International Legal Theory

PUBLICATION OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW INTEREST GROUP ON THE THEORY OF INTERNATIONAL LAW

Volume II (2) 1996

In Memoriam: Joaquin Tacsan

The international community has lost a great scholar. Many of us have lost a great friend. Joaquin Tacsan, Chair of the ASIL Interest Group on the Theory of International Law, died tragically on November 7, 1996, while traveling between Port Harcourt and Lagos, Nigeria in the Boeing 737 that crashed en route sometime around 5:00 p.m.

Dr. Tacsan had been in Nigeria for a regional workshop as part of an international comparative study sponsored by the Netherlands Institute of Foreign Relations. The study is entitled *Causes of Conflict in the Third World,* and Dr. Tacsan was serving as the Central American Regional Research Director. The study also involved a West African team (headed by Dr. Claude Ake of the CASS Institute who was also killed on the flight) and a South Asian team (headed by Professor Kinglsey de Silva of the ICES in Sri Lanka). The program has held its Central American conference in Costa Rica on December 8-11 in memory of Dr. Tacsan.

The flight to Lagos was the first leg of Dr. Tacsan's journey home after two weeks out of the country. On his way to Nigeria, Dr. Tacsan had stopped first in Germany to participate in the *International Conference of the Conversion of Military Sites and Defense Industries: Challenges and Opportunities* co-sponsored by the UNDDSMS and Rheinland Pfalz Institute. He had then attended the International Institute for Peace General Assembly in Vienna and lectured at a symposium on *New Dimensions of Sustainable Security in the Post-Cold War World.*

Dr. Tacsan held a J.S.D. (1991) degree from the University of California at Berkeley, School of Law (Boalt Hall). He was the recipient of the Bustamante Prize of International Law. In 1993 he was awarded the American Society of International law Certificate of Merit for his outstanding scholarly contributions. Dr. Tacsan served as the Director of the Arias Foundation's Center for Peace and Reconciliation, and was a Lecturer in International Law at the University of Costa Rica. His recent publications include the book "The Dynamics of International Law and Conflict Resolution" published by Martinus Nijhoff, The Netherlands. .

Every fellow member of the ASIL should know that the Interest Group on International Legal Theory and this Newsletter would not have come into existence without Dr. Tacsan's enthusiasm and drive for scholarship. He will be remembered as the Founder and first Chair of the International Legal Theory Section of the American Society of International Law and, most dearly, as a sincere and generous friend.

The Editors

Letter from the Chair

Our fourth edition of International Legal Theory presents a very interesting article by Professor Jonathan Charney and the reactions of members of the ASIL Interest Group on the Theory of International Law. I think that this issue contains a fascinating exchange of ideas, and I encourage those of you who have not participated yet in this process to do so in an upcoming issue.

Our bulletin has received a positive and warm reception in the international legal community, and we hope to continue enjoying the support and enthusiasm of those teaching, working, and studying in the field. But further efforts need to be undertaken to attract scholars from other disciplines who will not only complement but also challenge the

ideas we put forth. The importance of an interdisciplinary approach cannot be stressed enough. One of our main objectives is to enrich the academic quality of our endeavors.

International law and international relations have traditionally taken separate approaches to the detriment of theoretical and scientific progress. Lack of cooperation between these two disciplines produces un_ necessary duplication of ideas and explanations, making scholars in one discipline appear profoundly uneducated in the other. Many absurd situations have emerged from this lack of cooperation. International relations scholars, for example, are increasingly exploring the world of norms. Often they do so without making any significant reference to legal literature. They produce very interesting explanations that lawyers may consider creative ways to "reinvent the wheel", or reinterpret the norms, to be more accurate. Similarly, lawyers continue to take international law for granted, undertaking specialized studies without applying innovative methodological and theoretical frameworks.

In an effort to cross the bridge between international law and international relations, I have invited Professors Ann Florini and Martha Finnemore, two emerging scholars of international relations who are producing some of the most serious work in the normative field, to contribute the leading articles for the next issue. Not yet having received confirmation at this date, as the Chair I am nonetheless committed to convincing these scholars to submit their work and wish to encourage all members of the Interest Group to contact these and other international scholars who could complement the effort we are undertaking. Only through collaborative efforts can we develop a more productive and interdisciplinary approach to international law in general.

Dr. Joaquin Tacsan
Arias Foundation, Costa Rica

International Law-Making in a Community Context

(This paper is based on a presentation made at the symposium on "New Trends in International Law-Making-International Legislation in the Public Interest," Kiel, Germany, 8 March 1996. The completed paper will be published in the proceedings of the symposium. Distribution to the American Society of International Law Interest Group on International Legal Theory is with permission of the organizers of the Symposium.)

I. Introduction

By definition general international law serves the public interest because, if for no other reason, that law is directly created by the international community to serve its own interests. The order, consistency, cooperative aspects and reliability of the system of international law as well as its individual rules and norms exist to serve the public interest as commonly understood. Some rules, however, are particularly closely connected to interests of justice and those of individuals and groups of human beings. As such, they may more directly and more obviously serve the public interest. As such, they may more directly and more obviously serve the public interest. Some of these norms are identified as having special characteristics or labels such as *jus cogens* (peremptory norms) or *erga omnes.* Often pressure exists to create new norms or strengthen old ones by seeking to have them included in special categories of international law norms. Considerable attention has been given to these efforts especially in the areas of human rights, economic development and the environment.

My interest, however, is focused on the process by which new international law norms are formed and enforced. In my opinion, substantial changes have taken place in these areas. Those developments have improved the way international law is created and enforced. These developments also promote more directly the public interest. Some international principles are amorphous or hortatory and often are characterized as "soft law." Nevertheless, they serve a valuable purpose in promoting desirable public interest objectives. But until they enter public international law through the doctrine of sources and provide true operational guidance to states and other subjects of international law, I would not consider them to be part of international law, regardless of their fine goals.

In my opinion, the processes by which public international law is made today has evolved in such a way that there is greater community-wide participation in this process. Consequently, this permits the development of new norms of international law that may better reflect the public interest than heretofore. Such norms may be endowed with a particularly high standing, such as *jus cogens,* and/or may, under the right circumstances, be enforceable by third states *erga omnes.*

One place to begin this analysis is with a brief review of article 38 of the Statute of the International Court of justice (ICJ). This article sets out the doctrine of sources to be used by the ICJ in deciding matters before it in accordance with international law. It is certainly binding on the ICJ. But it has limitations. First, while it has been taken as a codification of the doctrine of sources in public international law, that use is not mandatory. It is only binding of its own force on the ICJ. The international community may move beyond that formula for matters not before the ICJ. Second, article 38 itself is open to interpretation and even evolution. We have witnessed a significant change in the way even the ICJ used this article in the *1969 North Sea Continental Shelf* cases as compared to its actual use in the recent *Nicaragua* case. The *Nicaragua* case approach is also found in other cases that have relied heavily on the 1982 Convention on the Law of the Sea and on the Vienna Convention on the Law of Treaties to find public international law.

In my opinion, this development reflects changes in the international community that required the Court to accommodate its approach to article 38 in order to maintain its relevance to the evolving international legal system. Thus, article 38 is not fixed in concrete and will evolve as the international community changes its understanding of the doctrine of sources. In my opinion, this evolution is more significant in article 38, paragraph 1(b), "international custom, as evidence of a general practice accepted as law" than article 38 paragraph 1(c), "general principles of law …"

In the post World War II period substantial changes occurred that bear on this topic. Rather than a small elite group of dominant western developed states, the international community now comprises nearly 200 states of varying interests, history and power. These changes have led to an increase in the number and importance of intergovernmental organizations and multilateral treaties. Furthermore, the international community of the late twentieth century is increasingly interdependent and faces an expanding need to develop norms to address global concerns, *e.g.,* global environment problems, weapons of mass destruction, international drug trafficking, international terrorism and human rights abuses.

II. The Contemporary International Law-Making Processes

A. Consent

These developments increase the need for norms of international law designed to serve the international community as a whole. Unfortunately, the traditions of the international legal system appear to work against this objective. States are said to be sovereign and, thus, able to determine for themselves what they must or may do. State autonomy continues to serve the international system well in traditional spheres of international relations. The freedom of states to control their own destinies and policies has substantial value. It permits diversity, allowing states to choose their own social priorities. If sovereignty and autonomy prevailed in all areas of international law, however, one could hardly hope to develop a more community oriented law-making process. A review of the traditional doctrine of sources demonstrates, that sovereign state consent is not as salient for all sources of international law as many assume.

Traditionally, consent is required before a state or other international legal person is bound by a treaty obligation; but even here state consent is not alone at the core of international treaty law. Rather than consent, however, the real source of the obligation to abide by one's treaties is the fundamental international law norm of *pacta sunt servanda. Pacta sunt servanda* binds all states in their treaty relations, regardless of whether or not they currently consent to that doctrine. Similarly, the *jus cogens* limitations on the authority of states to undertake treaty obligations also may be fundamental and exist as law, notwithstanding the present or past views of individual state members of the international legal system. While individual states must voluntarily assume their treaty obligations, these obligations are regulated by rules of international law independent of the present views of the contracting state.

Considerable debate exists regarding the nature of international law obligations derived from general principles of law. Theoretically, if all the principal domestic legal systems employ the same rule of law, that rule is a general principle of law. According to one view, this examination identifies rules of natural law. But for this approach to support the consent theory it requires proof that all have consented to every natural law rule within the category of general principles of law. In the absence of that proof, some if not most general principles of law appear to exist as law independent of the expressed wills of states acting domestically or internationally. The International Court tends to treat these norms as axiomatic without showing which states' domestic legal systems, if any, use them and without showing that states have consented to them at the international level.

Traditionally viewed, customary international law is the product of state practice and *opinio juris.* A norm of international law is established if states act in conformity with it and the international community accepts that norm as obligatory under law. Some maintain that individual states must choose to accept the norm as law. But clearly acceptance is required only by the international community and not by every individual state and other international legal

persons. Further more, acquiescence regularly is substituted for acceptance. In international law this acquiescence often is not tantamount to a knowing and voluntary consent, the real meaning of acquiescence. For acquiescence to substitute for actual consent, one must be aware of the subject of the consent and must know that failure to object is acceptance. Thus, acquiescence, if it is truly considered to be the source of a state's legal obligation, must be tantamount to actual consent expressed by non action rather than by action. Most of the time when new international law rules develop, one cannot establish that failure by states to object to the developing norm constitutes true acquiescence to its incorporation into international law.

At the same time, reliance on state practice should be clearly understood. The classical view requires that this state practice be actions in the real world where states directly interact in ways that conform to the norm in question. Repetition of such behavior over time also is said to be necessary. Allegedly, when the state takes such action its real interests provide a prime reason why the action is taken, providing highly credible evidence of that state's support of the normative standard. Unfortunately, such a conclusion is too facile. First, many state actions are taken without fully vetting state interests. Second, the actions upon which state practice is based often have ambiguous implications, such that linking them to a normative rule is an entirely subjective enterprise. This subjectivity undermines the evidentiary value of the practice. Third, each situation of state practice is unique to its circumstance. Thus, it is risky to derive generalized normative conclusions from the state behavior. Only in the rarest of instances, when the state behavior is accompanied by normative statements of the responsible high level government officials, may normative conclusions be drawn. Even then, one cannot be certain that the statements were intended to reflect the normative position of the state, rather than to obtain a tactical advantage in the particular situation. Thus, traditional state practice is hardly as probative as tradition assumes it to be.

Furthermore, when authorities examine the evidence necessary to establish customary law, they consider actions of a limited number of states, often only the largest, most prominent or most interested among them. The awareness and opinions of other states that take no overt position or relevant actions rarely are considered. Rather, when the evidence is gathered, decision-makers presume that the lack of opposition constitutes acquiescence. This presumption masks the reality that many do not know that the law is being made and, thus, have neither formed an opinion nor participated in its formation.

B. Categories of Public Intemational Law

This questionable traditional approach has been further eroded by the changes in the international system over the last fifty years that were stimulated by the United Nations (UN). While customary law still may be created in the traditional manner, in recent years that process has increasingly given way to a more community oriented method. Today, multilateral forums play a central role in creating and shaping contemporary international law. Developments in international law often get their start or substantial support from proposals, reports, resolutions, treaties or protocols debated and refined in such forums. That process draws attention to the norm and helps to shape and crystallize it.

The authoritative nature of the debates at these multilateral intergovernmental forums varies, depending upon many factors. Among the first is how clearly it is communicated to the participants that a norm under consideration reflects a potential development of general international law. Of importance is the support given to the potential new norm, as well as the opposition.

The discussions at such forums are necessarily communicated to all interested states. According to some customary law analysts, the debates and products of those forums may be characterized as state practice or *opinio juris.* Those solutions that are positively received by the international community through other indications of support will be absorbed rapidly into general international law, notwithstanding the technical legal status of their form when they emerge from the multilateral forum. The clearer the norm debated, the clearer the intention to promote a norm of generally applicable international law and the stronger the consensus in favor of the norm, the less will be the need for evidence from outside the forum to establish the norm as law. Similar attention over a period of time by the same or other forums may further strengthen the case for the norm.

This process differs from the traditional understanding of the customary law-making process. It may, thus, be more accurate to call it *general* international law as the International Court has done on numerous occasions. This procedure for generating new international law is a deliberative process that often approximates the largely symbolic legislative processes found in domestic legal systems. Nothing in the foundations of the international legal system bars such an evolution in the international law-making process.

The products of multilateral forums merely advance and formalize the international law-making process. They make possible the rapid and unquestionable entry into force of normative rules if the support expressed in the forum is confirmed. Decisions made at such forums, support for the generally applicable norm, publication of the proposed norm in written form and notice to the international community call for an early response from states. If the response is affirmative (even if tacit) the norm may enter into law. This process avoids some of the mysteries of customary law-making. It also permits broader and more effective participation by all states and other interested groups and allows a tacit consent system to operate legitimately. All members of the international legal community are increasingly aware that the work of multilateral forums contributes to the development of general international law. It reflects an evolution in the role the international community plays in the development of this law.

That process does avoid some of the problems inherent in the state practice *opinio juris* customary law tradition. A clear articulation of the norm under consideration avoids ambiguity and promotes communication to the entire international community, permitting widespread participation and, if necessary, true acquiescence. In that sense, the process more closely approaches the consent based foundations of international law than the traditional rule. The community-centered nature of the law-making process also may make ,universal law creation more likely.

The community-centered nature of the process also may diminish the influence of the most geo-politically powerful states. Some may consider this an advantage. But such a development is not necessarily likely. While decisions at global forums technically reflect a more democratic process, experience shows that variations in the geo-political power of states plays a major role in the decision-making process. Furthermore, objections by an important group of states will necessarily influence a normative development, even if that group is small.

Perhaps the most difficult criticism that might be made with regard to this process is that it relies on a short term consensus that may reflect political realities of the instant but not a systemic commitment that is necessary to create more durable law. A response to this argument is that the process described above requires two elements that may avoid that difficulty. First, the norm would not be created by a single resolution or other action at an international forum. Repetition over time and variations in the contexts in which the norm is articulated are important considerations. Furthermore, by requiring fairly explicit normative statements, the participating states are put on notice that a norm is developing and that foreign offices must take the issue seriously in order to determine whether the norm under consideration is acceptable. They would then take action to support the norm, acquiesce or oppose it. This involves more attention by the state than the traditional amorphous state practice *opinio juris* methods of creating customary international law. It also gives other non-state entities an opportunity to express their views.

Thus, the developing role of intergovernmental forums in the international lawmaking process increasingly provides a reliable indicator of state views that can endow a rule with normative status as law. The increased role of intergovernmental forums in the law-making process is now considered to be a legitimate part of that process, especially due to the greater formality of the process and its democratization. It may help to mark more clearly the line between international legal obligations and merely desirable international public policy. Thus, today the organized international community plays an increasingly salient role in the development of general international law. In that way international legislation in the public interest is promoted.

The existence of community oriented rules of international law is supported by the recognition of different categories of international law. Some norms are considered to be "fundamental" or "constitutional," or belonging to special classes such as *jus cogens* or the common heritage of mankind. These norms are considered to be binding on all members of the international legal community.

Many regard these categories of norms as exceptional because they are found in special classes that are exempt from the assumed usual rule that "persistent objectors" to a norm are not bound. However, once it is acknowledged that there may exist a rule of international law that can be binding on all, even in the face of a timely and active objection, it necessarily follows that the international community has the authority to legislate universal norms, notwithstanding some objections.

The only questions that remain are the circumstances by which such rules of law may be established. When this issue is examined, it becomes clear that there are two determining factors: the strength and intention of the supporting members of the international legal community and the significance of the opposition. The process of creating new law might establish that there is sufficiently strong support to place a particular norm in an exceptional category. Such a classification may give rhetorical strength to the view that none may be exempt from the law in question. Realistically, the international legal community determines for moral, practical or political reasons that a universal rule of law should be established, not with-standing the fact that some object to it or that exemptions from the rule are sought. This result is

especially likely if the subject is grave, the international consensus is strong and the adverse consequences of permitting exemptions are severe. Such a norm might be characterized as *jus cogens* or as required to protect the common heritage of mankind. Regardless of how it is categorized, the determination of the international legal community to establish the new law and to give the norm universal effect will be sufficient to achieve those goals in order to promote important interests.

III. Contemporary Enforcement of International Law

In the absence of a centralized law-enforcement system traditionalists consider enforcement of international law as bilateral. Only states that are palpably injured by a violation of international law by another state have the necessary standing to seek a remedy for the violation. Considerable doctrinal support exists for this approach. In a state-centered legal system, the international community has no stake in violations of international law. Rather, only the state that is injured as a result of the violation has the interest and the right to assert the claim. This state-centered bilateral approach avoids many difficulties inherent in a more liberal system. It limits the controversies that may result from law violations, it grants the remedial right to the state with the greatest stake in the violation and it creates a bright line for identifying the state that possesses the right to a remedy and others that do not. Enforcement by other states risks multiple demands for remedies, confusion and conflict escalation.

Viewed in a more systemic way, enforcement in response to violations of international law are essential to the maintenance of a system of law. If no enforcement were taken in the face of a high violation rate the system of law would be in doubt. Furthermore, enforcement not only discourages a violator from committing additional violations, but it also provides a warning to others that they risk sanctions if they violate international law. This warning effect provides an important motivation for states to abide by their legal obligations. As such, the entire international community has an interest in an effective system for the enforcement of international law against violators.

In some cases the international community interest is not especially salient, particularly when the violation effects the interest of one state only and the violation is minor. On the other hand, situations exist when the interests of the international community are salient. While much relevant history preceded the *dicta* by the ICJ in the *Barcelona Traction* case, its acknowledgment of *erga omnes* rights in international law made clear that the enforcement of international law is not always bilateral. Many commentators have assumed that this dicta describes two categories of international law norms. They are normal rules that are only enforceable bilaterally and those that are owed to the international community as a whole *(erga omnes)* such that they are enforceable by all states.

I do not understand the Court to have intended such a rigid classification system. Rather, the *erga omnes* passage in *Barcelona Traction* focuses more on whether the nature of the violation infringes on important interests of the international community as a whole as opposed to the mere bilateral interests of particular states. The open-ended list of norms that potentially have *erga omnes* implications identified by the Court provides no limiting criteria for their creation or designation. Accordingly, whether a violation of an international rule of law may be enforced only by the particularly injured state as opposed to other states depends as much on the interests for which the norm was created as the factual circumstances surrounding the violation. No criteria exist at a norm's creation to determine for all cases whether it is enforceable *erga omnes* or only bilaterally.

Rather than categorizing norms as *erga omnes* or not, a variety of factors should be considered at the time of the violation. These include situations in which: (1) no directly injured state would have the traditional standing to seek a remedy *(e.g.,* a state's violation of human rights against its own citizens); (2) the directly injured state is incapable of seeking a remedy due to reasons beyond its control *(e.g.,* overwhelming aggression by the violating state); and (3) wide-spread violations of the law that are committed by a powerful state or group of states creating a situation in which either the directly injured state alone is not able to effectuate a remedy or the injury is so widespread that the directly injured states are not readily identifiable *(e.g.,* damage to international common spaces through the release of ozone depleting substances).

The ICJ in *Barcelona Traction* did not explore the issue further in the context of modalities of enforcement. That case examined whether in the absence of enforcement by one state (Canada) another state with some interest in the matter (Belgium) could take up the claim and enforce it against a third state (Spain). Presumably, had the Court found that the alleged duty was owed *erga omnes,* Belgium as the third party would have had standing to bring the claim. However, this is not the only conclusion that may be reached. Indeed, it would also be possible that enforcement in such a situation requires collective actions by the international community as a whole or, instead, subgroups thereof. Certainly, collective actions avoid the risk of multiple claimants creating undesirable conflict and confusion capable of making the resolution of the dispute difficult. Collective actions may, in theory, appear more desirable and, in fact, the UN Charter does

provide for such collective actions in certain circumstances. However, the international system does not always have the appropriate collective enforcement vehicle. Furthermore, those vehicles that are available may be less than efficacious. While exhaustion of collective measures may be encouraged or even be a prerequisite, third state unilateral enforcement in the appropriate case is inevitable in the current international legal system.

One may or may not accept this more contextually-based analyses of third state remedies, preferring a doctrine that categorizes rules a normal international law and those owed *erga omnes.* Nevertheless, if one accepts the concept of third state remedies, one must accept a more fundamental proposition that international law has evolved from a system of overlapping bilateral relations based upon state autonomy to one that is increasingly based on the fundamental proposition that the interests of the international community as a whole are served by international law. The international community has a stake in its effectiveness, including a role in enforcement against violators.

IV. Conclusion

Although some may resist the movement from a strictly state autonomous system to one that contains a significant degree of community law-making and law-enforcing authority~ this development is hard to deny. International law has changed significantly in recent years. While state sovereignty and autonomy continue to provide important foundations for the international legal system, powerful interrelationships and interdependencies of states have driven the international community towards an increasingly cooperative structure for international law. The international legal system now includes substantive norms that go beyond bilateral relations of states, including moral questions and the organization and survival of the international community as a whole. International organizations play important roles as do multilateral treaties. All of these developments reflect a movement away from state autonomy and towards a more community-based structure. This movement necessarily creates a more community-based system of international law and, in doing so, has reshaped the landscape of the international legal system.

While the traditional bilaterally-oriented relations remain, they are complemented by the more community-based contemporary system. That system provides methods by which the community~ as a whole, participates in a quasi-legislative process to develop general international law. The system also promotes the community's interest in the conformity of all to the rule of law. Movement in this community-based direction has accelerated with the proliferation of multilateral forums and agreements, the increased need for the universalization of international law and the desire of all states and other entities to participate fully in the lawmaking process. Third-state enforcement of international law norms is an appropriate extension of these developments.

This evolution, however, should not be over stated. Much international law is developed and enforced in the tradition always; state sovereignty and autonomy remain essential elements of the contemporary international legal system. Whether the system will change radically to one that has even more centralized structures remains an open question. Such a development is not likely in the foreseeable future. Structural changes will take place only when necessary to promote clearly identifiable community interests. Otherwise, the international legal system will remain largely state-based, with a continually developing community-based component.

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Idea of Community In The International Law-Making Process

Idea of International Community

Professor Charney's article 'International Law-Making in a Community Context' begins with the claim that 'By definition international law serves the public interest because... that law is directly created by the international community to serve its own interests.' While such a development is most welcomed in the creation and advancement of international law, Professor Charney's approach is problematic due to some fundamental issues of the work concerning the idea of international community. This comment will focus on Professor Charney's (mis)use of the term "international community" and the effects it has on the international law-making process.

To say that international law serves the public interest is to suggest that international law has a much wider scope then just being a law among sovereign states. To follow that by saying the international law is created by the

international community again suggests that the situation we are dealing with goes beyond the purview of a strictly state controlled system. Professor Charney's article suggests that in the international arena, which is intended to convey the sense of all actors and processes upon which international law finds itself connected in various forms, we have moved from a state-based process of international law creation to one more community orientated. His idea of a greater community-based international law arises from the existence of nearly two hundred diverse states. This would mean that the community aspect of the development of international law is primarily dependent upon the actions of states. Is this international community or merely a change in the character of the community of states?

To speak of an international community aspect in the international law-making process in a true sense, one would have to speak of a situation in the international arena which includes states, inter-governmental organizations, and non-state actors, such as social movements, individuals, non-governmental organizations, and transnational corporations. In short, any entity whose actions and interests transcend given state boundaries. The idea of states being the sole actors within the international arena is outdated due to the ambiguity created by the numerous and various relations which go beyond the control and competence of the state, something which is clearly expressed by Professor Charney. The question arises though, has the erosion of a state-dominated international arena through greater interdependency and the activities of non-state actors which have had an impact on the international law making process, resulted in the existence of an international law based on a community context?

The term "international community" 's widely, and often loosely, used by the media, academics, and practitioners, but unfortunately, a definition of what is meant by international community is rarely given and in the legal world little effort gone into examining what the existence of an international community would entail. Many may say that it is merely just a choice of words and that the idea is understood and accepted by all or most in a similar fashion. However, this is problematic since different conceptions and ideas will exist as to what gives a community context to the international arena. A legal definition of 'international community' would be difficult to establish, but it is necessary to at least elaborate upon the idea so that some understanding may be developed. Problems arise, of course in any attempt at creating or securing a definitive definition. Interpretations through time and among conflicting views will always differ substantially, and arguments over the structure and content of a definition are surely inevitable. The literature of international law, as well as the law itself, would benefit greatly if rudimentary terms such as international community were given some sort of specific content. Any disagreement, which is destined to occur, should not prevent establishing a definition, but instead should be welcomed as a way to alleviate differences.

The idea of community, through its basic definition, would entail individuals and groupings of individuals living together and considered as a whole. Community~ more importantly suggests the idea of common interests, or some forum of fellowship or cooperation, something often distinctly lacking in the international arena. Also when it comes to the law-making process in the international arena, states remain the dominant players as is evident in Professor Charney's study. It appears difficult then to speak of a community-based structure in the development of international law, when the development of the law is dependent upon states and takes place mainly in international forums created by states. We have yet to reach the point where international law is created by the international community to serve its own 'interests.' It is still very much a law-creating process dominated by states and most often dictated by their own political and economic interests. A community aspect of the international law-making process would have to entail more then just diverse states meeting in larger forums. A greater amount of activity by non-state actors, from universally-mandated non- governmental organizations to individuals, will have to become a legitimate part of the process. This would ensure a greater cross-section of the international community, and not just states, are able to have their needs and desires addressed by the international lawmaking process.

The evidence that Professor Charney provides in supporting the existence of a greater sense of community in the law-creating process is the increase in number and importance of intergovernmental organizations and multilateral treaties, along with increased interdependency and greater efforts given to what could be called 'global concerns.' These examples do allow for a claim that increasingly non-state actors have been able to participate in the international law making process, it still does not allow for the label of community to be placed on the final product. While these examples are further proof that the dominance of the state is waning in the international arena, they do not necessarily provide evidence of an international community able to create an international law which addresses, or at least attempts to address the needs and desires of the greater public interests. Evidence of an international law more in line with the public interest would come with a law that is formulated based on the needs and desires of individuals and sub-state groups. At present international law is based on the strategic, political, and economic interests of states. The interests of the individuals and groups which make up these states are not adequately addressed, or even seen as a possible contributing factor.

While the evidence which Professor Charney uses to support his ideas have helped to create increased protection for human rights and the environment, along with greater concern for social issues and development, all of this progress has been controlled and determined by states, not necessarily the international community. Much of the progress which has been made in these and other areas began with some sort of community concern or impetus, but in the end, the actual creation and development of international law in these areas is solely dependent upon the actions of states. The law which has been created in these areas shows that the interests of states, not the international community, are primary.

One only needs to examine the body of human rights law for such an illustration. There exists a great number treaties establishing rights for the individual or for specific sub-state groups but few if any of these treaties provide rights truly accessible for individuals or groups and there is no proper form of recourse in cases of violations, making the rights elaborated merely hortatory and singularly useless to the aggrieved individual or group. For the most part, international human rights instruments deal mostly with the actions of states and not with the needs and concerns of individuals. Throughout the development of human rights in public international law, states have been able to maintain their dominance over the law-creating process and have ensured that their interests over human interests still prevail.

International Community: Order or Anarchy?

One may argue that the idea of an international community alluded to above, would be completely unworkable since there would be too many actors and too much confusion. This claim lies in the idea that there is the need for order and the ability to conduct business in the international arena, so therefore states provide the best vehicle to act out the public interest and that the diversity of individual states will lead to a greater sense of community in the development of international law. This point is valid in that there is the need for representation at all levels to prevent confusion and chaos. If the international law-making process was a wide open game, it is most likely that little progress would be made.

Regardless of that, care must still be taken in declaring community or public interest when really we are speaking of state interest or a more diversified collection of state interests. The increase in the number of states and their influence does not logically entail a greater sense of community in the law-making process. The majority of states in the world do not possess representative forms of government. This means that those who represent governments, and who are the primary determinants of international law are acting mainly in the interests of the leaders and governments that they represent, not the individuals and groups within their respective states. The same even holds true to a certain extent for democratic countries. The behaviour of a state at the international level is considered by international law as a domain strictly under the control of the head of state or proper representatives. (James Crawford. *Democracy in International Law. 8,* 1993.) Such a condition leads to a misleading understanding of the needs of the international community. If we could be ensured that states properly represent the populations within their boundaries, and that this representation is legitimate and accountable to those populations then we would perhaps be closer to the idea of community in the international law-making process.

Professor Charney claims that 'All members of the international community are aware that the work of multilateral forums contributes to the development of general international law.' If we see the international community as a community of states, along with organizations and agreements created by states, then this statement would hold true. However if we see the international community as consisting of a multitude of state and non-state actors and that the creation of international law depends upon all who are affected by a particular issue, then such a sweeping statement would be a misrepresentation of reality. The multilateral forums which provide Professor Charney's view of international law in a community context do not include those who are most affected by the issues involved. They primarily consist of states who naturally will put the interest of the government or ruling elite first in creating solutions. The recent Vienna Conference on Human Rights and Beijing Women's Conference exemplify of this situation. At Vienna, no government or other group was allowed to speak out publicly against the actions of another regime. At Beijing, every effort was made to ensure that non-governmental organizations and others had no effective access to the government delegations. Even in multilateral forums which appear to be open to all interested parties, states are insulated and only their efforts are considered legitimate.

Conclusions

Prof. Charney's ideas do provide some hope that the state-dependant international law-making process is evolving towards one which considers the needs and desires of those it affects. Staying within the dominant and persistent state structure of the international arena is not going to allow for the development of community interests. We still have not reached the point where in the development of international law 'international legislation in the public interest is promoted.'

The idea of moving international law from its direct relation with state interest and behaviour to a more community-orientated approach which depends upon states, as well as other international actors is a favourable development. To do this it is necessary to do more than just cast the state system and its control over international law in a different terminology and declare that change is occurring. The current international arena could best be described as an international system, with many various actors interacting in various forums and ways. It is no longer a forum exclusively restricted to states. As Prof. Charney points out, the most noticeable addition is intergovernmental organizations and other multilateral forums. The development of these multilateral institutions does not automatically give us a community.

The process that Prof. Charney speaks of cannot be seen as a new community-influenced process of creating international law. It is a process which entails a greater part of the community of states in the international arena which will give the nature of international law a new look. The creation of a community based law as described in his work does not necessarily entail any consideration of the public interests or the needs and desires of individuals and groups since state interest is still the prevailing factor in determining the existence of law. For any multilateral forum to be taken seriously by states and to be considered able to produce the necessary framework for new international law, that forum must come from the initiative of states, that is the only way they will see it as legitimate. Multilateral forums of the UN are indicative of this. They often help in the production of new international law based upon what could be termed 'community concerns'. However, these forums and the contribution they make to international law are strictly based on the will of states. A multilateral forum consisting of individuals, social movements, and non-governmental organizations, will not have the same sort of influence as an intergovernmental forum, but it is the latter which is most likely to advance the public interest. The structure of the international arena has been described as individual states locked in a competitive pursuit of their own interests and security, with no systematic means of pursuing the accountability and regulation of power economic and political forces which are responsible for the ordering of national and international affairs.(David Held. *Democracy and the Global Order. 82)* It is undeniable, as Prof. Charney recognizes, that the classical system of international law creation, based upon the above structure and wholly dependent on the will and actions of states, has evolved into a more encompassing process. Has the process, though, evolved enough so that we can truly speak of community ideas, values and efforts? The present condition of international law makes such a conclusion unlikely.

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International Law-Making in a Community Context: Not a True Reflection of the Community Interest.

By nature or design, international law is a social contract between the nation-states. Like any social contract, the parties have ceded some of their autonomy in favor of a general will, which in this case, is the will of the international community. However, because international law is supposed to be a contract between its members, it is important that the actual parties to the contract have participated in its construction. If the social contract does not represent the general will of the community, then it lacks legitimacy and obligatory force. Therein lies the problem with international law: it does not accurately reflect the international community's interests.

Jonathan Charney argues that contemporary international law will better reflect the community interests because the law is created in a community context. These communitygenerated international norms are a more legitimate source of international law-acquiring the characteristics and force of *erga omnes* norms. Theoretically, the community context described by Charney is the ideal forum for the creation of international norms. After all, the participation of a state in the development of international law translates into that state's obligation to comply with the law or norm. Unfortunately, on the practical level, the community processes do not effectively cure international norms of bias or create norms more reflective of the inter--national public interest. The "elite group" of western developed states continue to play a dominant and influential role in the creation of international law, despite the participation of other states in the creation of international law through community processes. Charney also encourages third-state enforcement of international law as an "appropriate extension" of international law developments. This method of enforcement only weakens the legitimacy of international law, because it enables the enforcement of dominant state interests in the international community. Each of these two aspects will be addressed separately**.**

I. International Law-Making in a Community Context Does Not Cure International Law of Bias

Jonathan Charney criticizes the traditional approach to international law-making as being subjective because it only takes into account certain state practices. The norms formed by this approach emerge more or less by quasi-acquiescence on the part of many states. Charney believes that states do not truly acquiesce because they are neither aware that an international norm is being formed nor do they realize that by not objecting, they accept this norm. Therefore the international norm is not formed by consent, but formed passively, and only represents the interests of the active states.

The community context supposedly remedies this passive approach to international law-making because states participate in the negotiation and development of norms when making international agreements. Obviously the participation of many states in the creation of a norm is better than a few. However, an international norm truly representative of the general interest can only result when all the members of the community have equal bargaining power. In the multilateral forums, there are Significant discrepancies between states in terms of the leverage they can exert at a bargaining table. The interdependent global economy definitely increases the bargaining power of each state; however, the existence of "developed" and "developing" states evidences the disadvantage some states have vis-a-vis others.

The state in the international legal system is analogous to the individual within a national democratic system. On the national level, granting each person a voice in the legislative processes does not guarantee that each voice is heard. Similarly, when states make agreements in the form of multilateral treaties or within intergovernmental organizations, the presence of less powerful states during the negotiations does not signify that the final product properly addresses their concerns. It is possible that these bow their interests to those of stronger states because they lacked significant bargaining power. In cases such as these, the resulting agreement is not truly representative of a community interest, and serves to promote dominant state interests.

Even assuming that individual states do not sacrifice their interests when drawing up the agreement or treaty, the final written product itself is not necessarily an accurate representation of accepted international norms. Often, in order for nation-states to come to an agreement, the treaty requirements are couched in very broad terms, leaving significant latitude for individual state interpretation. Should a dispute on treaty interpretation arise and be sent to an international judicial body, such as the International Court of Justice, adoption of this authoritative interpretation of the treaty depends ultimately on the whim of individual states. Thus the actual norm which emerges from the treaty can still be a biased one.

In addition, though a state participates in treaty negotiations, whether that state actually implements it or signs it is another matter. Insofar as signing represents acceptance, refusing to ratify the convention certainly signifies rejection of the norms embodied within the treaty or agreement. The United States, for example, still has not ratified the United Nations Convention on the Law of the Sea, although it was one of the states which initiated its creation. Many treaties suffer similar fates: they are negotiated, but then later not signed by countries who do not want to incur the obligation of implementing an international law which would require them to alter current national practices.

Even when a state signs a treaty, it may exercise its right to make a reservation to the treaty. Often the reservation or reservations dilute or even remove the legal impact that the treaty or international agreement would have on their national practices. In cases such as these, their signatures become little more than lip service to a norm which they have no desire to actually enforce. The fact that states make such reservations are another indication that a multilateral treaty is not necessarily representative of the "international interest." If many states make reservations to a particular provision of the treaty, the actual normative force of the treaty provision is considerably questioned.

The less-than-ideal community contexts in international law-making do not imply that multilateral agreements have no normative force, or that states take their commitments to these agreements lightly The principle of *pacta sunt servanda* remains a fundamental cornerstone of international law. However, current community practice's do not necessarily improve upon the traditional state-oriented approach by ensuring the creation of more "objective" international norms. All states are not created "equal-" that is, states may have the same rights, but they differ from each other in terms of economic or military power which would enable them to maintain a position at a bargaining table. The inequalities between states permit the assertion of certain state viewpoints over others within multi-governmental forums. Therefore, whether current treaties qualify as being more representative of an international will is questionable.

II. Third State Enforcement Weakens the Legitimacy of International Law

The inequalities between states also complicate the enforcement of international law. The international legal system distinguishes itself from other legal systems because there is no centralized enforcement body. Might may not

make right, but enforcement of international law is important to its continuity and effectiveness and prevents international agreements and treaties from becoming mere rhetoric.

Effective enforcement of international law requires the acceptance by states and other members of the international community that it is an international, and not a national, interest which is being protected. Charney argues that the norms created within an international community context embody the public interest. Therefore, violation of these norms are also violations of a community interest which justifies enforcement by a third state.

Third-State enforcement would replace the current system of bilateral enforcement, where only the injured state could respond to a violation of international law. Bilateral enforcement was premised on state sovereignty and the principle of non-interference in internal affairs. Again, theoretically third state enforcement is acceptable within human society. Even though physical aggression between individuals in society is not condoned, a bystander would certainly have the right to physically stop a thief from robbing a storekeeper. Stealing is recognized as a violation of social norms, and therefore each individual has a right to try and prevent it, even without government authorization. Similarly, if a universal international norm is being violated, then a third state would have the right to intervene and uphold a community interest, even though it is not the state which is injured from the violation.

However, in the international community, third state enforcement poses several risks. The international legal system does not have the "checks" which a national system does. On the national level, state governments act assurances that in cases where a third party citizen intervenes, the intervention is not disproportionate to the crime. Also, state government, acts a uniform enforcer of social norms; that is, the punishment of a violator of a social norm is not dependent upon the ability of individual citizens.

Assuming that the norms created within the international community context are representative of recognized international interests, relying on third-state enforcement actually detracts from the legitimacy of international law. Permitting third-states to enforce international law creates a situation where enforcement is random and inconsistent in response. A third state can only realistically be expected to respond to an international violation when it has a vested interest in the outcome. And the effectiveness of that state's response depends on the priority it places on the interest. Therefore, violations of international law will only be enforced if the violation coincides with a powerful state's interest.

In fact, during the past decade or so, international law has been enforced by third-states. For example, human rights violations are recognized as violation of *erga omnes* norms which permit other states to intervene. Even though third-state enforcement is accepted within the international community, it is criticized for the reasons expressed above. For example, the United States mobilized forces under the auspices of the United Nations to respond to Iraq's invasion of Kuwait and its treatment of the Kurds. Iraq's actions were denounced within the international community as violations of international law, and therefore merited response by third-states. However, violations of international human rights which occur in Israel or Bosnia have not been met with the same swift or effective retaliation. This uneven enforcement of international law links the value of an international norm to the interest of a third party state and makes it difficult for the international community to determine whether an international norm is being enforced or a state interest.

Moreover, only a minority of states actually have the military or economic capability to respond effectively to a recognized violation of international law. Therefore, enforcement of international law will primarily be carried out by the same states, raising the question about the value of the norms which are enforced. The fact that some states are significantly more powerful than others means that if the stronger states violate international law, which states would be able to sanction them?

Third-state enforcement may be an extension of current developments as Charney describes; however in practice, it can only detract from the legitimacy of international law. This type of enforcement may be the only method available to the international community to give teeth to international law, but to be effective, there must be a balance against those states who will be enforcing the laws. Otherwise third-state enforcements becomes little more than the assertion of some state interests over others--the exact situation that the international community is striving to avoid.

Conclusion

While international law-making in a community context is desirable because it mimics democratic legislative processes, it also magnifies the inherent difficulties within a pluralistic system created by unequal bargaining power between the individual members themselves. Democratic governments on the national level certainly experience problems in balancing out the competing interests, for instance those of big business and individual citizens. There are however, certain checks within national systems which give weaker interests a little more leverage, such as the judicial

system, the constitutional rights, and a centralized enforcement body. The international community offers none of these. Absent an international institution or mechanism to balance out the power between the states and other international legal subjects, international law-making within a community context may only represent the interests of a few members of the community.

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The Sources of Intemational Law

What are the sources of international law? The earliest modern advocate of the law of nations, Hugo Grotius, saw the ultimate source of law in humanity's natural need for social order, discovered and constructed by human intelligence (Hugo Grotius, *De Jure Belli ac Pacis Libri Tres (1625)* at Prolegomena *8).* Grotius observed that justice is approved, and injustice condemned, by good men everywhere (Prolegomena, 20). So he sought evidence of the law of nations in unbroken custom and the views of skilled and reflective authors throughout the ages (Grotius, I.xiv.2). just as municipal law arises from the mutual consent of individuals seeking the good of their community~ so for Grotius international law derived from the implicit consent of states, seeking the good of the international community as a whole (Prolegomena, 17*).*

Emmerich de Vattel also believed in national duties to the universal society of the human race (Emmerich de Vattel, *Droit des gens (1758)* at Preliminaries § 11). In the treatise that did most to promulgate the modern law of nations, Vattel sought to clarify the proper role of consent. States may create and alter some of their duties by treaty or custom, but other laws remain immutable components of the necessary law of nations. Treaties or custom contrary to these provisions are unlawful and void (Vattel, Preliminaries § 26). Vattel identified the law of nations with the law of nature, applied to nations (Preliminaries § 6*).* The greatest difficulty for international lawyers lies in discovering its content, which is why Vattel concluded that in making demands on other states, nations should restrict themselves to areas of general agreement (Preliminaries § 28 & III.xii.§§ 188-189).

The Statute of the International Court of justice reflects this same tension between immutable justice and its discovery by fallible human agents. Article 38 of the Court's statute recognizes four authorities to be applied in deciding cases according to international law: international conventions; international custom; the general principles of law recognized by civilized nations; and the teachings of the most highly qualified judges and publicists. Centuries of practice had not substantially altered the insights with which modem international law began three hundred years before.

The International Community

Both Grotius and Vattel spoke of creating and preserving the "international community" as a central purpose of international law. Christian Wolf, Vattel's main source, went further in identifying a preexisting world republic or "civitas maxima" as the source of the law of nations (C. Wolff, *Jus Gentium methodo scientifica pertractatum (1749)).* Some contemporary lawyers, such as Jonathan Chamey, see the public interest of this "international community" as- the central source of international law, without specifying too carefully who makes up the international "community" or why its interests should be paramount. Traditional doctrine, going back to Grotius, described international law as regulating a community of states, just as municipal law regulates the separate national communities of citizens.

Vattel made the best argument for this conception of international law: "Since men are naturally equal, and a perfect equality prevails in their rights and obligations, as equally proceeding from nature, -- nations composed of men, and considered as so many free persons living together in the state of nature, are naturally equal, and inherit from nature the same obligations and rights." (Vattel, Preliminaries § 18*).* It is an evident consequence of this liberty and independence of nations, that "all have the right to be governed as they think proper, and no state has the smallest right to interfere in the government of another" (Vattel at II.iv.§ *54).* The traditional conception of the international community is of a community of states, regulating their external affairs in pursuit of justice and the common good of the nations and peoples that they represent.

More recently, a "realist" camp has arisen among some lawyers, which sees international law as a *modus vivendi* between competing sovereigns, serving their mutual interests without regard to justice or the needs of their people. This view adopts Vattel's concept of a community of states, and sees each state's consent as the sole source of "law" regarding its own international obligations. John Austin's legal positivism lent this attitude a certain respectability, by

deriving all law from the will of "sovereigns," identified as the governments of individual states. This differs from traditional doctrine in emphasizing the will of states as sources of law, rather than their shared perceptions of justice or truth. But both approaches agree in recognizing the importance of states in determining the content of international law.

International Conventions

The emphasis on conventions in the Statute of the International Court of Justice, "establishing rules expressly recognized by the contesting states," follows naturally from Vattel's view of states as free and independent representatives of the peoples of the world. Treaties are the clearest possible expression of international consensus, and contract is one of the most basic components of universal natural justice. This is why so many since Grotius have endorsed his basic principle that "pacta sunt servanda" (Grotius, Prolegomena 15). If states speak for peoples then (a) their shared perceptions are likely to be true, and (b) their commitments should bind them.

To speak of treaties as binding would tend to vitiate the realist view of law as deriving from the will or consent of states. Treaties bind, under the usual doctrine, whether or not states still endorse their original agreements. There is an obvious utility in being able to rely on mutual commitments, which usually out-weighs the harm caused by respecting ill-considered or unjust agreements. As with contracts between individuals, fundamental changes in circumstances diminish the obligation of the original pact. Even brigands can accept these fundamental principles, which serve a basic human interest in planning and coordination.

There will be limits, however, to the power of treaties as sources of law if one looks beyond the pretense that states are free and equal representatives of free and equal citizens. Most states are not. Unequal treaties imposed by force do not reflect the views of the weaker party. Unjust treaties entered into by undemocratic governments do not speak for the peoples they purport to represent. There may be prudential reasons for maintaining such treaties after power changes hands, but the ultimate source of "law" is not present to make such conventions genuinely binding.

International Custom

Hugo Grotius (I.xiv.2) quoted Dio Chrysostom (Orations, lxxvi) for the proposition that time and custom create the law of nations. The reference in the I.C.J. Statute to international custom "as evidence of general practice accepted as law" reflects this very old observation that custom reveals a natural law proceeding from universal human characteristics (Grotius, Prolegomena 12). Vattel added that it may also reflect tacit consent, or a tacit convention between states that observe certain practices towards each other (Vattel, Preliminaries § 25). Vattel considered this sort of customary international law useful and obligatory if reasonable, but not obligatory otherwise, since nothing can oblige or authorize a state to violate the natural law of nations (Vattel, Preliminaries § 26).

Custom expresses the natural law of the community of nations because consensus naturally builds around rules made salient by the intrinsic characteristics of human nature. Where several solutions could equally provide a viable rule, custom properly determines which rule will govern future conflicts. Here again custom does not express so much the will of nations as their mutual recognition of external and preexisting norms. Custom is very good evidence of "natural law, applied to nations."

Custom need not be universal to bind states, including dissenters, when it arises from preexisting truths (the law of nature). Custom created by states to facilitate their social and mercantile interests derives their validity from consent (Grotius, Prolegomena 40), and only bind those who benefit from the practice involved. So while it is true in a sense to say that customs, like conventions, are generally created by the international community to serve erve its own interests, the interest involved is the maintenance of social order (Grotius, Prolegomena 8) and the advantage, not of particular states, but of the whole society of states throughout the world (Grotius, Prolegomena 17).

General Principles of Law

The general principles of law recognized by civilized nations take on a special significance for scholars ~vho want to minimize the role of states in international law. This is because they arise among "nations" (not "states") and only "civilized" nations have standing to create them. In the Statute of the International Court of justice, these "principles" would seem to be legal maxims accepted widely in the practices of more developed legal systems. To these some would now add "proposals, reports, resolutions, treaties or protocols" debated and refined in modern multilateral forums such as the United Nations (Chamey ILB).

If all interested states participate in a discussion of some area of law and reach consensus, or even substantial agreement, the standards thus generated would seem more likely correctly to reflect the social norms and justice that justify and create the law of nations than would most conventions or customs among states. The more open and self-conscious the process, the more valid the norm. Sometimes a short-term consensus will be able to generate norms that would be very difficult to achieve through gradual evolution, given the corruption and shifting self-interest of states.

This quasi-legislative process of creating general international law requires justification. Conventions and customs provide good evidence of international law because they reflect the consent and perceptions of states, which rest in turn on the consent and perceptions of their citizens and nationals. General principles of municipal law derive their validity in much the same way. Multilateral forums purporting to speak for the "international community" must offer a some such theory to justify their claim of authority. Direct democratic participation through representatives who speak for the common good offers the most compelling claim to moral accuracy and legal recognition. The smaller the democratic input, the lower the validity of the norm.

Teachings of the Publicists

Judicial decisions and the teachings of the most highly qualified publicists of various nations might seem to fail this democratic test, even as a subsidiary means of determining the rules of international law. Their persistent importance, going back to Grotius, Wolf, Pufendorf, Bynkershoek, Wheaton and the Statute of the International Court of justice, among many other examples, reflects the weakness, incoherence, corruption and democratic illegitimacy of most states during most of the world's history. If international custom, conventions and the deliberations of multilateral bodies derive their validity from the consent or perceptions of the peoples represented, then the participation of usurping governments and egregious tyrants in creating such standards will undermine their legitimacy. This creates the void that publicists have stepped forward to fill.

What judges and publicists offer in determining the content of international law is impartiality. Without a personal stake in the outcome of international conflicts, such figures may be franker and more objective in working out the obligations that arise from the community of states, or universal human society. Their influence depends less on democratic legitimacy than on the ability to state clearly truths that, once uttered, cannot be easily suppressed. Judges and academics who owe their positions to the patronage or sufferance of government officials will not speak or write impartially, and deserve little deference in determining the rules of international law.

It is doctrinaire nonsense to imagine that a strict system of autonomous states ever governed the creation of international law, and well-intentioned nonsense to suppose that the sources of international law have changed much in recent years. What may have changed is the efficacy of international law, and the frequency with which such sources are consulted. Claiming authority for international law has always involved assertions of truth and justice. The role of publicists may have decreased in recent years, and multilateral forums proliferated, but the sources of their authority continue as before to be the truth of their doctrines and the democratic legitimacy of those who articulate them.

Jus Cogens

The Vienna Convention on the Law of Treaties recognizes the long asserted principle of international law that (Art. 53): "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law." For the purposes of the Convention, a peremptory norm of general international law ("*jus cogens") is* a "norm accepted and recognized by the international community of states as a whole as anorm from which no derogation is permitted." This corresponds to Vattel's category of laws that no nation may create or recognize, because they violate the laws of nature (Preliminaries § 26).

The concept of *jus cogens* denies the possibility that international law derives in any significant sense from the simple will or consent of states. As described in the treaty, however, *jus cogens* creates a new category of fundamental norms "accepted by the international community of states as a whole." This "international community" transcends individual states, and may encourage the development of multilateral forums to recognize and articulate inchoate standards of international law.

Difficulties arise in seeking to distinguish *jus cogens* from other less fundamental rules of international law, which states may restrict by agreement. The examples usually offered include prohibitions on genocide, racial discrimination, slavery, piracy, crimes against humanity, and the use of force (Ian Brownlie, *The Principles of Public International Law* (4th ed. 1990) p. 513). All concern protecting individual rights against state malfeasance, with special emphasis on

protecting personal security and bodily integrity against serious violations. Most proposed elements of *jus cogens* protect what Vattel referred to as the "universal society of the human race" (Preliminaries § 11).

Erga Omnes

The "universal society of the human race" may sometimes find itself at odds with the "community of states," as is made most clear by the doctrine of *erga omnes,* advanced by theInternational Court of Justice in the Barcelona Traction Light & Power Co. Case (1970). In Barcelona Traction, the court suggested that states owe certain obligations to the "international community" as a whole. These obligations are *"erga omnes,"* according to the Court, and all states have a legal interest in their protection. *Erga omnes* obligations include acts of aggression, genocide, and violations of the basic rights of the human person, such as slavery or racial discrimination. States violating these norms offend the "international community," rather than the "community of states"

Human rights have played this overarching role in international law at least since the days of that first great promoter of state sovereignty, Jean Bodin, who admitted that rulers should be replaced by outside intervention when they cease to serve the common good of the people (Jean Bodin, Six *livres de la republique* 11.5.609 (1576)). Vattel considered it an act of "justice and generosity" for William of Orange to protect the English against James II (Vattel, II.iv.56). However much princes and the "community of states" may benefit from noninterference, international law has always recognized an obligation of the "international community" to liberate oppressed peoples from those that abuse them. The principles of self-determination and colonial liberation reflect this basic truth.

Attempts to confine international disputes into a purely bilateral framework ignore the principles that gave rise to international law in the first place. Certain obligations are *erga omnes* because they regard the very existence or basic justice of the international community as a whole. This is not strictly speaking a community of states, but rather a community of humanity acting through states to develop societies and protect their common good and basic freedoms. When norms are created to serve the international community, it makes sense that community as a whole should retain the right to enforce them.

Conclusion

The primary source of international law has always been the law of nature, applied to nations. Conventions, custom, legal principles and the opinions of publicists all seek if to articulate this preexisting truth, or its corollaries made salient by historical circumstances. The recent turn to multilateral action through the International Law Commission and other United Nations agencies creates a new vehicle for systematizing this sort of deliberation. This is no departure, but rather a confirmation of the traditional sources of international law.

Recent scholarship by authors such as Jonathan Charney has identified some confusion in the concept of an "international community." Is it a community of persons or of states? The doctrines of jus *cogens* and *erga omnes* also straddle this delicate issue. But to justify international law its proponents have always assumed an underlying community of humanity. Grotius and Vattel supposed that the world's peoples would act through states. But states are means towards the realization of a just society, not ends in themselves.

The sources of international law in justice and the common good of humanity have not changed for centuries, since peoples first entered into commerce with their neighbors. New vehicles for discovering these realities emerge, and are useful, most recently through multilateral forums such as those provided by the United Nations. Changed circumstances should never obscure the fundamental truths on which the law of nations rests, and without which international law would lose its efficacy and moral influence on states.

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Comments on International Law Making

In his famous book, "The Twenty Year Crisis", E.H. Carr said, "the harmony of interests ... is the natural assumption of a prosperous and privileged class whose members have a dominant voice in the community and are therefore naturally prone to identify its interests with their own" (at 80). Is there not something of a "harmony of interests"

idea underlying Jonathan Charney's essay? I will focus in this brief comment only on the first paragraph of Professor Charney's essay while occasionally drawing on other parts of his argument.

Charney begins: "By definition general international law serves the public interest, if for no other reason, that law is directly created by the international community to serve its own interests". There is something puzzling about this sentence. Perhaps, the attempted erasure of doubt or the unexpressed presence of conflicting voices. We know that "general international law" cannot, "by definition", carry the very definitional weight attributed to it as a mere phrase. The "because" which immediately follows reveals that general international law's service in the public interest does require an explanation, a defence. General international law necessitates nothing "by definition". Charney's essay is an act of definition which contradicts his first sentence.

How can we know that international law serves the public interest? One way to interpret the sentence is to assume that Charney is using a series of synonyms. According to Charney, general international law serves the public interest because it was created by the public to serve its own interests. However, even assuming this apparently tautologous usage, it is by no means clear that Charney's proposition is correct. The sentence assumes an unproblematic relationship between purpose and ends, between the agent's desires and the institutions created to satisfy them. It is surely equally possible that general international law is a failure when judged by its capacity to fulfil systemic needs. Merely establishing a set of rules or norms with the intention of fulfilling certain ends does not mean that the institution or norms will have the desired effects.

A further problem is raised by the possible disjunction between the international community and the public interest. Cosmopolitans have argued that the "international community" is an impoverished community and one presently incapable of acting consistently in the interests of the "public", say, world citizenry (T6son, A *Kantian Theory (1991)).* Dependency theorists, meanwhile, make the point that the international community consistently acts against the interests of large numbers of states within the system. According to the marxist-realist critique, the international community, here, is an idea or instrumentality that has been captured by an elite club of states (Carr, *Twenty Year Crisis, (1919)).*

The notion of the public interest, then, requires some scrutiny and cannot be posited as a free-standing assumption. Charney's position is not reinforced by his statement that there is a "public interest as commonly understood". Something is repressed by qualifiers and absolutes like "by definition", "as commonly understood", "most obviously" etc. That some-thing is, of course, the possibility of a radically fragmented community with few common interests. This, if you like, is the inter-text, the anti-text or, to be old-fashioned, the subtext. So, to take another example from the first paragraph, while general international law serves the whole community, "some rules ... are particularly closely connected to interests of justice and those of individuals and groups of human beings". All rules serve the public interest but some rules do it particularly. This seems implausible or at least calls into question the rules which merely serve the public interest in general. Perhaps "individuals and groups of human beings" is a different category from "the public" or "the international community" though each of these categories appears coterminous. However, a cosmopolitan alternative reading (not endorsed by Charney) might read as follows: general international law serves interest of states and or accidentally contingently that of individuals. The special rules of inter-national law are directed towards individuals. It is these rules which deserve priority.

These special rules, according to Charney, "are particularly closely connected to interests of justice". This being so, "they may more directly and more obviously serve the public interest". Justice and the public interest are transformed from the norm to the exception. The category general international law becomes a rule in which there are no obvious or direct links with either the public interest or justice. General international law is thus "directly" created by the international community to serve its own interests but does not "directly" serve these interests. Simply because general international law is directly created by the international community does not mean it directly serves the public interest? The fourth sentence carried within it the reversal of the first.

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Call for Papers

The American Society of International law Interest Group on the Theory of International Law invites its readers to submit or propose lead articles for the Interest Group publication, *International Legal Theory.* Articles published in *International Legal Theory* should be innovative, provocative and well-written, but not necessarily heavily footnoted, or

very long. Their purpose will be to encourage new thinking among members, and to elicit their responses, to be published with the article in each volume of the publication.

Please send manuscripts to: Prof. Mortimer Sellers, Center for International and Comparative Law, University of Baltimore School of Law, 1420 N. Charles Street, Baltimore Maryland 21201-5779.

Journal of International Legal Studies: Call for Papers

The Editors of the *Journal of International Legal Studies* would like to extend an invitation for submission of scholarly papers to all ASIL members and foreign affiliates.

The Journal provides a forum for the exploration of important and topical developments in international law and legal theory. The journal is published semi-annually, and is currently accepting submissions for its June, 1997 issue. Submissions should be directed to: Articles Editor, journal of International Legal Studies, 3401 North Fairfax Drive, Arlington, VA 22201-4498. Subscription orders ($25 a year/ domestic.- $30 a year/foreign) can be sent by mail to the above address or by fax to (703) 993-8088.

For more information, please visit the Journal's web site: http://web.gme.edu/departments/law/jils.html

Baltimore Studies in Nationalism and Internationalism: Call for Manuscripts

The Center for International and Comparative Law at the University of Baltimore School of Law announces a new book series and call for manuscripts on Nationalism and Internationalism.

The Baltimore Studies in Nationalism and Internationalism are published by Berg Press of Oxford (England) and Washington (D.C.). This series discusses issues of cultural identity, and the proper role of national and ethnic affiliations in the world's structures of legal and political power.

Ethnic conflicts, issues of sovereignty, the self-determination of peoples, and human rights within and across borders have increasingly become the focus of international attention. The series will offer insights on how human rights and cultural identity can most effectively and peaceably be reconciled.

Contributions from scholars working in all areas of the world and across a wide range of disciplines will be encouraged, as befits the cross-cultural aims of the series.

Should you have a proposal you would like us to consider, please contact: Kathryn Earle, Berg Publishers, 150 Cowley Road, Oxford OX4 IJJ, United Kingdom.

Trilateral Research Agenda

The American Society of International Law seeks to identify members of the International Legal Theory Interest Group who would like to participate in research projects conducted under the auspices of the Trilateral Research Agenda.

The ASIL, the Canadian Council on International (CCIL) and the Japan Association of International Law (JAIL) have held two joint conferences, and a third is being planned. The overall purpose of the Trilateral Agenda is to share interests, perspectives and expertise among the three societies. In order to do this we have agreed to make an effort to develop research projects of interest to all three societies and their members. We hope to establish diverse teams of experts from the three societies to work together, as appropriate, on common research projects. Professor Jonathan Charney is the contact person for the ASIL Coordinating Group. Thomas Schoenbaum, Martha Schweitz, Peter Trooboff and Michael Young are members of this coordinating group and Charlotte Ku serves as the alternative contact person.

At this fall's meeting of the CCIL in Ottawa, Charlotte Ku and Jonathan Charney met with representatives from the CCIL and JAIL to discuss a possible list of research projects. The result of that discussion was the list of potential project subjects set out below. We hope that members of the interest group will find ah aspect of one of the projects of interest to them. Alternatively, a member might have another project that he or she would like to work on in collaboration

with members of the other societies. The other societies are also seeking members to work on these projects but we also agree that if a member of one of the societies knows someone from another society with whom he or she would like to collaborate that will be encouraged.

The research subjects that we have identified are the following:

1. International trade with sub-headings:

   Dispute settlement - Including the
   Resolution of Trade Disputes between
   North-America and Japan

   Regionalism - Including regional Trading Associations and the Multilateral System

2. Domestic Implementation of International Law with sub-headings:

   Human Rights

   International Environmental Law

   International Law in General -Including Women and International Law

3. The Use of Force with sub-headings:

   The Role of the Security Council

   The Expansion of the Use of Force for

   Human Rights Purposes

4. The Law of the Sea with sub-headings:

   Maritime Territorial Disputes

   High Seas Fisheries

5. Transnational Litigation with sub-headings:

   Problems of Extraterritorial Jurisdiction

   Enforcement - Including Extradition for International Crimes

If you have any questions or information that you would like to discuss would you please contact Jonathan Charney or Charlotte Ku. Charlotte Ku, can be reached through the ASIL. Jonathan Charney's address is School of Law, Vanderbilt University, Nashville, TN 37205. His telephone number is 615-322-3563; his fax number is 615-3226631; and his e-mail address is jcharney@law.vanderbilt.edu