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The International Law Commission and Community Interests

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The International Law Commission and Community Interests*

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Abstract:

*The paper looks at community interests in international law from the perspective of the International Law Commission. As the topics of the Commission are diverse, the outcome of its work is often seen as providing a sense of direction regarding general aspects of international law. After defining what he understands by “community interests”, the author looks at both secondary and primary rules of international law, as they have been articulated by the Commission, as well as their relevance for the recognition and implementation of community interests. The picture which emerges only partly fits the widespread narrative of “from self-interest to community interest”. Whereas the Commission has recognized, or developed, certain primary rules which more fully articulate community interests, it has been reluctant to reformulate secondary rules of international law, with the exception of *jus cogens*. The Commission has more recently rather insisted that the traditional State-consent-oriented secondary rules concerning the formation of customary international law and regarding the interpretation of treaties continue to be valid in the face of other actors and forms of action which push towards the recognition of more and thicker community interests.*

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1. Introduction

International law has always addressed and protected community interests. Even at the height of the “Westphalian system,” the rules against pirates, *hostes humani generis*, or those against slavery, have formed part of international law.² Furthermore, community interests have never only been those of humanity as a whole. The modern development towards international organization began in the nineteenth century with river regimes between smaller groups of States and other forms of common management of certain technical aspects of the first globalization.³ Community interests therefore cannot simply be opposed to an inter-State system, or even to “bilateralism”.⁴ After all, bilateral treaties often protect a community interest, such as the sustainable use of a common resource. Even bilateral investment treaties are supposed to protect the community interest of generating investment, and thus the economic and social development of both parties, including economic security for investors as individuals. In a way, every legal rule represents a community interest, even if it is only the common interest in predictability.

If, however, the term “community interest” is conceived in such a broad way, it risks losing analytical force. The concept should therefore be opposed to, and delineated from, “self-interest.” Standing alone, however, self-interest is a similarly overbroad term. The protection against pirates on the high seas, or the protection against deleterious effects of climate change, lies in the self-interest of every single State, as well as in the self-interest of all individuals. In that sense, “self-interest” largely overlaps with “community interest.” This is different, however, if “self-interest” is understood as referring to the space for actors, under a legal system, to determine their own interests and to choose whether and how to pursue those interests regardless of others; and if, conversely, “community interest” is understood as referring to goods that require any one actor to take the situation of one or more other actors into account when exercising rights with respect to this good. Legally regulated community interests in this sense translate into community obligations.

This definition does not exclude the possibility of hybrid rules which, on the one hand, secure freedom for a State to act regardless of others, but only up to a certain point beyond which, on the other hand, an obligation arises to take the situation of others into account. In fact, very many rules are of that kind.⁵ The character of a legal rule as being more self-interest-oriented or more community-interest-oriented cannot be determined by way of a formal criterion but requires a qualitative assessment.

The principle of permanent sovereignty over natural resources may, for example, be understood as reflecting a stronger “self-interest” orientation or a stronger “community interest” orientation, depending on how it is interpreted. If it is interpreted as merely distributing the natural resources of

² JA Fernández, ‘*Hostes humani generis*: Pirates, slavers, and other criminals’ in B Fassbender and A Peters (eds.), *Oxford Handbook of the History of International Law* (OUP 2012), 120 ff.

³ J Klabbers, *An Introduction to International Organizations Law* (3rd edn, CUP 2015), 17 – 18.

⁴ But see, e.g., B Kingsbury/M Donaldson, ‘From Bilateralism to Publicness in International Law,’ in U Fastenrath et al (eds.), *From Bilateralism to Community Interest – Essays in Honour of Judge Bruno Simma* (OUP 2011), 81; for the contrary approach, see, e.g., A Paulus, ‘Reciprocity Revisited,’ in *ibid*, 114.

⁵ For example, the right of a State to use the water of a river for domestic consumption may go hand in hand with the obligation to take into account the needs of other riparian States or of communities beyond the jurisdiction of that State.

the earth among the different States according to their territorial jurisdiction, it primarily defines and secures the self-interest of States (with a residual community interest element which consists in the distributional function of the rule). If, on the other hand, the same principle is understood as implying a responsibility of each State to manage the exploitation of their respective resources responsibly and sustainably, in the interests of their own population and/or in the interests of humanity, then the principle becomes primarily one of protecting community interests, constituting a community obligation.

If they are understood in this sense, international law has always dealt with the relationship between community interests and self-interest. That relationship may change over time. National law has, for example, sometimes placed more emphasis on the freedom to contract and sometimes more on the protection of people against unfair terms of contract (e.g., consumers). The development of international law since the 19th century has been described by many authors as moving from greater recognition and protection of (sovereign) self-interest towards greater recognition and protection of community interests. This is essentially the narrative of “From Bilateralism to Community Interest.”⁶ It is part of a progress narrative of international law from a supposedly narrow-minded and old-fashioned focus on a freedom of contract-type sovereignty to the establishment and recognition of duties of States and other actors to take more community interests into account. It is time to specifically and critically look at the ways in which community interests are articulated, recognized, and implemented in international law. The present book attempts to map the situation by looking at different specific areas and at general aspects of international law.

The International Law Commission is situated at the intersection of several aspects of this question. The Commission is mandated to engage in the progressive development of international law and its codification.⁷ This broad mandate suggests that the work of the Commission is in some sense representative of the general direction international law is taking. It is true that the Commission does not deal with most specific areas of international law, for political and for technical reasons, as well as for lack of capacity. But the topics which the Commission does address are diverse and representative. The outcome of its work is therefore often seen as providing a sense of direction regarding general aspects of international law. This is particularly evident when the Commission deals with secondary rules of international law which apply in all areas of international law, such as the law of treaties and of State responsibility, or those regarding its sources.

In the following sketch, I will first look at certain secondary rules of international law, as they have been articulated by the Commission, and their relevance for the articulation, recognition and implementation of community interests (II). I will then consider some primary rules which the Commission has identified and dealt with as community interests (III). I will conclude with reflections on whether the picture which emerges supports a progress narrative of “from self-interest to community interest,” or whether we are rather seeing signs of continuity (IV).

⁶ B Simma, ‘From Bilateralism to Community Interest in International Law’ (1995) 250 RdC 217, 234-5 and 249.

⁷ Statute of the International Law Commission, Art 1(1), UNGA Res 174 (III) (21 November 1947), annex.

2. Secondary Rules

In its work on secondary rules, the Commission has ascertained the structure of international law, including the rules regarding the processes for the identification and the realization of community interests. A community interest does not fall from the sky, it is not something which exists objectively, but needs to be socially established (constructed, recognized).⁸ The establishment of a community interest in international law usually begins with a claim by a certain actor which then becomes politically more widely accepted, by persuasion or by different forms of pressure. The process by which a community interest is established is usually fed by many informal (political or other) impulses whose legal relevance is determined by secondary rules of international law. Secondary rules determine how a political process can result in a legal rule. The process by which an international legal rule may emerge is usually determined by an international organization, or by a conference of States parties, or by the conclusion of a treaty, or by the formation of a rule of customary international law. The law of treaties, the rules on State responsibility, the law of international organizations, and the rules governing the formation of customary international law are therefore important elements and preconditions for the establishment of community interests, including in their relationship with rules which protect the self-interest of actors. The secondary rules in these areas serve as gatekeepers which channel political processes and determine their legal relevance. The ILC has made some noteworthy contributions regarding the establishment of community interests through secondary rules, and who plays a role in establishing them.

a) The Law of Treaties and the Rules on State Responsibility

The two most important areas where the Commission has articulated secondary rules that are significant for the determination of community interests are the law of treaties and the rules on State responsibility:

From the perspective of community interests, the most important element of the law of treaties is the recognition, in articles 53 and 64 of the Vienna Convention, of *jus cogens*. This is not the place to describe the development of the idea of *jus cogens* again, from its historical origins, the acceptance of the concept within the Commission during the elaboration of the Draft Articles on the Law of Treaties, its relative lack of application over time, to its reaffirmation in the Report of the Chairman of the Commission's Working Group on the Fragmentation of International Law.⁹ Suffice it to say that *jus cogens* represents the core of community obligations in international law, and that its potential is not yet fully developed.

The most important question regarding *jus cogens*, as a form of community interest, is perhaps how norms of that quality come into existence. It is this question which, in 2015, led the Commission to put the topic of *jus cogens* on its agenda.¹⁰ Article 53 of the Vienna Convention on the Law of Treaties provides that norms of *jus cogens* must be "accepted and recognized by the

⁸ See Jan Klabbers, in this volume ... (at Fn. 23 in the old version); this is true even for interests for which scientific proof exists that they are under threat (e.g., the threat of the extinction of certain species).

⁹ See, e.g., D Tladi, First Report on Jus Cogens (8 March 2016) UN Doc A/CN.4/693, 7 – 24 at paras. 18 – 49; Report of the Study Group of the International Law Commission on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (13 April 2006) UN Doc A/CN.4/L.682, 181 – 192 at paras 361 – 379; A Paulus, 'Jus Cogens in a Time of Hegemony and Fragmentation, An Attempt at a Re-appraisal' (2005) 74 Nordic Journal of International Law 297, 300–308.

¹⁰ ILC, Report on the 67th session (2015) UN Doc A/70/10, 138 at para. 286.

international community of States as a whole.” Does this mean that the formation of a norm of *jus cogens* requires the general acceptance by States in the same way as a rule of customary international law requires the general acceptance of States, by way of, say, an *opinio iuris cogentis*?¹¹ Or does the term leave room for factors which exist independently of the consent of States, such as considerations of natural law or the views of non-State actors (“civil society,” “dictates of public conscience”)?¹² The proposition that a persistent objection by a State does not play a role with regard to *jus cogens* may turn out to be its most visible and acceptable characteristic, which in turn could lead to further conclusions regarding the nature of *jus cogens*, and how its norms come to reflect community interests.¹³

The rules on reservations are an important area within the law of treaties which delineate the permissible scope of self-interest from the community interest that is established by the treaty.¹⁴ In its “Guide to practice on reservations to treaties,” the Commission has adopted a generally “objective” approach which is protective of the object and purpose of the treaty, and thus restricts the scope of the permissible exercise of self-interest. The Commission did not, however, go so far as to hold a State which has formulated an impermissible, and thus an invalid, reservation, in particular one which is incompatible with the object and purpose of the treaty, to be necessarily bound to the treaty without the benefit of the reservation.¹⁵

The rules of State responsibility, as they result from the work of the International Law Commission,¹⁶ are of a similarly foundational nature. It would go too far to discuss the community interest aspect of most rules on State responsibility here. Suffice it to say that a community interest can be identified for almost every such rule. As with the law of treaties, the most important element of the rules on State responsibility is the recognition of a special regime for violations of peremptory norms of general international law.¹⁷ These rules represent community interests as characteristically as *jus cogens* does for the law of treaties. They are largely coextensive and functionally equivalent. An important question which arises in the context of the Commission’s work on *jus cogens* is therefore how far the topic also covers the formation and identification of peremptory norms of general international law, and would thus go beyond the law of treaties.¹⁸ A broader approach would certainly be helpful for the identification of community interests in international law. But here again, the question arises how peremptory norms come into being. Do they primarily depend on the consent of States, or rather on a specific form of collective action by States? Or is it necessary or appropriate to recognize a more important role for other actors? Some indications may be found in the way in which the Commission has recently dealt with the roles of States and other actors in the context of other topics:

¹¹ See ILC, Report on the 68th session (2016) UN Doc A/71/10, 301 at para. 115.

¹² ILC Report 2016 (n 11), 300 at para. 114; D Tladi, First Report on Jus Cogens (n 9), 24–30 at paras. 50–60.

¹³ ILC Report 2016 (n 11), 302 at para. 121.

¹⁴ Of course, in a broader sense, the treaty’s scope of permissible reservations can also be described as being part of the community interest that is established by the treaty.

¹⁵ ILC, Report on the 63rd session (2011) UN Doc A/66/10/Add.1, Guideline 4.5.3. and Guidelines in Part 3 sub 3.1. (3.1.1.–3.5.7.).

¹⁶ ILC, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Report on the 53rd session [2001] YBILC II 2, 26 ff.

¹⁷ See draft articles 41 ff. and 48 ff. on the Responsibility of States for Internationally Wrongful Acts (n 16).

¹⁸ ILC Report 2016 (n 11), 300 at para. 112, 301 at para. 116, 304 at para. 134.

b) The Roles of States, International Organizations, and Other Actors

In classical international law, i.e., among States and international organizations, community interests are established and promoted by way of rather formal procedures and legal relationships between relatively few actors and with an emphasis on consent. On an alternative vision, States and international organizations, while remaining important, are said to be increasingly abandoning traditional channels of cooperation for the sake of more informal channels.¹⁹ In addition, other actors (NGOs, transnational corporations, epistemic communities) would play an increased role and emancipate themselves (somewhat) from States, in particular by convening informally and solving their problems informally.²⁰ They would engage in practices, which they may formulate in writing. And these practices would often exercise a stronger compliance pull than formal international law. For those who see this world emerging, classical international organizations and other traditional forms of international lawmaking are too slow, too inflexible, and they do not reach the necessary degree of orientation and substantive problem-solving capacity.²¹ Optimists who share this alternative vision are confident that it produces “thicker” forms of legitimacy than the traditional State-centered world. They assume that most affected actors will be part of the process of rulemaking which takes place through procedures that are inclusive in the sense of taking the relevant interests into account, but without being hampered by formalist consent requirements.²² Sceptics are identifying selective power techniques, club structures, and other forms of domination.²³ But both optimists and sceptics see a new international legal world emerging in which States and formal international organizations play a (much) more limited role, and in which the significance of the law that emanates from the traditional sources of international law is considerably reduced. In short, the world of globalized networks and hubs of different kinds of actors challenges the significance of traditional international law by undermining its claim to authoritatively determine collective interests.²⁴ Traditional international law is confronted with the choice between coopting these new forms of global governance or distinguishing itself from them. It is clear that the choice between a more classical approach and the alternative vision has implications for the establishment of community interests and obligations.

¹⁹ LR Helfer, ‘Nonconsensual International Lawmaking’ (2008) 71 *University of Illinois Law Review* 71, 79 ff.; see generally C Calliess/G Nolte/PT Stoll (eds), *Coalitions of the Willing: Avantgarde or Threat?* (Carl Heymans Verlag 2007).

²⁰ KW Abbott/D Snidal, ‘Hard and Soft Law in International Governance’ (2000) 54 *International Organization* 421, 423; E Benvenisti, ‘Towards a Typology of Informal International Lawmaking Mechanisms and their Distinct Accountability Gaps,’ in J Pauwelyn, RA Wessel, J Wouters (eds.), *Informal International Lawmaking* (OUP 2012) 297, 298 – 305; K Raustialia, ‘The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law,’ (2002) 43 *VaJIL* 1, 11; AM Slaughter, *A New World Order* (Princeton University Press 2004), 12 ff.

²¹ Eg J Pauwelyn, RA Wessel, J Wouters, ‘When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking’ (2014) 25 *EJIL* 733, 743; see also UNSG K Annan, ‘We the Peoples: The Role of the United Nations in the 21st Century (Millennium Report of the Secretary-General)’ (March 2000) available at <https://www.un.org/en/events/pastevents/pdfs/We_The_Peoples.pdf> (last accessed 21 December 2016), 70 – 71.

²² Pauwelyn/Wessel/Wouters, ‘When Structures Become Shackles’ (n 21), 749 – 751; see also T Corthaut/B Demeyere/N Hachez/J Wouters, ‘Operationalizing Accountability in Respect of Informal International Lawmaking Mechanisms,’ in Pauwelyn/Wessel/Wouters, *Informal International Lawmaking* (n 20), 322 – 335.

²³ P Alston, ‘The Myopia of the Handmaidens: International Lawyers and Globalization’ (1997) 8 *EJIL* 435, 441; N Krisch, ‘The Decay of Consent: International Law in an Age of Global Public Goods’ (2014) 108 *AJIL* 1, 31; SJ Toope, ‘Emerging Patterns of Governance and International Law,’ in M Byers (ed.), *The Role of Law in International Politics* (OUP 2000) 91, 96 – 97.

²⁴ A Guzman, ‘Against Consent’ (2012) 52 *VaJIL* 747, 787 – 790; Krisch (n 23), 1; GC Shaffer, ‘International Law and Global Public Goods in a Legal Pluralist World’ (2012) 23 *EJIL* 669, 692.

Regardless of the merits of this alternative vision, there are signs that the classical world of States and international organizations, while often using the instruments which the alternative vision offers, is reluctant to fully recognize them as part of the international legal system. The ILC has recently reinforced this reluctance in the context of its work on the topic of *Subsequent agreements and subsequent practice in relation to the interpretation of treaties* and on the topic of *Identification of customary international law*. There, the Commission has addressed the role of non-State actors. In 2016, the Commission adopted Conclusion 5 of *Subsequent agreements and subsequent practice in relation to the interpretation of treaties* on first reading:

Conclusion 5

Attribution of subsequent practice

1. Subsequent practice under articles 31 and 32 may consist of any conduct in the application of a treaty which is attributable to a party to the treaty under international law.
2. Other conduct, including by non-State actors, does not constitute subsequent practice under articles 31 and 32. Such conduct may, however, be relevant when assessing the subsequent practice of parties to a treaty.²⁵

This Conclusion does not make a statement regarding the significance of conduct by non-State actors for purposes other than for the interpretation of treaties. The Conclusion does, however, send a signal about hierarchy. It recognizes that the conduct of non-State actors may be relevant for treaty interpretation, and it thereby takes a new reality into account. At the same time, however, it insists on the primary role of the parties to the treaties when it comes to the relevance of subsequent conduct for the interpretation of treaties. The Commission thereby recognizes that a threshold exists for an approach to treaty interpretation which emphasizes the “shared understanding” of all actors that are involved in, and affected by, the application of the treaty, including nongovernmental organizations.²⁶ This threshold frames the way in which community interests are identified in the context of treaty interpretation. But as long as the States parties remain “masters of the treaty,”²⁷ it is more difficult, even for a court, to identify a community interest which would lie beyond the horizon of the parties.

In 2016 the Commission also adopted on first reading a parallel conclusion regarding the topic of *Identification of customary international law*:

Conclusion 4

Requirement of practice

1. The requirement, as a constituent element of customary international law, of a general practice means that it is primarily the practice of States that contributes to the formation, or expression, of rules of customary international law.

²⁵ ILC Report 2016 (n 11), 121 at para. 75.

²⁶ See for a broader approach L Boisson de Chazournes ‘Subsequent Practice, Practices, and ‘Family-Resemblance’: Towards Embedding Subsequent Practice in its Operative Milieu,’ in G Nolte (ed.), *Treaties and Subsequent Practice* (OUP 2013), 62.

²⁷ ILC, Commentaries to the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, Report 2016 (n 11), 152; German Federal Constitutional Court, 134 BVerfGE 267, 349 f., 368, 381, 398; 89 BVerfGE 155, 190.

2. In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law.
3. Conduct of other actors is not practice that contributes to the formation, or expression, of rules of customary international law, but may be relevant when assessing the practice referred to in paragraphs 1 and 2.²⁸

This Conclusion was intensely debated within the Commission.²⁹ Not because it relegates the “conduct of other actors” to a position of secondary importance, but, to the contrary, because some members would have preferred not to recognize that the practice of international organizations may play a role in the formation or expression of rules of customary international law at all.³⁰ From that perspective, the Commission insists on a very classical, State-centered approach to customary international law which leaves little room for other actors to play a role in setting the legally relevant practice for the articulation and specification of community interests. This does not, of course, preclude some States from losing some of their political autonomy to national and transnational social forces, which would then give such social forces relevant influence and turn such States into merely formally competent actors.

c) The Distinction between International Organizations and Conferences of States Parties

International organizations have at times been widely understood as representing community interests as a matter of course. There is, however, also an awareness that international organizations can serve the particularistic aims of certain States or actors. From this stems the importance of the procedural aspect of international organizations as *fora* for the collective determination of community interests.³¹

The question is whether the forum function is today still characteristic of international organizations.³² This can be doubted. Conferences of States Parties (COPs)³³ perform the same function, but without the “organization” element of international organizations. Other forms of coordination and cooperation, including informal networks, public institutions, public-private partnerships and private actors, have even been described as providing “thicker” forms of legitimacy for articulating and promoting community interests.³⁴ In this view, classical international organizations and their formal legal products are “shackles” which contribute less and less to the development of the

²⁸ ILC Report 2016 (n 11), 76 at para 62.

²⁹ The debate is not reflected in the report of the Commission or the commentaries to the adopted draft conclusions; but see ILC, Summary Records of the 3301st, 3302nd and 3303rd Meetings (19 to 24 May 2016) UN Doc A/CN.4/SR.3301, A/CN.4/SR.3302, A/CN.4/SR.3303.

³⁰ *Ibid.*

³¹ Klabbers, forthcoming.

³² In the sense of: “‘International organization’ means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities;”, draft article 2 (a) of the ILC Draft Articles on the Responsibility of International Organizations, Report on the 63rd session (2011) UN Doc A/66/10, 54.

³³ In the sense of: “A Conference of States Parties [...] is a meeting of States parties pursuant to a treaty for the purpose of reviewing or implementing the treaty, except if they act as members of an organ of an international organization.”, see draft conclusion 10 (1) of the (provisionally adopted) Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, Report on the 66th session (2014) UN Doc A/69/10 170.

³⁴ Pauwelyn/Wessel/Wouters, ‘When Structures Become Shackles’ (n 21), 749.

global order.³⁵ This perspective puts emphasis on a multiplicity of supposedly relevant international actors and on a differentiation of policy fields in which multiple communities of affected actors engage in self-regulation. In this context, the responsibility of international lawyers is, first, to decide whether to coopt this “turn to informalization,” and second, if so, whether to articulate general standards of legitimacy and accountability with the aim of “nudging” those developments into line with general rule of law standards.

It seems that the distinction between international organizations and COPs often plays a limited role when it comes to the determination and articulation of community interests. Resolutions of international organizations and COPs are both mostly nonbinding, and they may both, exceptionally, be transformed into formal treaties. The choice whether the articulation of a collective interest is done through an international organization or by a COP seems to depend on whether an international organization happens to be competent in a certain area, and not so much on the inherently different legal character of such organizations and COPs. The separate legal personality of international organizations and their more elaborate organ structure, including their secretariats as legally independent organs, which represent the main legal distinctions between international organizations and COPs, thus do not necessarily play an essential role. This seems to be confirmed by recent assessments of the potential legal effect of resolutions of international organizations and COPs. In the context of its work on the topic of *Identification of customary international law*, the Commission has in 2016 adopted a Conclusion on first reading which seems to fully equate resolutions by international organizations and COPs regarding their possible contribution to the formation of rules of customary international law:

*Conclusion 12*³⁶

Resolutions of international organizations and intergovernmental conferences

1. A resolution adopted by an international organization or at an intergovernmental conference cannot, of itself, create a rule of customary international law.
2. A resolution adopted by an international organization or at an intergovernmental conference may provide evidence for establishing the existence and content of a rule of customary international law, or contribute to its development.
3. A provision in a resolution adopted by an international organization or at an intergovernmental conference may reflect a rule of customary international law if it is established that the provision corresponds to a general practice that is accepted as law (*opinio juris*).

It is true that this Conclusion does not exclude the possibility that a different weight may be attributed to resolutions of international organizations and COPs, respectively, in different specific cases. But the Commission does not emphasize the difference between both forms of cooperation in relation to the identification of customary international law, which is one of the basic forms of articulating community interests in international law.

Similarly, in the context of its work on the topic of *Subsequent agreements and subsequent practice in relation to the interpretation of treaties*, the Commission has reaffirmed the approach of the

³⁵ Pauwelyn/Wessel/Wouters, ‘When Structures Become Shackles’ (n 21), 743.

³⁶ ILC Report 2016 (n 11), 78 at para. 62.

Vienna Convention on the Law of Treaties, according to which the interpretation of a constituent treaty of an international organization (which usually contains the basic articulations of the relevant community interests) follows the general rules of interpretation, including by taking into account subsequent agreements and practice of the parties which “may arise from, or be expressed in, the practice of an international organization” (Conclusion 12 (2)).³⁷ But the Commission has also adopted a parallel Conclusion according to which a decision by a COP “may embody, explicitly or implicitly, a subsequent agreement under article 31, paragraph 3 (a), or give rise to subsequent practice under article 31, paragraph 3 (b), or to subsequent practice under article 32” (Conclusion 11 (2)).³⁸ Again, these Conclusions do not assert that the respective forms of action of international organizations and COPs are legally equally relevant or authoritative, but they also do not emphasize a difference – a fact that may be significant in itself.

The Conclusions regarding both topics suggest that an independent, or special, role of international organizations for the determination of community interests is currently not emphasized by the Commission, at least not in comparison to clearer forms of inter-State cooperation. The Commission rather seems to go back to emphasizing the role of States in the working of the two classical sources of international law, treaties and custom.

3. Primary Rules

Since its inception, the Commission has articulated community interests and formulated corresponding primary community obligations, as opposed to defining the realm of acceptable exercise of self-interest. One of the first outcomes of its work, the *Nürnberg Principles*, is a good example of the recognition and formulation of duties which States and individual human beings must respect in fulfillment of a recognized community interest.³⁹ This work reflected a generally recognized development in international law, despite the fact that the project of creating an international criminal court could not be pursued during the Cold War.

Probably due to the unfavorable Cold War context, the Commission initially concentrated on politically less ambitious projects. The resulting codification of the Law of the Sea, although inherently a community interest-oriented topic, is characterized primarily by the goal of clarifying and distributing the areas within which States could pursue their self-interest, and delineating them from the established common space and regime of the high seas.⁴⁰ It should be noted, however, that the four Conventions on the Law of the Sea did contain certain new duties of cooperation which secure community interests.⁴¹ The Vienna Conventions on Diplomatic and Consular Relations were also mostly codifications of rather classical rules of international law.⁴² Their rules, although they are characterized by a large measure of bilateral forms of reciprocity, nevertheless reflect a profound community interest, as was later confirmed by the recognition of the International Court of Justice,

³⁷ ILC Report 2016 (n 11), 123 at para. 75.

³⁸ Ibid, 122 at para. 75.

³⁹ ILC, Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, Report on the 2nd session [1950] YBILC II, 374.

⁴⁰ ILC, Draft articles concerning the law of the sea, Report on the 8th session [1956] YBILC II, 256 ff.

⁴¹ See, e.g., ILC draft article 38 and identical article 14 of the 1958 Convention on the High Seas (516 UNTS 205) (cooperation to repress piracy) and ILC draft article 48(3) and the slightly different article 25(2) of the 1958 Convention on the High Seas (cooperation to prevent the pollution of the high seas).

⁴² E Denza, *Diplomatic Law* (4th edn, OUP 2016), 1 – 2.

in the Tehran Hostages case, of the *erga omnes* dimension of certain obligations of the Conventions.⁴³

The Commission reached a limit when it tried to go beyond the formulation of more or less uncontested classical rules of international law. This was particularly true when it came to the codification and progressive development of the rules on State responsibility. The Commission could not make progress as long as that topic was primarily understood as concerning the rules on the responsibility of States for injuries to aliens⁴⁴ and as long as the Special Rapporteur did not take into account what was widely perceived as a new approach to the relevant community interest, i.e., the balancing of the interest of the alien (and his or her home State) on the one hand, and the regulatory interest of the State on the other. In this phase, however, it was not the community interest dimension of the project which constituted an obstacle, but rather simply the fact that the – narrowly understood – subject-matter had become too contested.⁴⁵ The fate of the later project on the Most-Favoured Nations Clause was similar. The original ambition of the sponsors of that project had been to broaden the scope of Most-Favoured Nations Clauses so that they could also apply to States that were not parties to a certain treaty. Although this ambition was described as promoting a broader community interest, resistance was so strong that the – consensual – final outcome was relatively insignificant.⁴⁶

It was only towards the end of the Cold War that the Commission started to more successfully pursue projects which went beyond rules delineating competences and to propose rules which more clearly contained “other-regarding” duties. This is true in particular for the topics of “Non-Navigational Uses of International Watercourses,”⁴⁷ “Transboundary Aquifers,”⁴⁸ and “Prevention of Transboundary Harm for Hazardous Activities.”⁴⁹ The Draft Articles on all three topics are full of obligations of States to cooperate, and to conduct assessments of possible harm to other States and to the environment. Whereas it remains theoretically possible to conceptualize such rules as delineating competences to pursue self-interest, they force the interpreter to specifically justify the pursuit of self-interest in terms of community interest.

The resulting *Convention on Non-navigational Uses of International Watercourses*⁵⁰ contains, in its articles 5 to 9 and 12, articulations of the principle of equitable and reasonable utilization, the obligation not to cause significant harm, and duties to cooperate, including the duty to notify of

⁴³ ICJ, *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (Judgment) [1980] ICJ Rep 3, 19, 43.

⁴⁴ See the revised draft and commentaries on responsibility of the State for injuries caused in its territory to the person or property of aliens by Special Rapporteur FV García-Amador, Sixth report on State responsibility, Addendum [1961] YBILC II, 46 ff.

⁴⁵ D Müller, ‘The work of García Amador on state responsibility for injuries caused to aliens,’ in J Crawford, A Pellet, S Olleson, *The Law of International Responsibility* (OUP 2010), 74; G Nolte, ‘From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-State Relations’ (2002) 13 EJIL 1083, 1096.

⁴⁶ ILC, Draft Articles on Most-Favoured-Nation Clauses, Report on the 30th session [1978] YBILC II 2, 16 ff.

⁴⁷ ILC, Draft Articles on the law of the non-navigational uses of international watercourses with commentaries, Report on the 46th session [1994] YBILC II, 89 ff.

⁴⁸ ILC, Draft articles on the law of transboundary aquifers, Report on the 60th session [2008] YBILC II 2, 19 ff.

⁴⁹ ILC, Draft articles on prevention of transboundary harm from hazardous activities, Report 2001 (n 16), 146 ff.

⁵⁰ Convention on the law of the non-navigational uses of international watercourses, UNGA Res 51/229 (8 July 1997) UN Doc A/RES/51/229, annex.

planned measures with possible adverse effects. The latter obligation has rightly been described as providing for a minimal deliberative obligation in regard of “the other.”⁵¹ Articles 20 to 28 of the same Convention spell out duties of States parties to cooperate in furtherance of the common interest of environmental protection. Thus, the *Convention on Non-Navigational Uses of International Watercourses* can be seen as representing a move, in international law, from the relatively free pursuit of self-interest (subject to the no harm principle) to more bounded duties to pursue self-interest within a framework of other-regarding duties of cooperation. The Convention later indeed became the blueprint for the “Draft Articles on Transboundary Aquifers,” which adopted most of the pertinent duties from the Convention.⁵² It should, however, not be forgotten that the Watercourses Convention, and the other related projects, address a kind of problem for which States had already occasionally found community-oriented arrangements during the nineteenth century. More importantly, it later turned out that the extent to which duties of cooperation and of equitable use were recognized by the Commission, and later in the Watercourses Convention, remained more limited than what the International Court of Justice was ready to accept as customary international law in the *Gabčíkovo-Nagymaros* judgment.⁵³

On a more general level, the Commission has also articulated basic concepts and other-regarding community obligations that flow from the sovereignty of States in its *Draft Articles on the Prevention of Transboundary Harm for Hazardous Activities* – which has led authors to raise the question whether such obligations are limited to the prevention of harm from hazardous activities, or whether they “would be considered relevant to most, if not all, decisions that affect foreign stakeholders.”⁵⁴ The Commission has not, however, answered this question in the latter sense. This becomes clear when looking at the Commission’s recent work regarding the topics of *Expulsion of Aliens*,⁵⁵ *Protection of the Atmosphere*,⁵⁶ and *Protection of Persons in the Event of Disasters*.⁵⁷ The work on these three topics can at best be described as ambiguous with regard to the recognition of community obligations:

Expulsion of Aliens, a classical topic of international law, could today be seen as requiring an approach that goes beyond the traditional framework in which the interest of one State to expel a non-national is balanced against the human rights of the person concerned and the interest of other States, in particular that of the home State of the person concerned. In a time of mass migration, community interest considerations of migration flows could in one way or another be integrated in the existing legal framework, at least by way of a progressive development of international law.⁵⁸ It is clear, however, that the Articles on Expulsion of Aliens, as they were

⁵¹ E Benvenisti, ‘Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders’ (2013) 107 AJIL 295, 318-9.

⁵² ILC, Draft articles on the law of transboundary aquifers (n 48); see also the commentaries thereto, ILC Report 2008 (n 48), 28 – 29.

⁵³ ICJ, *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Judgment) [1997] ICJ Rep 7, 56 at para. 85; E Benvenisti, *Sharing Transboundary Resources* (CUP 2002), 161 – 168.

⁵⁴ Benvenisti, ‘Sovereigns as Trustees of Humanity’ (n 51), 316.

⁵⁵ ILC, Draft articles on the expulsion of aliens, Report 2014 (n 33), 11.

⁵⁶ For the current State of the topic see ILC Report 2016 (n 11), Chapter VIII.

⁵⁷ For the current State of the topic see ILC Report 2016 (n 11), Chapter IV.

⁵⁸ The *Institut de Droit International* will consider this topic based on a report by Maurice Kamto, <<http://www.justitiaetpace.org/commission.php>> (last accessed 21 December 2016).

adopted on second reading in 2014,⁵⁹ are mostly confined to articulating well-established rules, with only occasional elements of progressive development. This is due to a strong renewed emphasis, by most States as well as by most members of the Commission, on the primary need to articulate the elementary rules, as well as their knowledge that a more ambitious and other-regarding approach would not have been acceptable to many States.

When it comes to less traditional topics, the first question is the way in which a specific community interest is articulated in normative terms. This is often uncontroversial since general and aspirational formulations usually do not commit to following a specific path. A recent example in the work of the ILC, however, demonstrates that even the articulation of the general character of a collective interest may be difficult to achieve: The Commission decided in 2013, after much debate, to put the topic of “Protection of the Atmosphere” on its agenda.⁶⁰ In 2015, the Special Rapporteur was due to propose a Draft Conclusion which would articulate the collective interest that is at stake in normative terms. In his report, he pondered the possibilities that the atmosphere could either be declared a “common heritage of mankind” or a “common concern of humankind.”⁶¹ After concluding that the “concept of common heritage of mankind had failed to gain traction beyond the quite limited success within the Convention regime of the deep seabed,”⁶² he proposed that the Commission adopt the formulation that was used in the Preambles of the *UN Framework Convention on Climate Change* and in the *Convention on Biological Diversity*, both of 1992:

Draft guideline 3: Common concern of humankind

The atmosphere is a natural resource essential for sustaining life on Earth, human health and welfare, and aquatic and terrestrial ecosystems, and hence the degradation of atmospheric conditions is a common concern of humankind.⁶³

This formulation, however, while sounding rather innocuous and well-established, gave rise to a controversial debate within the Commission in which the argument prevailed that the concept of “common concern of humankind” had not been sufficiently confirmed in treaty practice since 1992 across the scope of the topic and that States had expressed concern because “the concept was vague and controversial, and that its content was not only difficult to define but also subject to various interpretations.”⁶⁴ Thus, the Commission ultimately settled on moving the articulation of the community interest and its normative character from the operative part to the preamble, and to use the following formulation:

Preamble

- Acknowledging that the atmosphere is essential for sustaining life on Earth, human health and welfare, and aquatic and terrestrial ecosystems,
- Bearing in mind that the transport and dispersion of polluting and degrading substances occur within the atmosphere,

⁵⁹ ILC, Draft articles on the expulsion of aliens (n 55).

⁶⁰ ILC, Report on the 65th session (2013) UN Doc A/68/10, 115.

⁶¹ S Murase, Second report on the protection of the atmosphere (2 March 2015) UN Doc A/CN.4/681, 18 – 19 at para. 29.

⁶² Murase, ‘Second report’ (n 61), 19 at para. 29.

⁶³ Ibid, 25 at para. 39.

⁶⁴ Ibid, 18 at para. 28.

- Recognising therefore that the protection of the atmosphere from atmospheric pollution and atmospheric degradation is a pressing concern of the international community as a whole,
- Recalling that these draft guidelines are not to interfere with relevant political negotiations, including those on climate change, ozone depletion, and long-range transboundary air pollution, and that they also neither seek to “fill” gaps in treaty regimes nor impose on current treaty regimes legal rules or legal principles not already contained therein.⁶⁵

While one might think that the expression “pressing concern of the international community as a whole” puts a stronger emphasis on the “atmosphere” as being a community interest than the term “common concern of humankind,” the background and the context of this expression suggest otherwise. “Pressing concern of the international community as a whole” is, after all, (only) the criterion which the Commission uses to select its own topics.⁶⁶ The simultaneous subordination of this concern to “relevant political negotiations” will prevent this expression from inspiring the international legal community, including the academic community, in the same way as the concepts of “common heritage” or “common concern of humankind” would do and have done in the past.⁶⁷ But it was this possible resonance which contributed to triggering the resistance on the part of some members of the Commission. Being a body which usually decides by way of consensus, no more emphatic or clearer articulation of the collective interest “protection of the atmosphere” was possible at that moment.

This experience within the ILC is representative of certain difficulties concerning the articulation and promotion of collective interests within the structures and rules which prevail in international organizations. Indeed, an expert body should not try to overcompensate for a lack of political progress at the political level. In this case, however, it seems that the Commission had underestimated the acceptability of the term “common concern of humankind” with regard to its topic. This is because this particular expression was used a few months later in the Paris Agreement on Climate Change⁶⁸ to normatively articulate the most important collective interest at stake. It remains to be seen whether the Commission will reconsider its decision in the light of the Paris Agreement on Climate Change. In any case, this incident demonstrates that the Commission is not necessarily “ahead of” States, leading the way towards the recognition of more community interests and obligations.

The most recent topic which raises issues of community interests and obligations is *Protection of Persons in the Event of Disasters*.⁶⁹ This topic possesses both classical and nontraditional features. It is classical insofar as it deals with the role of an “affected State” in providing for the persons in its territory or under its control. But the topic is also nontraditional insofar as it frames the collective and often worldwide effort to protect persons in the event of a disaster. The topic deals

⁶⁵ ILC Report 2015 (n 10), 22 – 23 at para. 53.

⁶⁶ ILC, Report on the 50th session [1998] YBILC II 2, 110.

⁶⁷ For a critical assessment of the restrictive approach of the Commission with regard to this topic, see PH Sand/ JB Wiener, ‘Towards a New International Law of the Atmosphere?’ (2016) 7 *GoJIL* 195, 216.

⁶⁸ Framework Convention on Climate Change, Conference of the Parties, Paris Agreement (12 December 2015) UN Doc FCCC/CP/2015/L.9/Rev.1.

⁶⁹ See ILC Report 2016 (n 11), Chapter IV.

with the adaptation, or translation, of general rules of international law to an extreme situation, and insofar is comparable with the earlier topic of *Prevention of Transboundary Harm for Hazardous Activities*.

The *Draft Articles on the Protection of Persons in the Event of Disasters* were adopted on second reading in 2016. Overall, they can be described as a mildly progressive articulation of community obligations. At the same time, however, they also contain an important reaffirmation of the principle of sovereignty of States and their freedom to deal with a disaster situation as they see fit. On the one hand, the affected State not only has a duty to cooperate in the event of a disaster, but even has a duty to seek external assistance if the disaster “manifestly exceeds its response capacity” (Article 11). And once an affected State has given its consent to external assistance, such consent “shall not be withdrawn arbitrarily” (Article 13). Interestingly, many duties which arise in the case of a disaster are declared not to be limited to States but also extend to “other assisting actors,” including NGOs. The Commission has thus formulated a set of Draft Articles which contain certain innovative community interest obligations in a situation which calls for the fulfillment of classical State functions. On the other hand, the Commission has deliberately refrained from invoking the term “responsibility to protect,” and has, in the preamble of the articles, used the formulation “stressing the principle of sovereignty of States and, consequently, reaffirming the primary role of the State affected by a disaster in providing disaster relief assistance,” a formulation which it reemphasized in Draft Article 10, paragraph 2 (“The affected State has the primary role in the direction, control, coordination and supervision of such relief assistance.”).

One of the most important results of the work on this topic is the way in which the Commission has conceived and derived the role and the responsibility of the affected State. On first reading, in 2014, the Commission had adopted a formulation which gave prominence to an understanding of sovereignty which emphasizes a community interest orientation:

Article 12

Role of the affected State

1. The affected State, by virtue of its sovereignty, has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory. [...] ⁷⁰

This understanding of sovereignty goes back much further than the debate regarding the “Responsibility to Protect” (R2P) and it has roots in Max Huber’s award in the *Island of Palmas Case*, as noted by the Commission.⁷¹ On second reading in 2016, however, this formulation was dropped in favor of the following:

Article 10

Role of the affected State

1. The affected State has the duty to ensure the protection of persons and provision of disaster relief assistance in its territory, or in territory under its jurisdiction or control. [...] ⁷²

⁷⁰ ILC Report 2014 (n 33), 88 at para. 55.

⁷¹ See *ibid*, 118, footnote 358.

⁷² ILC Report 2016 (n 11), 15 at para. 48.

The reason for dropping the formulation “by virtue of its sovereignty” was not, however, any doubt among the members of the Commission regarding the foundation of the proposed rule. It was rather the extension of the duty beyond a State’s own territory to any “territory under its jurisdiction or control,” which suggested that the (exclusive) reference to sovereignty should be dropped. It cannot, after all, be its sovereignty which obliges an *occupying* State to ensure the protection of persons in the occupied land. Rather than saying “by virtue of its sovereignty, territorial jurisdiction or control,” the Commission decided, simply for reasons of drafting, to merely refer to the duty itself in the Article, and to leave it to the commentary to explain its foundation. This is confirmed by the commentary to the new Article 10, which still refers to the previous explanation of the concept of sovereignty, as has been expounded by Max Huber and later by Judge Alvarez in the Corfu Channel Case.⁷³

In conclusion, the way in which the Commission has dealt with the primary rules of international law, most recently in the context of the topic of “Protection of Persons in the Event of Disasters,” suggests that, while it keeps the recognition and development of community obligations in mind, it is doing so in a way which reassures States that the traditional inter-State paradigm remains untouched.

4. Conclusion

The picture which emerges from the work of the International Law Commission is that of an institution which has accompanied the development of international law in a way which fits the narrative of “from self-interest to community interest” only to a certain extent. Whereas we can, at certain moments, see the development of certain primary rules which more fully articulate community interests, the Commission has been quite reluctant to reformulate secondary rules of international law, and in particular, to follow the view of those who see community interests as being better represented by the recognition of a more diverse set of relevant actors. The most important exception to the reluctance to reformulate secondary rules of international law is, of course, the recognition of the existence of *jus cogens*. But the Commission has not drawn many specific consequences from this concept. More recently, the Commission has rather insisted that the traditional State-consent-oriented secondary rules concerning the formation of customary international law and the interpretation of treaties continue to be valid even in the face of – what many perceive as – a rising world of other actors and forms of action which push towards the recognition of more and thicker community interests.

The significance of the orthodox approach of the Commission as a sign of the state of international law ultimately lies in the eyes of the beholder. Much depends on whether one thinks that the Commission is wise in drawing a line between the traditional vision of States and international organizations and the alternative vision of a multitude of relevant affected actors. One possibility of justifying an orthodox approach is the assumption that, ultimately and paradoxically, the more the determination of a community interest is contested, the more important formal and State-driven consent ultimately becomes as a legitimately authoritative factor. Epistemic and expert communities may be able to successfully articulate and promote a community interest (as well as defend realms for the pursuit of self-interest), in particular under the benign acquiescence of

⁷³ ILC Report 2016 (n 11), 51 – 52 at para. 23.

formal institutions, but their competence may ultimately not go far beyond that of a catalyst. Even in areas where the existence of certain community interests is uncontested, as in international humanitarian law or with respect to climate change, but where States are hesitant to commit to more specific standards beyond those already achieved, it risks being misleading to try to compensate for the lack of political will of States by other means.

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The Kolleg-Forschergruppe “The International Rule of Law – Rise or Decline?” examines the role of international law in a changing global order. Can we, under the current significantly changing conditions, still observe an increasing juridification of international relations based on a universal understanding of values, or are we, to the contrary, rather facing a tendency towards an informalization or a reformalization of international law, or even an erosion of international legal norms? Would it be appropriate to revisit classical elements of international law in order to react to structural changes, which may give rise to a more polycentric or non-polar world order? Or are we simply observing a slump in the development towards an international rule of law based on a universal understanding of values?

The Research Group brings together international lawyers and political scientists from five institutions in the Berlin-Brandenburg region: Freie Universität Berlin, Hertie School of Governance, Humboldt-Universität zu Berlin, Universität Potsdam and Social Science Research Center Berlin (Wissenschaftszentrum Berlin). An important pillar of the Research Group consists of the fellow programme for international researchers who visit the Research Group for periods up to two years. Individual research projects pursued benefit from dense interdisciplinary exchanges among senior scholars, practitioners, postdoctoral fellows and doctoral students from diverse academic backgrounds.