem. Such recognition does not yet entail per se an obligation to act upon the problem'.[193] Instead of undermining state sovereignty, the principle thus legitimises 'international interest in the conservation and use of the resource'.[194] That being said, some authors argue that it is possible to attach certain substantive implications to the identification of an issue as common concern, such as the precautionary principle, the no harm principle, the principle of sustainable development, the principle of common but differentiated responsibilities, and the principle of intergenerational equity.[195]

In recent years the principle of common concern has failed to continue to secure the support of states following initial enthusiasm in the 1990s in light of the fact that its substance remains unsettled.[196] However, as some authors note, in some ways it is exactly this normative indeterminacy which constitutes its strength. As French notes, 'common concern was chosen precisely to avoid

188 Ibid 728.

189 Werner Scholtz, 'Greening Permanent Sovereignty through the Common Concern in the Climate Change Regime: Awake Custodial Sovereignty!' in Oliver C. Ruppel, Christian Roschmann and Katharina Ruppel-Schlichting (eds), *Climate Change: International Law and Global Governance*, vol 2 (Nomos 2013) 206.

190 Shelton (n 168) 86; see also Kovic Dine (n 173) 101.

191 French (n 137) 354; Brunnée, 'The Global Climate Regime: Wither Common Concern?' (n 169) 723; Alexandre Kiss, 'The Common Concern of Mankind' (1997) 27 Environmental Policy and Law 244, 246.

192 Brunnée, 'Common Areas, Common Heritage, and Common Concern' (n 135) 565-7; see also Cottier and others (n 140) 302.

193 Cottier and others (n 140) 301.

194 Ibid 307-308; see also Schefer and Cottier (n 177) 129; Shelton (n 168) 85.

195 Castillo-Winckels (n 176) 144; Kovic Dine (n 173) 101.

196 Castillo-Winckels (n 176) 132-133.

raising the spectre of (direct) international interference … it generates global interest, and thus removes the conceit of an exclusive domestic domain'.[197] As such, seeing the principle in a negative light – a weaker alternative to the common heritage of humankind – would be to miss the mark, as 'its potential to raise challenges to the established legal order is highly significant'.[198] By facilitating the interest of the international community in issues that would under normal circumstances be considered to fall within the sovereignty of the territorial state, the common concern principle thereby establishes limits on the exercise of this sovereignty – and perhaps even redefining the nature of sovereignty itself in such a manner that the state is considered as a trustee of the issue which constitutes a common concern.[199]

2.3 The state as the sole arbiter of common interests?

2.3.1 The regulation of the protection of common interests in international law

The starting point of this chapter was the concept of universality, defined as the process whereby international legal instruments designate certain regulatory issues as being subject to the common interest of the international community. The chapter set out to answer how international law regulates the protection of these common interests, viewed through the twin lenses of legal doctrine and positive law.

As can be seen in the previous section, notions of common interest have influenced the development of international law over the course of the twentieth and twenty-first centuries. An ever-growing number of international treaties draw upon the language of universality, invoking concepts such as the 'international community'; 'common', 'community' or 'universal interest'; 'common concern'; or the 'common heritage of humankind'. In certain situations, the identification of a given regulatory issue as being subject to the common interest of the international community has concrete consequences both at the level of primary and secondary norms. With regards to the latter, norms protecting the common interest are frequently identified as *jus cogens* norms or obligations *erga omnes* and are sometimes subject to differential regimes with respect to the invocation of state responsibility or the application of the rules concerning reservations or treaty interpretation.

197 French (n 137) 343-4.

198 Ibid 356.

199 Ben Boer, 'Land Degradation as a Common Concern of Humankind' in Federico Lenzerini and Ana Filipa Vrdoljak (eds), *International Law for Common Goods: Normative Perspectives on Human Rights, Culture and Nature* (Hart 2005); Jaeckel (n 175) 187; Kiss, 'The Common Concern of Mankind' (n 189); Cottier and others (n 140) 304.

It is particularly with reference to the law of the global commons that identification of a given issue as a common interest leads to consequences at the level of the primary norms adopted, with the concepts of the common heritage of mankind and common concern being prime examples. In the case of the principle of common concern the main consequence is that the need for international cooperation is explicitly identified as one of the core parameters which should define the further development of the law; by contrast, in the case of regimes drawing upon the principle of the common heritage of humankind there are also a range of limitations imposed upon the use of the resource or area. The resource or area is thus reserved for peaceful use and cannot be appropriated by individual states; moreover, it is not only subject to international cooperation but also frequently common management and benefit-sharing mechanisms.

In certain situations, the identification of a common interest also has institutional consequences, such as the creation of an international court or tribunal, the possibility of individual complaints mechanisms, the creation of a management body which is wholly independent from states, or – most frequently – the joint management of the issue through an assembly of States Parties which is transparent to the public at large and which provides methods of participation for certain types of non-state actors, such as NGOs. The idea behind the creation of these institutions is the view that the common interest in question is either too important to be left to the supervision of the state alone, or is of such a nature that its management inherently crosses borders and thereby requires an international approach.

2.3.2 A tension between the form and function of common interest regimes

However, these developments have been accompanied by their own tensions, most prominently the mismatch between the central organising principles of the international legal order – which remain chiefly bilateralist in nature – and the goals articulated by many of these new common interest regimes.[200] As such, the expansion of international legal norms focused on the protection of common interests has been matched by the emergence of numerous doctrinal accounts developed by scholars grappling with the notion of universality. At their core, these arguments are concerned with the tensions implied by the shift of international law from 'coexistence to cooperation' and the idea that the tools with which international law is equipped remain wanting in order to achieve these goals, in light of the 'incomplete' nature of the international

200 As Schrijver, 'Managing the Global Commons: Common Good or Common Sink?' (n 133) notes in relation to regimes established for the protection of common goods, these regimes frequently suffer from a 'lack of effective supervisory mechanisms' and the 'absence of a coherent and compulsory peaceful dispute-settlement system': 1261.

legal system and the continued operation of state sovereignty and state consent as guiding principles within that system.

More broadly, this has been described as a 'tension between [the] form and function' of treaties concluded in the pursuit of global, rather than bilateralist interests.[201] Whereas treaties are often dependent on mechanisms of reciprocity to ensure performance of their obligations – such as the suspension of obligations or the taking of countermeasures – these mechanisms are less successful in ensuring compliance with community norms. A similar tension emerges with respect to the bilateralist nature of many international dispute settlement mechanisms.[202] While some developments have occurred which counter this trend (such as the emergence of new institutions or *jus cogens* and *erga omnes* outlined above), these developments often remain piecemeal. The following quote by Antonio Cassese is particularly evocative in this regard:

> The great promises heralded in the 1960s and 1970s – the upholding of forward-looking notions such as obligations *erga omnes*, "obligations owed to the international community as a whole", *jus cogens*, the aggravated responsibility of states, the common heritage of mankind, the right to development – have remained unfulfilled … It is as if states, after much discussion and interminable polemics on its placement and configuration, had built a magnificent skyscraper, provided it with an entrance, floors, stairs, lifts, fully furnished rooms, and even vases full of freshly cut flowers, and then left the building empty, for nobody dares to enter and live there.[203]

This tension also emerges with respect to the examples of universality discussed in the second section. While notions of common interest have influenced the development of international law over the course of the twentieth and twenty-first centuries, questions remain about the extent to which international law has developed in such a way as to truly change the central role of state sovereignty within public international law in the guaranteeing of common interests.[204] Quite to the contrary, the majority of these developments function

---

201 Brölmann, 'Law-Making Treaties: Form and Function in International Law' 386 (n 62); Brölmann, 'Typologies and the "Essential Juridical Character" of Treaties' (n 73) 386. See also Thin (n 28) 54-5.

202 André Nollkaemper, 'International Adjudication of Global Public Goods: The Intersection of Substance and Procedure' (2012) 23 EJIL 769, 771.

203 Antonio Cassese, 'Soliloquy' in Paola Gaeta and Salvatore Zappalà (eds), *The Human Dimension of International Law: Selected Papers of Antonio Cassese* (Oxford University Press 2008) lxvii-iii.

204 Benedek and others (n 35) 221; Villalpando (n 23) 401-10. See also McCreath, who notes (with respect to the protection of the marine environment within national jurisdiction) that the identification of a given issue as a community interest '[does] not necessarily give rise to binding legal obligations for States' and 'does not change the character of the primary obligation by which the [State] was already bound': Millicent McCreath, 'Community

within the realm of state sovereignty; perhaps redefining its scope – expanding the reach of international interest into issues previously considered to fall wholly within the realm of domestic jurisdiction, or reconfiguring the state as a trustee exercising its sovereignty on behalf of present and future generations of humankind – but never fully undermining its existence.[205] Certain conceptions of the common interest within international law are thus in fact centrally derived from the interests of the international community, *as represented by individual state governments*, in which states are perceived as the custodians of the common interest.[206] That this should be the case is perhaps only logical, in light of the fact that these principles have been developed by states themselves and a viable alternative to their central role in international governance has yet to be developed.[207]

However, there are nonetheless still valid reasons to question the current system and the dominant role of states therein – particularly when held against the light of the universalist goals which states themselves have formulated through the vehicle of international law. As Graf notes, there is reason to be wary of universalist language in international law as a 'normative corrective to the state', precisely 'because arguments for the enforcement of mankind's universal law can easily entail arguments for the solidification of the sovereign state',[208] rather than the protection of other actors who are intended to be the ultimately beneficiary of common interest norms.[209] In a manner that is comparable to the functioning of the concept of 'public interest' in domestic law,[210] the invocation of common interests in public international law often functions as a trump card over other interests.[211] The main difference in the case of international law, however, is that there is no corresponding institutional apparatus to challenge 'false' invocations of the common interest (as would be the case in many domestic political systems, where the executive is required to answer to the legislative and judiciary); the tension between

Interests and the Protection of the Marine Environment within National Jurisdiction' (2021) 70 ICLQ 569, 600-1.

205 Cottier and others (n 140) 304; Scholtz (n 189) 202; Schrijver (n 133) 1259.

206 de Feyter (n 97) 160. With regards to the legitimacy of the state in this regard, Benvenisti sees 'sovereigns as key venues for policymaking', instead calling for a 'reinterpretation' of sovereignty which 'retains the state as an important democratic venue for exercising personal and communal self-determination': Benvenisti (n 21) 300.

207 French (n 137) 340.

208 Sinja Graf, *The Humanity of Universal Crime: Inclusion, Inequality, and Intervention in International Political Thought* (Oxford University Press 2021) 173.

209 Benvenisti writes how '[m]any international organisations have functioned to further disempower diffuse domestic electorates by expanding the executive power of powerful States and increasing the leverage of multinational corporations': Eyal Benvenisti, *The Law of Global Governance* (Brill 2014) 18.

210 Vaclav Janecek, 'Three Problematic Assumptions about Public Interests in Law' in Luboš Tichyì and Michael Potacs (eds), *Public Interest in Law* (Intersentia 2021) 75.

211 Thin (n 28) 41-2.

'form and function' outlined above. While the emergence of common interest regimes and the rise of the language of universality in international law thus appears to present a challenge to the central position of state sovereignty in the international legal order, in many situations these regimes in fact solidify the position of the state within that order.[212]

In light of the state's privileged role as the sole international legal person with 'complete' international legal personality, the state not only becomes the arbiter of what is identified as a common interest, but often also of which methods of protection are adopted in the name of this common interest. What's more, given that many common interest regimes are focused on cooperation and facilitating state action – rather than punishing non-compliance – the state is subsequently often not subjected to an independent assessment of its implementation of the chosen methods of protection. The excesses of universalist rhetoric are thus often left unchecked in situations where there is a mismatch between the 'form and function' of a given common interest regime. This tension can be illustrated with respect to a number of examples from the regimes discussed in the chapter, which illustrate how the empowerment of the state by the emergence of common interests has packed out badly, particularly for non-state actors.

In relation to the law of the global commons, some authors have thus highlighted that the practical application of principles such as the common heritage of humankind and common concern often remain wanting, particularly if viewed from their ability to protect the interests of concrete communities of individuals. Scholars have further pointed out that common interest principles, in particular the common heritage of humankind, have fallen short in their promise towards achieving genuine economic equality.[213] In the context of the management of the Area by the International Seabed Authority, Feichtner thus points out that while this system appears to be beneficial for small developing states, the concrete benefits of the regime for the individual citizens of these states remain elusive. Despite this fact, 'justifications of the expansion of resource extraction [of the deep seabed] frequently invoke the notion of benefits to humanity as a whole,'[214] a promise which they do not seem to be able to fulfil. Ranganathan similarly argues that the disadvantageous effects of apparently universal forms of law justified on the basis of common benefit are shrouded through the use of the international legal form, where 'takings

212 Ukri Soirila, *The Law of Humanity Project: A Story of International Law Reform and State-Making* (Hart Publishing 2021) 14, 150.

213 See e.g. Surabhi Ranganathan, 'Seasteads, Land-grabs and International law' (2019) 32 LJIL 205; Isabel Feichtner, 'Mining for Humanity in the Deep Sea and Outer Space: The Role of Small States and International Law in the Extraterritorial Expansion of Extraction' (2019) 32 LJIL 255; Mickelson, 'Co-opting Common Heritage: Reflections on the Need for South-North Scholarship' (n 155) 116.

214 Feichtner, 'Mining for Humanity in the Deep Sea and Outer Space: The Role of Small States and International Law in the Extraterritorial Expansion of Extraction' (n 213) 269.

come disguised as givings, expulsions as inclusions, private gains as global solutions'.[215] Similar dynamics are often at play in other environmental regimes, particularly those creating protected areas.[216]

Comparable critiques are levied at fields such as international criminal law, which heavily draw on ideals of universal humanity: thus McMillan argues that the transactional nature of international criminal law results in the law focusing overtly on the harm caused to actors such as the international community, rather than the harm to individual human beings who lie at the heart of these crimes. In other words, 'the international significance of certain crimes is not found in the local and lived – that is, it is not understood as emanating from the significance of particular lives, people, and their experiences'.[217] These local harms are appropriated by international criminal law: 'a harm or event becomes international through its refiguring as somehow belonging elsewhere and to others,'[218] an act irrevocably embedded in existing global-local power dynamics. Simultaneously, the offenders of international criminal law are cast as offending against humankind,[219] dividing the globe 'into those contravening mankind's law and those complying with it'.[220] By invoking humankind, international criminal law broadens the scope of who can respond to infringements of the law, '[casting] claims to universal crimes as the authorisation to act coercively in political spaces far away',[221] yet very rarely in centres of power in the Global North.

More broadly, scholars have expressed doubts with regards to the possibility of identifying and protecting common interests within the international community without thereby falling victim not only to existing power relationships within the international community as a whole, but also between majority and minority communities within individual states.[222] They point towards the fact that community-making implies the drawing of boundaries between 'insiders' and 'outsiders', raising the question who is excluded from the 'universal' international community.[223] According to this line of thinking, 'universalism at once obscures and legitimizes the particular interests that drive

215 Ranganathan, 'Seasteads, Land-grabs and International law' 214 (n 213); Surabhi Ranganathan, 'Ocean Floor Grab: International Law and the Making of an Extractive Imaginary' (2019) 30 EJIL 573, 577, 597-8.

216 See e.g. Federica Cittadino, *Incorporating Indigenous Rights in the International Regime on Biodiversity Protection* (Brill Nijhoff 2019); Marie-Catherine Petersmann, *When Environmental Protection and Human Rights Collide* (Cambridge University Press 2022).

217 McMillan (n 123) 6-7.

218 Ibid 6-7.

219 Graf (n 208) 2-3.

220 Ibid 3.

221 Ibid.

222 Benedek and others (n 35) 220; Martti Koskenniemi, 'Projects of World Community' in Antonio Cassese (ed), *Realizing Utopia* (Oxford University Press 2012); Ayça Çubukçu, 'Thinking against Humanity' (2017) 5 London Review of International Law 251.

223 Conklin (n 10) 137; Graf (n 208) 172.

the operation of international law.'[224] Scholars working in this tradition argue that this requires us to turn our attention to the political projects which are authorised through the invocation of universal international law, in order to examine whether and how this invocation 'goes hand in hand with claims to hierarchy and legitimate coercion in world politics',[225] and to question the neutrality that is implied by the nature of speaking on behalf of the 'universal'.[226] A particular dilemma which faces scholars from traditions such as TWAIL and critical legal theory is thus whether the universalist modes of reasoning predominantly employed within international law are fundamentally flawed, or whether they can also be used for counterhegemonic purposes.[227]

A final core element of the critique of common interest regimes circles around the role of actors other than states in both the identification of common interests and decision-making processes with regards to these interests, coupled with the backlash against international organisations in the context of denials of justice resulting from actions either undertaken directly by the international organisation or by individual states implementing its decisions.[228] Many authors have thus called for the inclusion of more and other stakeholders than the state in international governance, such as individuals.[229] They point out that 'while international law is no longer created only for States, it remains largely – at least in formal law-making channels – created by States.'[230] A chief concern in this regard is the fact that decision-making procedures in international organisations are often not embedded within the same safeguards as is the case for public institutions at the national level,[231] with an attendant call to subject these organisations to the same checks and balances as, for

224 Gordon (n 9) 865.

225 Graf (n 207) 171.

226 Koskenniemi (n 222) 9-10; Benedek and others (n 35) 225-6; Ranganathan, 'Ocean Floor Grab: International Law and the Making of an Extractive Imaginary' (n 215) 597. For a concrete example in relation to children's rights, see Noam Peleg, 'Illusion of Inclusion: Challenging Universalistic Conceptions in International Children's Rights Law' (2018) 24 Australian Journal of Human Rights 326, 326.

227 Martti Koskenniemi, 'Legal Universalism: Between Morality and Power in a World of States' in Sinkwan Cheng (ed), *Law, Justice, and Power: Between Reason and Will* (Stanford University Press 2004) 48; Sundhya Pahuja, 'The Postcoloniality of International Law' (2005) 46 Harvard International Law Journal 459; Gordon (n 9) 877; Jouannet (n 9) 397. Cf. Pierre-Marie Dupuy, 'Some Reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Martti Koskenniemi' (2005) 16 EJIL 131, who argues that '[e]xamples abound of … universal concepts being hijacked in support of aims that are anything but … [However], the instrumentalization of law is not a European specialty. It is inherent to its social use' (at 133-4).

228 Rishi Gulati, *Access to Justice and International Organisations* (Cambridge University Press 2022) 1-2.

229 de Feyter (n 97) 184.

230 Samantha Besson, 'Ubi Ius, Ibi Civitas: A Republican Account of the International Community' in Samantha Besson and J.L. Martí (eds), *Legal Republicanism: National and International Perspectives* (Oxford University Press 2009) 210-11.

231 Ibid 206-7.

example, domestic administrative agencies.[232] This critique, chiefly represented by authors within the Global Administrative Law tradition, accordingly places great emphasis on procedural legitimacy as a way of securing justice for non-state actors affected by international governance.[233] In response to this critique, a range of legal instruments have been developed which emphasise the importance of the participation of affected groups and individuals in decision-making processes concerning the management of common interests, some of which will be discussed in Chapter 6.[234]

2.3.3 The 'humanisation' of international law

Precisely how to adequately protect common interests in a legal system which remains centred around states has also formed a central line of thought in the work of a range of scholars interested in the 'humanisation' of international law.[235] These scholars seek to answer the question 'how a community interest of all individuals can be articulated through, and against, a structure of international law designed to accommodate the interests of States as such,'[236] rather than common interests, particularly if the territorial state (wilfully) neglects its custodial role.[237] On the one hand, they argue that public international law has undergone a transformation, in which the state is variously reconfigured as a trustee of common interests,[238] or wholly transformed in such a manner that state sovereignty should be seen as subservient to the interests of humanity.[239] On the other hand, they emphasise that the role of non-state actors looms ever larger; the international legal system is thus no longer wholly predicated around states as the sole legal persons who play

232 Benvenisti, *The Law of Global Governance* (n 209) 16-7.

233 Ibid 22. Although, as Benvenisti points out, 'the emphasis on the proper procedure for decision-making in global governance bodies is [not] a panacea … the temptation to hide power in the cracks of the rules of procedure is very hard to resist and to thwart': ibid 23-4.

234 See ibid at 158 and further; Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Cambridge University Press 2016) 492.

235 See e.g. Simma, 'From Bilateralism to Community Interest' (n 3); Theodor Meron, *The Humanization of International Law* (Martinus Nijhoff Publishers 2006); Antonio Cassese, *Realizing Utopia* (Oxford University Press 2012); Trindade, *International Law for Humankind* (n 19). For an overview of these arguments, see Tzevelekos (n 32); Soirila (n 212) 11, 17. For uses of the phrase 'humanisation' by critical scholars, see e.g. Hani Sayed, 'The Humanization of the Third World' in Luis Eslava, Michael Fakhri and Vasuki Nesiah (eds), *Bandung, Global History, and International Law* (2017) 434.

236 Kingsbury and Donaldson (n 31) 81.

237 Benedek and others (n 35) 225-6; Villalpando (n 23) 409-10.

238 Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' (n 21); Benedek and others (n 35) 194.

239 Anne Peters, 'Humanity as the A and Ù of Sovereignty' (2009) 20 EJIL 513; Trindade, *International Law for Humankind* (n 19) 637-40.

a role in the creation, elaboration, and enforcement of international law.[240] A central element of this trend is the emergence of the international legal personality of the individual as a bearer of rights and obligations under international law.[241] The figure of the 'human' thus assumes a central role on the stage of international law, with the influence of the state diminishing or becoming radically reconfigured.[242]

The theoretical discussion surrounding the purported humanisation of international law often straddles the boundary between *lex lata* and *lex ferenda*. On the one hand, the argument goes that the structure of public international law has already been radically changed from its earlier incarnations, with reference to developments such as *erga omnes* and *jus cogens*, or the emergence of fields such as ICL and IHRL, or the impact of human-rights inspired changes in fields such as treaty law, the law of immunities, diplomatic protection, and state responsibility.[243] Some scholars in particular argue that the influence of human rights is radiating out and impacting all areas of international law.[244] However, others point out that these arguments are rejected just as frequently as they are accepted,[245] and that sovereignty remains a central organising principle of the international legal order.[246] Thus, on the other hand, the second group of humanisation scholars insists that while international law might still be centred around state sovereignty, the emergence of human rights norms and the growing centrality of the individual presents an important agenda for the future development of the law.[247] Human rights

240 Robert McCorquodale, 'An Inclusive International Legal System' (2004) 17 LJIL 477; Meron (n 235) xv.

241 Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (n 234) 58, 526, 551-2; Benedek (n 31) 186.

242 Soirila (n 212) 11.

243 Trindade, *International Law for Humankind* (n 19) 640; Menno T. Kamminga, 'Final Report on the Impact of International Human Rights Law on General International Law' in Menno T. Kamminga and Martin Scheinin (eds), *The Impact of Human Rights Law on General International Law* (Oxford Academic, Oxford University Press 2009) 22.

244 Trindade, *International Law for Humankind* (n 19); Kamminga (n 243); Peter-Tobias Stoll, 'A "New"' Law of Cooperation: Collective Action across Regimes for the Promotion of Public Goods and Values versus Fragmentation' in Massimo Iovane and others (eds), *The Protection of General Interests in Contemporary International Law* (Oxford University Press 2021) 328.

245 Massimo Iovane, 'Conflicts Between State-Centred and Human-Centred International Norms' in Riccardo Pisillo Mazzeschi and Pasquale De Sena (eds), *Global Justice, Human Rights and the Modernization of International Law* (Springer 2018); Soirila 11, 14, 150.

246 Nehal Bhuta, 'The Role International Actors Other Than States Can Play in the New World Order' in Antonio Cassese (ed), *Realizing Utopia* (Oxford University Press 2012).

247 Tzevelekos (n 32) 75; Gaja (n 3) 45; Cassese, 'Soliloquy' (n 203) lxvii-iii; Antonio Cassese and Luigi Condorelli, 'Is Leviathan Still Holding Sway over International Dealings?' in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford Academic, Oxford University Press 2012); Antonio Cassese, 'Gathering Up the Main Threads' in Antonio Cassese (ed), *Realizing Utopia* (Oxford University Press 2012) 653; Simma, 'From Bilateralism to Community Interest' (n 3) 230-4, 249.

and dignity are assumed to be central concepts in this regard.[248] The practical counterpart of the humanisation debate is thus a broader discussion within numerous international legal regimes on the promotion of human rights-based approaches to international law.[249] Human rights are posited as (at least part of) the answer to the problems created by the tension between international law's commitment to common interests and the determination of its structure by state sovereignty, although these proposals have certainly not gone without critique.[250]

It is against this theoretical background – a concern with the predominant role of state sovereignty and the mismatch between 'form and function' in the governance of common interests, the impact of the invocation of universalist ideas at the local level, and the debate on procedural legitimacy and the diversification of stakeholders in international law – that this dissertation is situated. As we will see in Chapter 5, similar tensions can also be identified with respect to the workings of universality in cultural heritage law. These tensions force us to question and be attentive to the impact of universalist invocations in international law, not only at the global level between more or less powerful states, but also at the local level, where the invocation of the universal through the vehicle of international law can override local concerns. The current state of affairs thus raises the question: how can we identify what constitutes the common interest of the international community with regards to cultural heritage? Who has the authority to decide upon their identification and subsequent methods of protection? And what is the role of actors other than states in these processes?

The subsequent chapters of this dissertation shall seek to place cultural heritage law within the broader landscape sketched above: the proliferation of common interest regimes and the use of the language of universality therein (Chapter 3); the continued role of the state within these regimes and the tensions between their form and function (Chapter 4 and 5), and the proposals being made to diversify the actors involved in the identification and management of common interests (Chapter 6). It argues that it is useful to view the tensions faced within cultural heritage law alongside these parallel developments within international law at large. The final chapter (Chapter 7) will subsequently return to the humanisation thesis – as well as broader critiques on the predominance of state sovereignty in the enforcement of common interests in international law outlined above – asking whether it is appropriate to apply it in the context of cultural heritage law, thereby reflecting on the

248 Soirila (n 212) 11; Trindade, *International Law for Humankind* (n 19) 637-40; Benedek (n 31) 190; Cassese, 'Gathering Up the Main Threads' (n 247) 653.

249 See e.g. UN General Assembly, 'Renewing the United Nations: A Programme for Reform' (14 July 1997) UN Doc A/51/950 (on the mainstreaming of human rights in the work of the UN).

250 E.g. from critical legal scholars who question the liberatory potential of human rights.

role of universality within cultural heritage law and its future. In doing so, it seeks to draw upon lessons learned from developments in a range of international legal regimes, particularly focusing on principles relating to the participation of individuals and local communities in decision-making processes.