
The Peremptory Norms of the International Community

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Abstract

This article claims that the quest for the identity of peremptory norms in terms of sources is misdirected. Instead of the identity of a discrete rule or right of international law, one needs to examine why a peremptory norm is binding. The latter issue addresses the referent of the identity issue: namely, the international community as a whole. Various significations of the latter are recognized and found wanting. The article examines three general forms of the international community: the community as an aggregate of inter-dependent states, the community as a rational construction, and the community as a social-cultural ethos independent of members and yet for the members. The first two forms are found wanting. First, they presuppose that a state is a self-creative author expressing its own will. Secondly, the community is reified vis-à-vis the social-cultural ethos in which the community is immersed. Thirdly, the community is exclusionary. The three problems take for granted that a territorial-like boundary separates outsiders from between insiders. The article concludes that the notion of an international community needs excavation before jurists can be assured that peremptory norms exist and why they exist.

International law faces a serious mystery. On the one hand, peremptory norms (often cited as *jus cogens*) are said to possess a universal character in that no state may derogate from them, despite the will of the state to do so. This scope of peremptory norms extends to conflicting customary norms, general principles of international law, and treaty provisions.¹ Reservations in violation of peremptory norms are considered void.² A treaty may neither be severed nor incidentally derogated from if it

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¹ This point is developed by James Crawford, *Creation of States in International Law* (2006), at 102. Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, Art. 45.

² Human Rights Committee, *General Comment 24*, at para. 8, UN Doc. CCPR/C/21/REV.1/ADD.6 (11 Nov. 1994).

violates a peremptory norm.³ Peremptory norms have been recognized and justiciable since the late 18th century.⁴ Indeed, peremptory norms have rendered domestic norms non-existent since the late Roman Republic.⁵ On the other hand, despite their acknowledged universality, it remains unclear which norms are peremptory. That issue, I wish to suggest, depends upon how one responds to the question: why are peremptory norms binding? And that question, in turn, hangs upon the relation of a peremptory norm and the international community as a whole.

In particular, the opaqueness surrounding the identity of peremptory norms raises a series of unresolved problems. A state member of the international community has been said to have a legal interest in enforcing peremptory norms even though the member has not been injured. Individuals and groups are said to be harmed by virtue of harm to peremptory norms and yet, until relatively recently, only states have been considered members of the international community. An individual or group may possess standing to make a claim for compensation for harm caused to peremptory norms and, yet, the state causing harm to a peremptory norm may not have consented to their standing. More generally, if an entity harms a peremptory norm, why may such an entity possess a legal claim if it is not a member of the international community? If a state which has caused harm no longer exists as a legal entity, what institution or official owes an obligation to protect or enforce the peremptory norm? Non-state entities? International organizations? If harm is caused to a peremptory norm and if the individual is legally unrecognized as a national anywhere on the globe, what institution has the legal obligation to fulfil or enforce the peremptory norm? A remedy for violation of a peremptory norm may be expected but what remedy? A mere declaration? May a civil or criminal remedy be forthcoming to a non-state even though a state did not suffer compensatory losses?

The search for the identity of a peremptory norm leaves further important issues unresolved. Further, the very possibility of a peremptory norm once again suggests a hierarchy of international law norms with peremptory norms being the ‘fundamental standards of the international community’ at the pinnacle.⁶ The hierarchy has been described as a ‘sliding scale’.⁷ The issue remains: why is one norm weightier or more fundamental than another? Further problems remain. A sense of permanence in time and space is said to colour a peremptory norm. And yet, according to Article 61 of the Vienna treaty, the peremptory norm may emerge in the future and, by so doing, ‘terminate’ the treaty as ‘void’.⁸ If a peremptory norm changes through time, how and why is it peremptory? And who is entitled to possession of a peremptory norm? Article

³ VCLT, *supra* note 1, Art. 45. For a discussion of this point see Crawford, *supra* note 1.

⁴ *Filartiga v. Pena-Irala*, 630 F.2d 876, at 885–888 (2nd Cir. 1980) (Kaufman J.).

⁵ Conklin, ‘The Myth of Primordialism in Cicero’s Theory of *Jus Gentium*’, 23 *Leiden J Int’l L* (2010) 479.

⁶ *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-T, Trial Judgment, 121 I.L.R. 218, at para. 153, at 58 (10 Dec. 1998); M. Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (1999), at 194; Geck, ‘General Principles of Law’ in R. Bernhardt (ed.), *Encyclopaedia of Public Int’l Law* (1997), iii, at 511, 518.

⁷ Kirgis, ‘Custom as a Sliding Scale’, 81 *AJIL* (1987) 146.

⁸ Also see *Forti v. Suarez-Mason*, 694 F. Supp. 707 (ND Cal. 1988) (Jensen, J.).

48 of the ILC's Articles on State Responsibility extends the protection of peremptory norms to entities and persons 'other than injured States'.⁹ Indeed, the commentary to Article 48 asserts that a peremptory norm may be harmed even though 'no state . . . is individually injured by the breach'.¹⁰ Although individuals are regarded as 'the ultimate beneficiaries and in that sense as the holders of the relevant rights', why may a peremptory norm exist 'outside the framework of human rights'?¹¹ If this is so, why may any such right become a peremptory norm?¹² This is the point which the ILC describes as leaving 'greater difficulties which the present articles cannot solve'.¹³ One suggestion, preoccupied with the sources of international legal norms, looks to the difference between primary and secondary norms.¹⁴ Another is the difference between a special and a general legal norm.¹⁵ Another is said to be the logic of individual rights.¹⁶ Such suggestions, though, associate a peremptory norm with a quest for the institutional sources of general international law, the source thesis being traced to Roman law, as Sabine Grebe argued.¹⁷ The crucial question is this: 'Why is such a norm or, indeed, its institutional source, binding upon non-state as well as state actors?' What is it about the international community which explains why peremptory norms are binding upon states and non-states, individuals and groups?

This article responds to the question 'Why is a peremptory norm binding upon state and non-state actors?' My argument is as follows. First, I attend to the traditional response to the effect that a peremptory norm exists in terms of the traditional sources of general international law. I take one such aspect of general international law – namely, a customary legal norm – in order to highlight problems with the sources thesis. I then turn to the sources thesis, best associated with Article 53 of the Statute of the International Court. Each generally accepted source of general international law constructs a circuitous and tautological response to the issue 'Why is a peremptory norm binding upon state and non-state actors?'. With this in mind, I suggest in section 2 that a peremptory norm somehow relates to the international community as a whole. Here I offer three senses of an international

⁹ J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries* (2002).

¹⁰ Crawford, 'Article 48 and Comm (12)', in *ibid.*, at 279.

¹¹ ILC 'Article 33 and Comm (3)', in *ibid.*, at 209.

¹² See Report of the International Law Commission, Fifty-third session, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (Supp) (23 Apr–1 June and 2 July–10 Aug. 2001) (adopted by the ILC, 53rd Sess., 2001), reprinted in Crawford, *supra* note 9, at Art. 33, Comm. at para. 3, at 209.

¹³ *Ibid.*, at Art. 48, Comm. at para. 12, at 279.

¹⁴ Crawford 'Introduction', in *ibid.*, at 14–17, Comm at 74–75, para. 33 Comm (4), at 210; Besson and Tasioulas, 'Introduction', in S. Besson and J. Tasioulas (eds), *Philosophy of International Law* (2010), at 9–12; Besson, 'Sources of International Law', in *ibid.*, at 163, 178–183; Lefkowitz, 'Sources of International Law', in *ibid.*, at 186, 196–197.

¹⁵ E. Vanneste, *General International Law before Human Rights Courts* (2010), at 35–40.

¹⁶ *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-A, Appeals Chamber (2002) ILR 213, at para. 151 (21 July 2000); W.N. Hohfeld, *Fundamental Conceptions as Applied to Judicial Reasoning* (ed. W.W. Cook, 1978 (1919)).

¹⁷ Sabine Grebe has traced this theory of legal authority to the Augustan period: Grebe, 'Augustus' Divine Authority and Vergil's *Aeneid*, 50 *Vergilius* (2004) 35.

community: an aggregate of the wills of self-willing states; a rationally constructed community where each state possesses an ‘associative’ relationship with the community; and an international community nested in the social ethos. I draw here from Hegel’s theory of international law, as hinted elsewhere.¹⁸ My claim is that a peremptory norm protects such an ethos and, in particular, the legal order of such an ethos. If the peremptory norm is violated, so too the very existence of the legal order is undermined. To take one example and only as one example, if many states could torture inhabitants, non-nationals, or stateless persons, and if such states could do so under the colour of international (or domestic) legal standards, would the standards, although identifiable in the sources of law, be binding? Would there be an international legal order?

1 The Sources Thesis

International adjudication and jurists’ opinions not infrequently begin with the recognition of peremptory norms in the Vienna Convention on the Law of Treaties (VCLT). Article 53 of the Convention provides that a peremptory norm is ‘accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted’ and, secondly, that the norm may be ‘modified only by a subsequent norm of general international law having the same character’. Let us address the latter requisite. A general international legal norm, however, offers little guidance to the jurist, not least because there is so little consensus as to what is general international law. General international law, in turn, has been considered ‘moral commandments ... considered by the conscience of mankind to be indispensable for the coexistence of man in organized society’, the shared principles of domestic legal orders, international legal standards, and general principles generated from treaties, customs, and *opinio juris*.¹⁹ More often than not, jurists are satisfied with a list of norms which are continually repeated as peremptory in international law rhetoric: the right to state self-determination and the prohibitions against the use of force, torture, enslavement, mass internal displacement, and mass disappearances.²⁰ The list is often supplemented by an appeal to a Latin phrase, *jus cogens* (‘compelling law’) without more, as if the Latin reference can legitimize the label of peremptory.

¹⁸ W.E. Conklin, *Hegel’s Laws: the Legitimacy of a Modern Legal Order* (2008), at 270–298.

¹⁹ See generally B. Schlütter, *Developments in Customary Law* (2010), at 74–79.

²⁰ Art. 702 of the *Third Restatement* lists the following examples of peremptory norms: genocide, slavery or slave trade, the murder or disappearance of people, torture or other cruel, inhuman, or degrading treatment or punishment, prolonged arbitrary detention, systematic racial discrimination, and consistent pattern of gross violations of internationally recognized human rights: *Restatement (Third) of Foreign Relations Law of the United States* (1987), ii, s. 702, at 161. Jean Allain has added the principle of non-refoulement as a peremptory norm: Allain, ‘The Jus Cogens Nature of Non-refoulement’, 13 *Int’l J Refugee L* (2001) 533, at 533–558. Ulf Linderfalk argues that the logical consequence of peremptory norms is to render the list far wider than has hitherto been considered: see Linderfalk, ‘The Effect of Jus Cogens Norms: Whoever Opened Pandora’s Box, Did You Ever Think About the Consequences?’, 18 *EJIL* (2008) 853, at 853–871.

The consequence is that instead of clarifying the identity of a peremptory norm, the diverse sources open the door for the expert knowers of legal rhetoric to conclude, without more, which norms are peremptory.

What is crucial to appreciate in all this is the objective of the jurist's legal inquiry. The quest for the identity of a peremptory norm in institutional sources leaves the all-important question, 'why is the norm compelling?', to the side. Various concerns have been expressed about this endeavour.²¹ The concerns have focused upon how peremptory norms can be identified in customary norms. Once we contextualize a peremptory norm in terms of its identity as a self-standing rule, though, more issues are left unsettled than jurists have taken for granted.

A The Peremptory Norm as a Customary Norm

Let us turn to the nature of a customary norm as one possible source of a peremptory norm. The circuitous character of such an inquiry is apparent.²² In order for there to be a sense of obligation towards a peremptory norm, the peremptory norm must already exist as a discrete and self-standing rule. How does it exist without there being a sense of obligation? Similarly, before the peremptory norm exists as a customary norm, consistent state practices must manifest a sense of obligation. Further, if a peremptory norm is grounded in the sources thesis, the two requisites of such a norm – a sense of obligation by state officials and state practices – may change through time and thereby render the peremptoriness of a norm suspect.²³ Although an individual right may initially exist outside the structure of peremptory norms, such a right may also emerge as a peremptory norm.²⁴ A violation of an existing customary rule disconfirms the rule so that it becomes less weighty as a rule on the next occasion when a rule is disobeyed.²⁵ Since the weight of time seems to be a relevant factor, how many years or months must transpire before a sense of obligation and state behaviour manifest a peremptory norm? If a peremptory norm may lose its weightiness through calendar time, why is it described as peremptory? Further, what is the threshold for the weightiness of state behaviour? Why would a state behave in a

²¹ ILC (Koskenniemi Report), *Report of the Study Group on Fragmentation of International Law at the Fifty-Eight Session of the International Law Commission 2006*, UN Doc. A/CN.4/L. 682, Yrbk ILC (2006-II) Pt 2, at para. 62.

²² See Koskenniemi, 'The Politics of International Law', 1 *EJIL* (1990) 4, at 26–27. See also M. Koskenniemi, *From Apology to Utopia: the Structure of International Legal Argument*, Reissue with a new Epilogue (2005), at 324.

²³ For the sense of obligation see O. Schachter, *International Law in Theory and Practice* (1991). For state practices see Byers, *supra* note 6, at 193. For a close application of this requirement for customary norms see Henckaerts, 'Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict', 87 *Int'l Rev Red Cross* (2005) 175, at 175–212.

²⁴ See ILC (State Responsibility Report) in Crawford, *supra* note 9, Art. 33, Comm. at para 3, at 209.

²⁵ D'Amato, 'Is International Law Really "Law"?', 79 *Northwestern L Rev* (1985) 1293, at 1297 n. 7. Bin Cheng denies that there is circularity in this subjectivity sense, however: see Cheng, 'Custom: The Future of General State Practice in a Divided World', in R. St. John Macdonald and D.M. Johnson (eds), *World Constitutionalism: Issues in the Ordering of the World Community* (2005), at 513, 530–532. I use the terms 'norm' and 'rule' interchangeably.

manner which derogates from its own identity as a sovereign entity? And why would we defer to the self-interest of a state in order to protect all inhabitants on its territory if such inhabitants utter statements or act in a way which state officials consider treasonous or subversive of the state's identity? Indeed, why define a peremptory norm in terms of the express or implied consent of states if a peremptory norm protects non-state actors, individuals, groups, and stateless inhabitants? Are the sense of obligation and the state behaviour material if a domestic governmental structure is occupied by tyrants? Do we include a state's behaviour if the state is a mere shell for complex traditional societies, or warlords? Even if a discrete norm, such as a proscription against torture, is identifiable as a weighty customary norm accepted by the behaviour of all or most states, why is such a norm binding upon all states and non-states? Is it possible for a rule to be peremptory even though it lacks a basis in state behaviour?

B *The Logic of a Right*

One explanation has been said to rest in the logic of a right. The problem here, once again, is that the inquiry into a discrete and self-standing right misses the possibility that a peremptory right represents some ultimate form independent of the identity of the right. Such a misdirected inquiry concerns the legal duty reciprocally associated with an individual right. A state is said to possess duties to protect its inhabitant, one might say, because the inhabitant has human rights. Without such rights there cannot be duties, and vice versa.²⁶ The *Furundzija* judgment follows this line of thought when it holds that a duty towards the 'international community' inevitably infers a 'correlative right' by each member to enforce the duty.²⁷

The International Law Commission has rejected such a dyadic analysis of peremptory norms, however.²⁸ An individual or group possesses peremptory rights even though the state does not acknowledge its duties to protect the individual rights. If the state or states do not recognize such duties, how can one identify a peremptory right? And what institution or official resolves the issue of 'which rights are peremptory'? And why is this right peremptory and that one is not? Is the duty owed to some entity other than a state or its officials or inhabitants? To the international community, for example? Something more needs to be addressed aside from the identity of a discrete right or duty.

International adjudication leaves this prior 'something more' to the side. The *Namibia* Advisory Opinion in 1971, for example, did recognize that states owed peremptory duties but the International Court offers little explanation as to why.²⁹ The Court has continued to accept the existence of peremptory norms in the *East Timor*, *Nuclear Weapons*, and *Genocide* (Bosnia and Herzegovina) cases. And yet, the Court has

²⁶ Hohfeld, *supra* note 16.

²⁷ *Prosecutor v. Anto Furundzija* (CA), *supra* note 16, at para. 151.

²⁸ Crawford, 'Introduction', *supra* note 9, at 7.

²⁹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion [1971] ICJ Rep 16.

failed to explain the point in time when a peremptory norm emerges, nor has the Court explained why.³⁰ Officials are held open to prosecution for an offence against a peremptory norm in *Arrest Warrant Case of Congo Official* and, yet, one remains unenlightened as to what it is about the international community which renders such a norm peremptory.³¹ Even the ILC's study of state responsibility accepts the existence of peremptory norms without pressing further as to why this or that norm is so peremptory.³² Once a peremptory norm is said to be identified as a right traceable to one of the sources accepted in Article 18 of the Statute of the International Court, our role, as lawyers, seems complete. Or so we assume. If enough jurists just accept this or that proscription as peremptory, we need only label the proscription as *jus cogens* and proceed to the identity of the next possible peremptory norm on the list as if intellectual inquiry is closed. The peremptory norm is left in the air. This very association of a peremptory norm with an institutional source as if the norm were discrete and self-standing constitutes a blind spot of contemporary international legal analysis. The blind spot takes for granted that a peremptory norm can be found, as Judge Weeramantra of the International Court once stated, in 'a series of separate rights *erga singulum*'.³³ A deeper issue than the identity of the discrete norm is forgotten despite its presence in Western legal thought, namely: why is an international legal norm binding?

C The Wrong Question

The wrong question is being asked when jurists examine the sources of international law in order to understand whether a particular norm is peremptory. How does a peremptory norm differ from an ordinary customary norm except by the number of times legal rhetoric cites the norm? The identity of a peremptory norm is all the more problematic when one appreciates the ironic twist that it is a treaty, the VCLT, which is invariably offered as the authority for the existence and the identity of peremptory norms. What confers the authority of the Vienna Convention to privilege the identity of a peremptory norm in general international law? Why can general international law render a treaty or ordinary customary norm void? If a peremptory norm is identifiable in customary norms, why does a treaty bind states to recognize customary norms as voiding other treaties? Would norms still be peremptory if another treaty repealed the Vienna Convention? If the general international law incorporates customary norms, why may customary norms be so fundamental as to render void a

³⁰ See, e.g., *East Timor (Portugal v. Australia)* [1995] ICJ Rep 90, at 172, 213–216. See also *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] ICJ Rep 226, at para. 83, at 258, and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Preliminary Objections [1996] ICJ Rep 595, at paras 31–32, at 615–616.

³¹ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Provisional Measures [2000] ICJ Rep 182 (Order of 8 Dec.).

³² See, e.g., ILC (State Responsibility Report), in Crawford, *supra* note 9, Art 1, at Comm. at para. 4, at 79; Art 3 and Comm., at para. 7, at 90; Art. 12, Comm. at para. 7, at 127; Art 26 and Comm., at para. 5, at 188; Art 33 and Comm., at paras 1, 2, 4, at 209; Ch 3 at 242–245; Art 40 and Comm., at para. 2, at 245; Art 48 and Comm., at paras 5, 10, at 277, 278.

³³ *East Timor*; *supra* note 30, at 172.

treaty to which a state has expressly consented? Indeed, could consistent state practices evidence a customary norm which renders Article 53 of the Vienna Convention void?

2 The Relation of a Peremptory Norm to the International Community as a Whole

The missing referent in the analyses of peremptory norms returns us to Article 53 of the Vienna Convention. I noted above that Article 53 raised two factors in the elucidation of a peremptory norm. The one which I addressed above concerns the locus of a peremptory norm in general international law. The other requires that the norm be ‘accepted and recognized by the international community of States as a whole from which no derogation is permitted’. This condition precedent for a peremptory norm addresses a very different issue from the sources thesis. Rather than searching for the source that will identify a legal norm, the condition precedent asks the question ‘Why is an identifiable legal norm binding?’. In order to be binding, the peremptory norm, once identified, refers to some international community which, despite its interdependence, is objective *vis-à-vis* the ordinary norms of an international (or domestic) legal order.

The dependence of a peremptory norm upon the international community has been taken for granted in both treaties and international adjudications. The preamble to the Universal Declaration of Human Rights 1948, for example, asserts that freedom, justice, and peace are founded in the rights ‘of all members of the human family’. Article 15 of the International Covenant on Civil and Political Rights 1966 situates ‘the general principles of law’ in a ‘community of nations’. Other multilateral and regional treaties continue the presupposed relationship.³⁴ Perhaps the most often quoted *dictum* to this effect is the ICJ’s *Barcelona Traction*, to the effect that an obligation to the international community differs from an obligation to a particular state.³⁵ State officials are not immune from prosecution for violating peremptory norms against the international community according to the House of Lords in *Pinochet*.³⁶ The European Court of Human Rights has extended this principle to civil proceedings.³⁷ Jurists too

³⁴ International Convention for the Suppression of the Financing of Terrorism, GA Res. 54/109, at para. 9, UN Doc. A/RES/54/109 (9 Dec. 1999). See also Convention on the Safety of United Nations and Associated Personnel, GA Res. 49/59, preamble, at para. 3, UN Doc. A/RES/49/59 (15 Feb. 1995); International Convention for the Suppression of Terrorist Bombings, GA Res. 52/164, at para. 10, pmbl., UN Doc. A/RES/52/164 (9 Jan. 1998); Rome Statute of the International Criminal Court, Rome, 17 July 1998, 2187 UNTS 90 (RS), at para. 9, pmbl., UN Doc. A/CONF.183/9. For other treaties see International Convention against the Taking of Hostages, at para. 4, pmbl., 17 Dec., 1979, 1316 UNTS 205; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, at para. 3, pmbl., 14 Dec. 1973, 1035 UNTS 167; African Charter on Human and Peoples’ Rights, adopted 27 June 1981, entered into force 21 Oct. 1987, OAU Doc. CAB/LEG/67/3 Rev. 5, reprinted in 21 ILM (1982) 58, 7 *Human Rts LJ* (1986) 403, Art. 27.

³⁵ *Barcelona Traction, Light and Power Company, Limited (New Application 1962) (Belgium v. Spain)* [1970] ICJ, Rep 3, at para. 91, at 47.

³⁶ *R v. Bartle* [1999] 2 All ER 97, [1999] 2 WLR 827 (HL).

are increasingly accepting the dependence of peremptory norms upon the international community.³⁸ And the International Law Commission's Articles on State Responsibility have consistently appealed to the 'international community as a whole' as the basis of peremptory norms.³⁹

The problem is that the quest for the identity of a discrete and self-standing rule or right does not explain why the rule or right binds state members and non-state members. The latter requires a study of the relation of the content of the rule or right to the international community as a whole. How are peremptory norms justified in terms of the international community if the members of the norms are identifiable in terms of state behaviour? Put differently, what is it that renders the international community a community? When does a member owe a duty to the international community as opposed to a national of another state? Why? And are all inhabitants of the globe protected by peremptory norms? Even the *Barcelona* judgment excluded inhabitants from the protection of peremptory norms if lacking a state-conferred nationality: '[h]owever, on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality'.⁴⁰

There must be something about the international community which generates the binding character of a law. States, though unharmed individually, may generally lay a claim of harm to the international community as a whole. The international community is especially harmed when peremptory norms are harmed. What is this international community in whose name states and non-states owe obligations and in whose name individuals and groups are conferred rights?

One approach has characterized the international community as 'the civilized world'. Although the association continues to the present day,⁴¹ 'civilization' was especially highlighted for membership of the European 'family of nations' in 19th

³⁷ App. No. 35763/97, *Al-Adsani v. UK*, 34 ECHR (2001) 273.

³⁸ Green H. Hackworth stated in 1943, e.g., that the alien was warranted a standard of protection that was 'essential to the community of nations': G.H. Hackworth, *Digest of International Law* (1940–41), v, at 471–472. Jessup asserted in 1948 that there is a broad 'principle of community interest in the prevention of breaches of international law': P.C. Jessup, *A Modern Law of Nations: an Introduction* (1948) (repr. 1968 with a new Preface by author).

³⁹ Crawford, *supra* note 9, at 148–150, 158–160; Simma and Alston, 'The Sources of Human Rights Law: Custom, *Ius Cogens* and General Principles', 12 *Australian Yrbk Int'l L* (1992) 82, at 103; Mosler, 'The International Society as a Legal Community', 140 *RdC* (rev. edn 1980) (1974) 11, at 19. Frowein documents several contexts where peremptory norms entertain a duty of third parties to challenge or punish a state party: see Frowein, 'Obligations *Erga Omnes*', in Bernhardt (ed.), *supra* note 6, (1997), iii, 757, at 757 (quoting A.G. Heffler, *Le Droit International public de l'Europe* (1866)), at 211).

⁴⁰ *Barcelona Traction*, *supra* note 35, at para. 91, at 47.

⁴¹ *Sosa v. Alvarez-Machain*, 542 US 692 (2004). For other American cases see Randall, 'Universal Jurisdiction under International Law', 66 *Texas L. Rev* (1988) 785, at 789–790. McNair takes the condition of civilized states for granted: see A.D. McNair, *The Law of Treaties* (1961), at 213–214: '[i]n every civilized community there are some rules of law and some principles of morality which individuals are not permitted by law to ignore or to modify by their agreements'. For examples from other jurisdictions see, e.g., *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General of Zimbabwe and Others*, Judgment No. SC 73/93, 14 *Human Rts LJ* (1993) 323 [2001], AHRLR 248 (Zimb. Sup. Ct 1993); *Filartiga v. Pena-Irala*, *supra* note 4, at 885–888; *Riley and others v. Attorney-General of Jamaica* [1982] 3 All ER 469 (PC).

century court decisions and treatises.⁴² In an earlier day, civilization was associated with being Christian.⁴³ Recognition of membership as civilized was, as James Crawford has put it, ‘a sort of juristic baptism, entailing the rights and duties of international law’.⁴⁴ Why is one society considered ‘civilized’ and another not so? And why do we describe a community as international if uncivilized nations are excluded?

The international community has also been said to be recognizable, secondly, when states contravene ‘the conscience of mankind’.⁴⁵ The Israeli District and Appeal Courts offered this as one of the two bases for the charge against Eichmann: his crimes ‘offended the whole of mankind and shocked the conscience of nations’.⁴⁶ How can a state member have the intentionality of a conscience? Given the contemporary day-to-day reports of torture by most states, what is the source of the conscience of these same states? A third approach, recognized in the drafting process leading to Articles 53 and 64 of the VCLT, identifies the international community with the ‘criteria of morality and ‘public policy’.⁴⁷ Needless to say, the senses of morality radically differ from each other in international law commentaries, and the dominant Kantian view may well support one sense of the international community to the exclusion of a more important one in the context of peremptory rights.⁴⁸ And ‘public policy’ may well circuitously take one back to the justificatory objective of the peremptory norm. Once again, we are left with an empty concept: which public (the state or the international community) of the policy, and what policy, one might ask? More likely, what we signify by ‘public policy’ will remain empty of the objective of the peremptory norm; that is, it may constitute a ‘mere puff’, to quote Lord Lindley in *Carbolic Smoke Ball*.⁴⁹

⁴² *The Paquete Habana*, 175 US 677 (1900).

⁴³ Crawford, ‘Introduction’, in Crawford, *supra* note 9, at 14–16. However, one can still find the criterion of ‘civilized nation’ in relatively recent cases: see, e.g., *Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden)* [1958] ICJ Rep 55, at 92 (separate opinion of Judge Sir Hersch Lauterpacht).

⁴⁴ Crawford, *supra* note 1, at 16.

⁴⁵ Crawford is satisfied with this criterion at one point in Crawford, ‘Introduction’, in Crawford, *supra* note 9, at 38 (quoting *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion [1951] ICJ Rep 15, at 23. Dan Dubois cites a series of scholars who are satisfied with the conscience of the international community as the root of peremptory norms: see Dubois, ‘The Authority of Peremptory Norms in International Law: State Consent or Natural Law’, 78 *Nordic J Int’l L* (2009) 133, at 154 n. 72, 155 n. 77.

⁴⁶ *Attorney General of Israel v. Adolf Eichmann*, District Court of Jerusalem, 36 ILR 18, at 25, 26, 50 (Israel Dist. Ct. 1961). See also judgment of the Sup. Ct. sitting as Court of Criminal Appeals at 36 ILR 277, at 299, 304 (Israel Sup. Ct. 1962).

⁴⁷ See J. Dunoff *et al.*, *International Law: Norms: Actors, Process* (2nd edn, 2006), at 59; R.K.M. Smith, *Text & Materials on International Human Rights* (2007), at 15.

⁴⁸ Cf., e.g., the Kantian views accepted in Perreau-Saussine, ‘Immanual Kant on International Law’, in Besson and Tasioulas, *supra* note 14, at 53–75 with the Hegelian view in Conklin, *supra* note 18, at 162–187, 270–298.

⁴⁹ *Carlill v. Carbolic Smoke Ball Co.* [1893] 1 QB 256; [1891–1894] All ER Rep 127 (CA).

To make a further effort to understand a peremptory norm in terms of its source, the international community has been said to exist by virtue of 'basic human values'.⁵⁰ But why the values are 'basic', we have just found, depends upon the character of the international community. Why turn back to the identity of a basic norm? In any case, which values? And who is the 'we'? Why our values rather than yours? Does this, in turn, depend upon which of us is physically the stronger or which of us controls the international rhetoric? It has not helped to say, as does the ILC, that the international community is 'more inclusive'.⁵¹ The international community has been said to include, to take Malanczuk's suggestion, 'all organized entities endowed with the capacity to take part in international legal relations', including stateless individuals and groups, insurgents, transnational corporations, NGOs, minorities, 'peoples', and nationals who lack a minimal legal or economic security of protection.⁵² If the international community includes all of the above, why? May we just posit such without explanation or guidance? The ILC and the Committee of the ICCPR have asserted that peremptory norms are owed to individual human beings.⁵³ Why individual beings and not groups and other entities, as suggested by Malanczuk? Patrick Kelly has described the international community as a mere metaphor.⁵⁴ A metaphor associated with what?⁵⁵ Can we be satisfied with conclusory assertions as advocates of law or as members of the academy?

The issue may be put this way. If consent (as manifested in treaties and customary norms) generates and legitimizes peremptory norms, then such norms depend upon and reinforce the arbitrary wills of the aggregate of states. Universality exists, but only within each state's territorial borders. When a state contravenes the peremptory norm, the legitimacy/authority of the international community in which the peremptory norm is nested is annulled. What is it about a community which renders a peremptory norm binding independently of domestic laws? We are faced with the issue addressed by Socrates' 'Speech of the Laws' in the *Crito* (50b) and by Plato in the *Gorgias* (471e–d, 484–c, 486–c, 493c) as well as by Hegel in his *Philosophy of Right* and in his lectures on the legitimacy of law, namely: why is the self-conscious subject bound to a law independent of the subject?

3 Three Senses of an International Community

Unless we can gain a sense of the relation of a peremptory norm with the international community, we will be left with conclusory assertions about the existence of a

⁵⁰ Dubois, *supra* note 45, at 161–166.

⁵¹ See, e.g., Crawford, 'Introduction', *supra* note 9, at 40; Art. 48 and Comm., at 40, at para. 10, at 278. However, Ian Brownlie suggests that the State Responsibility Articles only contemplate non-derogation of peremptory norms when states have already agreed to such: see I. Brownlie, *Principles of Public International Law* (6th edn, 2003), at 489.

⁵² Mosler, 'International Legal Community', in Bernhardt (ed.), *supra* note 6, iii, at 1251, 1252.

⁵³ See Crawford, *supra* note 9; Human Rights Committee, *General Comment* 26, at para. 4, UN Doc. CCPR/C/21/REV.1/ADD.8/REV.1 (8 Dec. 1997).

⁵⁴ Kelly, 'The Twilight of Customary International Law', 40 *Virginia J Int'l L* (1999–2000) 449, at 465–469.

⁵⁵ See ILC (State Responsibility Report) in Crawford, *supra* note 9, Art. 2, Comm. at para. 12, at 84.

peremptory norm. Such a conclusory assertion is exemplified when Malanczuk posits that the existence of the international community is ‘too logical and reasonable to be challenged’,⁵⁶ and when Hugh Thirlway asserts that the international community exists as ‘a matter of faith’.⁵⁷ In a similarly posited manner, Eric Wyler and Alain Papaux suggest that the less said the better.⁵⁸ Chusei Yamada has expressed frustration in the endeavour to justify peremptory norms in terms of the ultimate referent of the international community.⁵⁹ After a deep analysis on the nature of international law, Peter Fitzpatrick offers that the international community is a mere empty form.⁶⁰ Jurists are increasingly asserting that there is such a thing as ‘the international community as a whole’, and yet little content is attributed to the relation of peremptory norms to such a community.⁶¹ Let us turn to three senses of an international community in an effort to ascertain whether such a community is a mere empty form.

A The Community as an Aggregate of the Particular Wills of States

With the mystery of peremptory norms in mind, one sense of the international community suggests that it is the totality of an aggregate of the particular wills of state members. A distinction is needed here. A hard sense of a state’s will takes for granted that the state is self-reliant. It needs no other state for its existence. Too many examples of such a view of a state manifest the state conflict today. A soft sense of a state’s will suggests that a state exists only by virtue of its dependence upon other states. A bilateral treaty, much like a contract, exemplifies such a dependent relationship. This inter-dependency has especially characterized the UN Charter as well as human rights treaties such as the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural

⁵⁶ P. Malanczuk, *Akehurst’s Modern Introduction to International Law* (7th revd edn, 1997), at 58.

⁵⁷ Thirlway, ‘Injured and Non-injured States Before the International Court of Justice’, in M. Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter* (2005), at 311, 311.

⁵⁸ See, e.g., Wyler and Papaux, ‘The Search for Universal Justice’, in Macdonald, *supra* note 25, at 273, 296–299.

⁵⁹ See Yamada, ‘Revisiting the International Law Commission’s Draft Articles on State Responsibility’, in Ragazzi, *supra* note 58, at 117, 120–121.

⁶⁰ Fitzpatrick, ‘Latin Roots: Imperialism and the Making of Modern Law’, in P. Fitzpatrick, *Law as Resistance: Modernism, Imperialism, Legalism* (2008), at 275–291; Fitzpatrick, ‘Justice as Access’, 23 *Windsor Yrbk Access Justice* (2005) 1, at 9–13; Fitzpatrick, ‘“Gods would be needed ...”: American Empire and the Rule of (International) Law’, 16 *Leiden J Int’l L* (2003) 429, at 436; Fitzpatrick, ‘“No Higher Duty”: Mabo and the Failure of Legal Foundation’, 13 *Law Critique* (2002) 233, at 242. Also see Barboza, ‘Legal Injury: The Tip of the Iceberg in the Law of State Responsibility’, in Ragazzi, *supra* note 58, at 7, 18, 21.

⁶¹ See, e.g., M. Shaw, *International Law* (5th edn, 2003), at 116–119; ILC, *State Responsibility* (2002); Mosler, *supra* note 52, at 1252; Frowein, *supra* note 39, at 757–759; Simma and Alston, *supra* note 39, at 103; de Hoogh, ‘The Relationship between Jus Cogens, Obligations Erga Omnes and International Crimes: Peremptory Norms in Perspective’, 42 *Austrian J Public Int’l L* (1991), at 183, 190, 193–196; Danilenko, ‘International Jus Cogens: Issues of Law-Making’, 2 *EJIL* (1991) 42; Mosler, *supra* note 39, at 19; Brudner, ‘The Domestic Enforcement of International Covenants on Human Rights: A Theoretical Framework’, 35 *U Toronto LJ* (1985) 219, at 249–250.

Rights (ICESCR), the Geneva Conventions I–III, the Refugee Convention, and the Statelessness treaties. The international community is possible with the soft sense of a state. However, the community is constituted from the aggregate of the wills of territorially bounded states.

Three problems envelop this first sense of the relation of peremptory norms and the international community. First, is an international legal order of such a community possible if its norms are the totality of the wills of states members of the community? Such members possess the legal authority to decide who are their nationals or members. Does an international community which defers to such a freedom of its members necessitate the exclusion of individuals or groups or societies from the community? Is a person ‘lawfully in the territory of a state Party’ to the ICCPR, for example, if s/he lacks legal recognition by any state member of the aggregated international community? Is a duty owed to a person if state officials consider the individual an insurgent, an illegal combatant, or a terrorist? Do peremptory norms leave some persons unprotected?

Contemporary analytical jurisprudence offers great weight to this first sense of an international community.⁶² What renders this community legitimate, we are advised, is the express (in the case of treaties) and implied (in the case of customary norms) consent of a state. A great tradition, which grounds the international community in terms of consent, has emerged with Thomas Hobbes and continues to the present day. The kernel to this theory rests on the presupposition that a state is an author,⁶³ the author is self-generating,⁶⁴ and a law is binding if it has been authored in the proper manner and form. The consent theory of an international community presupposes that an author creates or determines norms which are located in a legal objectivity. Such an author cannot countenance a competing source of binding laws within its territorial control.

Because the peremptory norms of such an international community take the authorial basis of law for granted, the peremptory norms can hardly stand out from the aggregate of separate but equal authors, each with a will of its own. The international community preserves a *domaine réservée* for each state author to express its own will. Like the League’s Covenant, the UN Charter takes this will for granted: ‘[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are *essentially within the domestic jurisdiction of any state* or shall require Members to submit such matters to settlement under the present Charter’ (Article 2(7), emphasis added). The will of each state is considered equal (Article 2(1) UN Charter). The protected space of the state author is ‘inherent’, ‘inviolable’, and ‘fundamental’, to use the terms of the UN Charter. No institution external to the state may interfere with the state-author’s freedom to express itself within its territorial

⁶² See, e.g., Besson and Tasioulas, *supra* note 15; J.L. Goldsmith and E.A. Posner, *The Limits of International Law* (2005).

⁶³ W.E. Conklin, *Invisible Origins of Legal Positivism* (2001), at 37–44, 84–85, 125–128, 145–151.

⁶⁴ See Foucault, ‘What is an Author?’, in P. Rabinow (ed.), *The Foucault Reader* (1984), at 101–120; Conklin, ‘The Invisible Author of Legal Authority’, *7 L and Critique* (1996) 173.

control, at least in this sense of an international community.⁶⁵ That the legality of such an intervention by an international organization is authorized only if the state itself has expressly or impliedly consented to the intervention is a principle of general international law.

This takes us to a second problem. The presupposed requisite of state consent to peremptory norms incorporates a crucial bounded character into the international community. A state exists by virtue of its claim of title over a territory. But just that claim takes for granted a territorial boundary. Such a bounded space includes some and excludes others by virtue of the territorial boundary. Much as Immanuel Kant and John Stuart Mill extend the inner freedom of the individual to states, outsiders to the bounding of the state's space may trespass a state's territorial boundary only upon the consent of the state's officials.⁶⁶ A state is free to fail to recognize another state as a member of the international community.⁶⁷ More importantly, by virtue of its freedom, a state is free to decide who may inhabit its territory and who may not.

The exclusion of outsiders to the state's territorial boundary extends to the international community as a whole. The bounded space of a state and the consequential incorporation of such territorial boundaries into the international community raise the prospect that some inhabitants of the globe may remain without protection by norms considered peremptory. Nomadic groups, traditional societies, undocumented migrants, travellers, and unregistered people of the street may indirectly remain unrecognized members of the international community. If states or social groups are left outside the territorial boundary of a state member, how can one say that there are peremptory norms? How can an inter-dependent interest exist without being the product of the particular interests of individual states? Why does the 'common benefit' of different states constitute a community rather than the interests of a temporary amalgam of territorial entities?

The third problem rests in the reification of the express and implied consent *vis-à-vis* the social *ethoi* of the aggregate of state wills. This reification arises because of two phenomena. First, the customary practices are lifted by an act of intellectualization into an intellectual abstraction. It is not just one experienced event but a regularity of such events which constitute the regularity. The regularity is thereby transformed from an experienced event or idiosyncratic practice into an intellectual act about the event in relation to other events. The second phenomenon recognizes such a regularity as a rule. The rule is a concept in a still higher metaphysical level. Here, a concept recognizes the 'observed' regularity of experienced events as a sign. The signified

⁶⁵ In an early draft of the Charter the non-intervention principle was limited to matters 'solely' within the inner freedom of a state. Thus, if a matter such as the withholding or withdrawal of nationality impacted upon other states, the inner freedom of a state was no longer protected as an end in itself. 'Solely', however, was changed to 'essentially', thereby reinforcing the inviolability of the inner freedom of the state even in a context where it impacted upon other juridical persons.

⁶⁶ Kant, 'Perpetual Peace: a Philosophical Sketch', in I. Kant, *Kant's Political Writings* (trans. H. Reiss, 1970), at 93, 96; Mill, 'A Few Words on Non-intervention', in G. Himmelfarb (ed.), *John Stuart Mill: Essays on Politics and Culture* (1963), at 368.

⁶⁷ This has been so when the unrecognized state did not protect peremptory norms. Crawford, *supra* note 1, at 16, 26, 74–89.

regularity as a rule is an intellectualization *about* the regularity of events/practices as if such a rule is synonymous with the regularity, let alone with the generating experienced event.

The international community, as constituted from the express and implied consent of states, is the product of such two-fold acts of intellectualization. These acts of intellectualization risk reifying the community *vis-à-vis* the social-cultural *ethoi* of societies, individuals, groups, and organizations. The international community thereby becomes autonomous of experienced events as well as autonomous of discrete rules and doctrines about the experiences, let alone about their event.

All this reification transpires as if the peremptory norms of the international community are binding by virtue of the consent of states. The concepts become increasingly reified as jurists forget the iterative social experiences which generated the state practices.⁶⁸ Each act of intellectualization validates the next in the name of consent as manifested in state practices. The concepts become dependent upon each other just as state members become dependent upon each other. At some point, the structure of rules is justified in terms of the weightiness of a rule *vis-à-vis* other rules, not in terms of the iterative experienced events. The aggregate of the wills of states gains a structure of concepts, but the structure risks becoming exterior to the generative iterative social experiences which are said to generate the wills of the states. Interestingly, even the appeal to customary norms dissolves into an intellectual abstraction *about* empirically observable regularities of social behaviour. As H.L.A. Hart himself acknowledges with respect to the domestic legal structure of the state member:

[w]e only need the word 'validity', and commonly only use it, to answer questions which arise *within* a system of rules where the status of a rule as a member of the system depends upon its satisfying certain criteria provided by the rule if recognition. No such question can arise as to the validity of the very rule of recognition which provides the criteria; it can neither be valid nor invalid but is simply accepted as appropriate for use in this way.⁶⁹

The concepts (*sc.* rules and principles), not the pre-conceptual iterative social experiences, guide the state's officials.

And so, what began as everyday practices by states and non-states is intellectualized into an abstraction *about* an abstraction in the name of iterative social experiences. This is so despite the claim that both requisites of the implied consent theory, the sense of obligation and state practices, are generated from social behaviour. The transformation of social behaviour into a reified structure of concepts also transpires despite the contemporary acceptance of the transformation as 'democratic'.⁷⁰ The reification is even more apparent if all one does is to aggregate utterances, as documented by state and international officials, rather than to inquire into the actual context-specific practices by state officials.

⁶⁸ However, see Coyle, 'Practices and the Rule of Recognition', 25 *L & Philosophy* (2006) 417, at 492–497.

⁶⁹ H.L.A. Hart, *Concept of Law* (2nd edn, 1994), at 109.

⁷⁰ E.g., see Christiano, 'Democratic Legitimacy and International Institutions', in Besson and Tasioulas, *supra* note 14, at 119, 121–125; Pettit, 'Legitimate International Institutions: a Neo-republican Perspective', in *ibid.*, at 139, 151–152.

One would certainly be hard pressed to describe the consent approach as ‘sociological’ or empirical. The content of the rule on regularities about iterative social experiences is immaterial. As Gerald Postema posits, ‘it is tempting to say that, at least for jurisprudential purposes, it does not matter *what* the reasons for acceptance are, what matters only is *that* it [the custom] is accepted’.⁷¹ The rule about the regularities of social practice is independent of the content of the practices. The actual events of social behaviour of state actors (and of inhabitants inside a state’s territorial control) are forgotten. And what we call a peremptory norm also risks being reified from the *ethoi* of the international community. The community does not exist *for* its members. Peremptory norms thereby become products of acts of intellectualization about other concepts reified from the *ethoi* of an international community.

B The Rational International Community

Let us turn to a second sense of the international community and the relation of peremptory norms thereto. Here, the international community is a rational construct of arguments and the principles derived from the arguments. What generate the identity of the international community’s concepts (*sc.* rules and principles) are the justifications of the concepts. Such justifications appeal to unwritten background or consciously recognized higher-ordered concepts. The legal structure of concepts, albeit forever incomplete, is the consequence. Thomas Franck elaborates this sense of a rational international community.⁷² Arguments and concepts, in Franck’s view, produce a ‘rules community’ or ‘community of principle’.⁷³ Peremptory norms presumably lie at the pinnacle of the hierarchy of norms. Rights and duties, as discrete units of the structure of concepts, are linked to the whole.⁷⁴ In this regard, norms are inter-dependent.⁷⁵ The rational community is ‘open to change from arguments’, as Dworkin puts it.⁷⁶ The whole, though, is a metaphysical whole. More about this in a moment.

The international community, however, is not entirely the product of the justifications of concepts. The expert knowers of the concepts must *believe* that rational justifications will constitute a legal order. Jurists just cannot climb outside this rational community in order to observe whether the rules and principles are practised in the social ethos of the international community.⁷⁷ Each partner in the community *must*

⁷¹ Postema, ‘Custom in International Law as a Normative Practice’, in A. Perreau-Saussine and J.B. Murphy (eds), *The Nature of Customary Law* (2007), at 279–306; Postema, ‘Norms, Reasons and Law’, 51 *Current Legal Problems* (1998) 149, at 155; Postema, ‘The Normative of Law’, in R. Gavison (ed.), *Issues in Contemporary Legal Philosophy* (1986), at 81, 99–104.

⁷² Franck, ‘Legitimacy in the International System’, 82 *AJIL* (1988) 705, at 705; T. Franck, *The Power of Legitimacy among Nations* (1990), at 175, 181–182, 202–203; Tasioulas, ‘In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case’, 16 *OJLS* (1996) 85, at 117–118.

⁷³ Franck, *Legitimacy among Nations*, *supra* note 73, at 202–203.

⁷⁴ Mosler, *supra* note 39, at 1252–1253.

⁷⁵ *Ibid.*, at 1253.

⁷⁶ Dworkin, ‘What Justice Isn’t’, in R. Dworkin, *A Matter of Principle* (1985), at 214, 217, 219.

⁷⁷ See Dworkin, ‘Objectivity and Truth: You Better Believe It’, 25 *Philosophy & Public Affairs* (1996) 87, at 128.

act from a desire or belief rationally to justify conceptions, not from a desire to observe and recognize whether unwritten customs have crystallized into guiding rules.⁷⁸ Inner beliefs do generate why a jurist will justify this over that concept. Indeed, the very pursuit itself is based upon a belief: 'objectivity and truth', Dworkin once wrote, 'you'd better believe it'.⁷⁹ And as Dworkin ends his *Law's Empire*, we have to hope that there will be a consensus based upon arguments about the conceptions that justify our beliefs.⁸⁰

The self-willed author here is not the state but a cadre of interpreters. Their rationally cohesive narrative structure constrains the actions of the state. A self-generating author is constructed as impliedly consenting to the narrative. Without author-interpreters willing and capable of arguing about concepts there would be no international community, according to this theory. *Opinio juris* will especially play an important role in the identity and construction of the international community. The international community is located in an objectivity intellectually constructed by *opinio juris*. And the author is the interpreter of such an objectivity. When Franck focuses upon 'who are the community's members?' he admits that the members are states.⁸¹ Dworkin also takes this for granted.

Now, what is the end-point of the objectivity of the international community, generated as it is from a human subject's belief in such an objectivity? What we call the 'international community as a whole' becomes an ultimate empty or indeterminate form, just as Peter Fitzpatrick points out,⁸² or a heaven of concepts as H.L.A. Hart fears.⁸³ Once again, the international community, as the consequence of a rational construction, is reified from experienced events (except for the generating experience of desiring rational justifications). Franck goes further and explains that acts of intellectualization displace social practices in favour of 'a pyramid of secondary rules at whose apex is an ultimate rule or set of rules of recognition. The ultimate rule defines the community.'⁸⁴ The community is 'a club'. Its members enjoy a special status.⁸⁵ The international community is 'structured' and centrally organized in contrast to 'unstructured, standardless interactions between actors', according to Franck.⁸⁶ Acts of intellectualization are 'our critic not our mirror', Dworkin adds.⁸⁷ All this transpires in the name of the international community which is believed to represent the whole. And yet, the consequence, as with the implied consent approach, is that the peremptory norms risk being reified *vis-à-vis* the ethos of the international community.

⁷⁸ See Dworkin, *Law's Empire* (1986), at 168. Also see Simmons, 'Justification and legitimacy', 109 *Ethics* (1999) 739; Dworkin, *supra* note 77, at 219.

⁷⁹ Dworkin, *supra* note 78, at 87 (emphasis added).

⁸⁰ *Ibid.*, at 407; R. Dworkin, *Justice in Robes* (2006), at 260.

⁸¹ Franck, *Legitimacy Among Nations*, *supra* note 72, at 233.

⁸² Fitzpatrick, *supra* note 53.

⁸³ Hart, 'Jhering's Heaven of Concepts and Modern Analytical Jurisprudence', in H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (1983), at 265.

⁸⁴ Franck, 'Legitimacy', *supra* note 72, at 753.

⁸⁵ Franck, *Legitimacy Among Nations*, *supra* note 72, at 38.

⁸⁶ *Ibid.*, at 196–197.

⁸⁷ Dworkin, *supra* note 76, at 219.

The never-ending trace of justifications of the concepts constituting the international community impacts upon the problematics of peremptory norms in a second manner. The membership of the international community will depend upon whether the state members and their officials take for granted that justificatory arguments count for what are peremptory norms. The consequence is that, as so many 19th-century jurists concluded, societies which lacked a state-centric institutional structure would fail to pass muster as members of the international community. This exclusionary feature of an international community has continued into contemporary international law thought. Franck excludes 'undeveloped' societies from membership of the international community, for example, because such societies depreciate rational argument.⁸⁸ Dworkin insists in his early work that a community must share a genre and narrative with a shared plot, a point, characters, and the like. Only participants who share the desire rationally to justify concepts in terms of a rationally coherent narrative would count as members of the ethos.⁸⁹ More recently, Dworkin himself excludes some of his contemporaries from membership in what he conceives as the genre and narrative about analytical jurisprudence.⁹⁰ Membership of a community requires a reciprocity, Dworkin argues.⁹¹ This reciprocity, though, is a reciprocity of justifications rather than of the recognition of each and all as experiential beings in an ethos.⁹² The inter-relation of abstractions goes hand-in-hand with what Georg Schwarzenberger describes as a 'center of government with overwhelming physical force and courts with compulsory jurisdiction to formulate rules akin to those of public policy on the national level'.⁹³ Only in Dworkin's effort, an 'abstract and ethereal sovereign' – the inter-relation of arguments and principles – is the 'sword, shield and menace' of the legal order.⁹⁴

The very preoccupation of Anglo-American legal reasoning with doctrines and rules, both being the products of acts of intellectualization, once again risks reinforcing the territorial boundary of the members of the international community. Preoccupied with the decomposition (what we call analysis) of concepts, we typify or categorize the experienced world to such a point that social experiences are lifted into an intellectual world reified from the social practices.⁹⁵ Dworkin for his part holds that

⁸⁸ *Ibid.*, at 197–198.

⁸⁹ To be fair, Dworkin naively (I believe) claims that all citizens will be such participants. He certainly would shudder at Postema's suggestion that the participants are 'self-identified': see Postema, 'Normativity of Law', *supra* note 71. That said, there is a universality (or imperial character) about the rational community so that those who do not participate (that is, those who lack a 'sense of integrity') are excluded from the rational community.

⁹⁰ He urges that Critical Legal Studies 'should be rescued' but only if we assume that 'its aims are those of law as integrity, that it works to discover whether, and how far, judges have avenues open for improving law while respecting the virtues of fraternity integrity serves. These are indeed the aims of *at least some members of the movement*': Dworkin, *supra* note 78, at 275.

⁹¹ *Ibid.*, at 199.

⁹² This sense of ethicality is elaborated in Conklin, *supra* note 18, at 167–187.

⁹³ Schwarzenberger, 'International *Jus Cogens*?', 43 *Texas L Rev* (1964–65) 455, at 476. Also see H. Bull, *The Anarchical Society: a Study of Order in World Politics* (1977), at 63–67.

⁹⁴ Dworkin, *supra* note 78, at p. vii.

⁹⁵ Franck, 'Legitimacy in the International System', *supra* note 72, at 751–752, 756–759.

the international community is 'sophisticated' if participants are skilled in the analytical methodology of justifying the rules. A hierarchy of societies with rationally skilled members at the pinnacle is thereby built into our legal consciousness. Once again, the jurist cannot climb outside this international community in order to observe customs or to test 'who is a member of the international community'. The participants possess a rational or cognitive sense of belonging with a rationally constructed community.⁹⁶ The consequence is that the rational community defines itself and, at the same time, claims a universality for itself. Violence risks being the consequence as we impose our categories – perhaps we even call them peremptory norms – over iterative social experiences in the name of a reified 'international community'.

The question is, then, what renders an international community a community? The international community, to be a community, would have to exist independently of the territorial boundaries of its members. Even Dworkin has more recently posited that a different sense of a community from the rational justification one is needed.⁹⁷ The International Court has affirmed that the international community is composed of individuals and even social groups, not just territorial states.⁹⁸ So too, the Human Rights Committee of the ICCPR has presupposed in many of its General Comments that the international community is composed of individual human beings as well as of states. And the International Court suggests in the *Case concerning the Arrest Warrant of 11 April 2000* that 'a true universality principle' must lack 'territorial or nationality linkage'.⁹⁹ Can we identify duties to the 'international community' without understanding a sense and the possibility of an international community which exists as if the territorial boundaries of state members are transparent?

C *The Peremptory Norm and the Ethos of the International Community*

The challenge presented to us is to understand the relation of peremptory norms in a manner in which the international community is independent of the aggregate of the wills of states and yet nested in the *ethoi* of the international community. The implied consent sense of an international community begins with what it takes as the social-cultural world and constructs an international community reified from the ethos with which it allegedly began. The rational basis community begins with a belief presupposed of expert knowers of the ethos only to lop off such an ethos in hopes that the rationally constructed international community will itself become an ethos. Reification problematizes both approaches. If the international community as a whole were constituted from the shared self-interests of each state, then why would a state support a peremptory norm if the norms undermined the identity of a state

⁹⁶ Franck, *Legitimacy Among Nations*, *supra* note 72, at 51–52.

⁹⁷ See Dworkin, 'Thirty Years On', 115 *Harvard L Rev* (2002) 1678, at 1655.

⁹⁸ See, e.g., *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75)*, Advisory Opinion OC-2/82, 1982 Inter-Am. Ct. H.R. (ser. A) No. 2, 67 I.L.R. 559, 22 I.L.M. 33 (24 Sept. 1982).

⁹⁹ *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* [2002] ICJ Rep 3, at paras 31, 45, 46, per Higgins, Kooihmans, and Buergenthal.

as a sovereign entity? If there is some ultimate referent which is analytically prior to and hierarchically above the self-interests of a state, is such a referent a mere empty category which ultimately camouflages the aggregate of particular wills of separate but equal sovereign states? Is it possible that there is a sense of an international community independent of its members and yet nested in its ethos?

The very nature of a peremptory norm, we have seen, is that the norm overrides and, indeed, renders void the wills of states. This leads us to a third sense of the international community. Here, the community is objective in that it exists independently of the consent of states. This is so, though, at the very moment that the community exists for the consent of its members as features of the ethos.

The international legal order exists whether or not a particular state consents to its peremptory norms. The very reliance upon the sources thesis depends upon an international community which recognizes, protects, and guides states with territorial borders. Without peremptory norms which protect a state-centric legal order, some other international legal order would exist.¹⁰⁰ The question of the existence of peremptory norms returns us to the iterative experienced events of the social-cultural ethos of the international community. The content of peremptory norms is directed towards and protects just such social assumptions and expectations. The assumptions and expectations embody the international community. The content-independent analysis of sources and of justificatory arguments, however, has forgotten the importance of the ethos of the international community. Peremptory norms are integral phenomenological conditions for the very existence of the international legal order.

This relation of a peremptory norm and the international legal order returns us to the Speech of the Laws. If a member of the *polis* were allowed to violate a law, the Laws maintain, the very existence of the whole legal order would be challenged (*Crito* 50b). If members of an alleged community are allowed to torture human beings, to enslave inhabitants, turn a blind eye to mass rape and genocide, and expel stateless persons as members of ethnic groups, then can one still maintain that such an entity is a community? Does it presuppose a legal order? The international (and domestic) legal order is analytically prior and anthropologically prior in time to the state's acts. Arthur Watts suggests this analytically prior international legal order when he asserts that international crimes 'offend against *the public order* of the international community'.¹⁰¹ And Alexander Orakhelashvili states that '[t]he very essence of *public order* in every legal system consists in ensuring that public interest is *preserved* in the face of private transactions motivated by individual interests of legal persons'.¹⁰²

¹⁰⁰ For such other international legal orders see A. Bozeman, *Politics and Culture in International History: from the ancient Near East to the opening of the Modern Age* (1994).

¹⁰¹ Watts, 'The Legal Position in International Law of Heads of States, Heads of Government and Foreign Ministers', 247 *RdC* (1995) 82 (emphasis added).

¹⁰² A. Orakhelashvili, *Peremptory Norms in International Law* (2006), at 7–35, 47 (emphasis added). See also Brudner, *supra* note 61, at 249–250; L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (1988), at 4; Zemanek, 'New Trends in the Enforcement of *erga omnes* Obligations', 4 *Max Planck Yrbk UN L* (2000) 1.

Indeed, contravention of peremptory norms would appear to undermine the very existence of a state, even if the state does not consent to the norm and even if the state causing harm to the international community no longer exists as a legal entity. If a state causes grave harm to a peremptory norm, the very possibility of the international legal order is undermined. But with such a dissolution of the international legal order, the state's domestic legal order as a legal order is also undermined. To be sure, state consent and justificatory argument are elements of the ethos of the contemporary international legal order. So too, though, are proscriptions against genocide, torture, slavery, systematic rape, and mass displacements of a populace. My point is that the recognition of a state as a member of the international community is not because the state is self-reliant as the hard sovereignty model presupposes, nor the consequence of the recognition by other states as soft sovereignty presupposes. Rather than being ends in themselves, states exist by virtue of an international legal order. The sense of obligation of state officials and the state practices relate to the very possibility of a (international) legal order. This point can extend to international organizations, non-governmental organizations, and individual human beings. In sum, a peremptory norm exists independently of state members of the international community, and yet for those very members because, without the peremptory norm, there would not be a (domestic or international) legal order of which the states are legal entities.

Returning to the issues with which I introduced this article, a peremptory norm may emerge or even be displaced by another peremptory norm, as suggested in Article 61 of the Vienna Convention, because the ethos of the international community may change through time. So too, an individual right may initially exist outside the structure of peremptory norms and yet, through time, emerge as a peremptory norm.¹⁰³ A social entity may be harmed by a violation of a peremptory norm even though the entity is not a member of the international community. Although a state which has caused harm to peremptory norms no longer exists, all members of the international community owe a duty to protect and enforce the peremptory norm. If peremptory norms are violated when they would otherwise protect stateless persons, all members of the community owe a legal obligation to fulfil or enforce the peremptory norms. A civil or criminal remedy may be forthcoming to a non-state even though a state did not suffer compensatory losses. An individual may be harmed by virtue of harm to the ethos of the international legal order as a whole. Such an individual is a beneficiary of the legal order. Human rights are important because of their relation and the extent of their relation to peremptory norms, although beneficiaries may exist outside the international legal structure. Peremptory norms exist as often unwritten pillars of the ethos of an international legal order – unwritten until the very existence of the legal order is at issue.

The analytically and anthropologically prior international community is not something new to international legal discourse. The rite of passage through an international strait, for example, has been considered to be analogous to a peremptory norm

¹⁰³ See ILC (State Responsibility Report), in Crawford, *supra* note 9, Art. 33, Comm. at para. 3, at 209.

in that the right protects the international community independently of any treaty.¹⁰⁴ In the 1951 Reservations to the Genocide Convention, for example, the International Court explained that the parties to a human rights treaty ‘do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d’être* of the Convention’.¹⁰⁵ In the *South-West African Cases*, Jessup held, dissenting, that ‘[s]tates may have a general interest – cognizable in the International Court – in the maintenance of an international regime adopted for the common benefit of the international society’.¹⁰⁶ The *Barcelona* case, discussed earlier, explained in 1961 that the obligations of a state towards the international community as a whole are ‘the concern of all states’ in contrast with duties owed by one state to another state by virtue of their legal relationship *inter se*. This ‘concern of all states’ leads to ‘outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination’.¹⁰⁷ After *Barcelona*, the International Court has consistently held that peremptory norms exist by virtue of their relation to the international community as an end in itself.¹⁰⁸ Without tracing the idea to Roman law,¹⁰⁹ the US Supreme Court in *Filartiga* explained that ‘the torturer has become – like the pirate and slave trader before him – *hostis humani generis*, an enemy of all humankind’.¹¹⁰ So too, the *Pinochet* case held that the peremptory norm against torture ‘may be punished by any state because offenders are “common enemies of all mankind” and all nations have an equal interest in their apprehension and prosecution’.¹¹¹ The Committee of the ICCPR similarly stated in General Comment 31 that every state possesses ‘a legal interest’ in enforcing the ‘basic rights of the human person’. And Section 702 (Comment O) of the Third Restatement states that duties related to peremptory norms are owed to all states. The Articles on

¹⁰⁴ See generally Davide, ‘*Hostes Humani Generis*: Piracy, Territory and the Concept of Universal Jurisdiction’, in MacDonald, *supra* note 24, at 731–732. But see MacDonald, ‘The International Community as a Legal Community’, in *ibid.*, at 869.

¹⁰⁵ *Genocide Reservations*, *supra* note 30, at 23.

¹⁰⁶ *South West Africa, Second Phase (Ethiopia v. South Africa; Liberia v. South Africa)* [1966] ICJ Rep 373 (dissenting opinion of Judge Jessup).

¹⁰⁷ *Barcelona Traction*, *supra* note 35, at paras 33–34, at 32.

¹⁰⁸ See, e.g., *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)* [1979] ICJ Rep 7, at 19 (Order of 15 Dec.) and Judgment [1980] ICJ Rep 3, at para. 92, at 43. The Court has consistently held that peremptory norms exist by virtue of their relation to the international community as an end in itself. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136, at para. 157, at 199. See also especially *East Timor*, *supra* note 30, at 102, 172, 213–216 (dissenting opinion of Judge Weeramantry); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits [1986] ICJ Rep 14, at para. 190, at 100; *Furundzija (CA)*, *supra* note 17, at paras 151–157, at 260–262. Judge Weeramantry gives an extensive list of international court decisions where there is an incorporation of the *jus cogens* principle: see *East Timor (Portugal v. Australia)* [1995] ICJ Rep 90, at 214. The *Furundzija* judgment provides another list of international decisions in *Furundzija (CA)*, *supra* note 17, at 58, n. 170.

¹⁰⁹ See Conklin, *supra* note 5.

¹¹⁰ *Filartiga*, *supra* note 4.

¹¹¹ *R v. Bartle*, *supra* note 35.

State Responsibility also take for granted that peremptory norms exist by virtue of their support for the international community.¹¹²

Peremptory norms reinforce and guard the ethos of the international community. All inhabitants, as a consequence, have a legal interest in ensuring compliance with the peremptory norm. And individual human beings and non-state actors become members just as are states today. The international community exists other than through the self-interest of shared economic, military, or political matters.¹¹³ Hersch Lauterpacht missed this point.¹¹⁴ The question I pose is whether the international community is the product of territorially bounded entities or is it an entity which possesses legitimacy independently of the wills of states? If international law is constituted from a community defined by a territorial boundary, then it too will act from an arbitrary will *vis-à-vis* social entities exterior to the territorial boundary of state members. How can human rights, alleged to be peremptory norms, be universally shared amongst the inhabitants of such states if the states' arbitrary wills win the day?

The point that bears emphasis is that all inhabitants and states members have an interest in enforcing peremptory norms because of harm caused to the international legal order, a legal order objective to the members and yet nested in the ethos of the community. The International Law Commission hints at such a sense of harm.¹¹⁵ There is something about a peremptory norm which protects the community *independently* of its members and yet exists *for* the protection of its members.

Who, then, are the members of the international community if the community exists independently of the members and yet for the members? The universal character of the international community as a whole, according to the International Law Commission, includes non-state entities such as the United Nations, the International Red Cross, and the European Community.¹¹⁶ It also includes transnational corporations, NGOs, insurgents, minorities, diplomatically and *de jure* stateless individuals and groups, 'peoples', and nationals who lack a minimal legal or economic security of protection. Much as the Laws asserted about Socrates' dependence upon the legal order, so too the ILC has claimed that individual human beings 'should be regarded as the ultimate beneficiaries' of the international legal order.¹¹⁷ The remedying state

¹¹² Crawford, *supra* note 9, Art. 33 and Comm., at para. 4, at 210.

¹¹³ The ILC raises the distinction between the international community on the one hand and the shared will of the aggregate of states on the other in *supra* note 13, at para. 48, cmts. 5, 6. Giorgio Gaja also raises the issue and reads peremptory norms in Gaja, 'Obligations Erga Omnes, International Crimes and Jus Cogens: A Tentative Analysis of Three Related Concepts', in J.H.H. Weiler *et al.* (eds), *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (1989), at 152–154.

¹¹⁴ L. Oppenheim, *International Law: A Treatise* (ed. H. Lauterpacht, 8th edn, 1955), at para. 7, at 11. Also see H. Bull, *The Anarchical Society* (1977), at 13, 53–54, 65–76. The problematics of deriving an international community from mere shared interests is examined in Conklin, *supra* note 18, at 149–153.

¹¹⁵ ILC in Crawford, *supra* note 9, Art 40 and Comm., at 245, at paras 5–6, at 277.

¹¹⁶ *Ibid.*, Art. 33 and Comm., at para. 4, at 41 (citing *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion [1949] ICJ Rep 174).

¹¹⁷ *Ibid.*, at para. 3, at 209. See also *LaGrand (Germany v. United States of America)* [2001] ICJ Rep 465, at para. 99, at 496, as cited in ILC in Crawford, *supra* note 9, 12 at 209.

need not act together or in unison with other states.¹¹⁸ A peremptory norm protects the very possibility of a legal order of the international community as a whole.¹¹⁹

Conclusion

Norms are peremptory by virtue of their relation to some sense of an international community. What feature of such a community binds its members to respect, protect, and be guided by peremptory norms? The association of a peremptory norm with its identity as a discrete norm justified in terms of a source has worked its way into ‘the international community as a whole’ without an appreciation that that community incorporates the territorial boundary which characterizes a state. Such a boundary includes its own members and excludes others. The challenge is to understand the international community in a manner which postulates such territorial boundaries as transparent.

Such a sense of the international community is nested in the social-cultural assumptions of an ethos. Such an ethos is analytically and experientially prior to a state’s consent or a rational justification to approaches to a community. Peremptory norms are situated in just such an ethos. The binding character of a legal norm addresses the relation of such a norm to the ethnos in which it is nested. A peremptory norm is especially important in this regard because a peremptory norm protects the hitherto unwritten assumptions and expectations making for the ethos of a legal order.

One such assumption and expectation permeates contemporary international law discourse: namely, the territorial boundary of the state members of the community. Such a boundary reinforces the idea that the community is an aggregate of the wills of territorial entities. The international community as an aggregate of wills exists for its state members and not independently of such wills. The consequence is an international legal order which directly or indirectly varies with the arbitrary wills of the state members. The territorially bounded wills produce a legal discourse which is reified *vis-à-vis* the social-cultural ethos of the international community.

A focus upon the ethos of the international community addresses why a state or non-state is bound by the legal order of the international community. The quest for the identity of a legal norm in terms of its source is misdirected if the ethos of the international community is at issue. The international community ‘as a whole’ is not just *for* its members but also independent of its members. Such a possibility arises when we understand peremptory norms as immersed in social-cultural *ethoi*. Peremptory norms protect the ethos of an international community. What is crucial to appreciate is that the acts of intellectualization of the jurist reify what we might otherwise take as an international community unless we link such acts to the ethos in which we find ourselves. This ethos is what is reified when officials address a peremptory norm as if it is a discrete and self-standing concept the justification of which rests in one of

¹¹⁸ ILC in Crawford, *supra* note 9, Art. 48 and Comm., at para. 4, at 277.

¹¹⁹ *Ibid.*, at 276. The issue of the ‘legal interest’ of an *erga omnes* norm is addressed in Thirlway, *supra* note 56.

the state-centric sources of the modern international legal order. A legal discourse centred about such a quest for the identity of a discrete norm misses the question whether the norm is binding in a legal order. As H.L.A. Hart once explained in a forgotten passage, a social '*bond* [his emphasis] binding the person obligated ... is *buried* [my emphasis] in the word 'obligation' [t]his figure ... *haunts* [my emphasis] much legal thought'.¹²⁰ A peremptory norm requires that its relation with the very idea of an international community be excavated.

¹²⁰ Hart, *supra* note 69, at 87.