Beyond Bilateralism: Community Interest as the Foundation of a New International Legal Order

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Abstract: The traditional, bilateralist model no longer accurately describes modern international law, if it ever did. International law has undergone significant transformation, yet we have thus far lacked a theoretical underpinning through which to understand the new international legal order. The international community interest can provide this tool. Transcending the individual interests of states, it attaches instead to a shared system of values and common concerns, such as the protection of human dignity and the global environment. Fundamental changes to the international legal order – the increasingly cooperative and communitarian nature of international law-making; the objectivised legal consequences of international law-breaking; and the developing systemic framing of the international legal order – can all be explained and understood through the community interest. This is the new paradigm through which we can understand international law.

I Introduction

International law has traditionally been understood as a decentralised, exclusively inter-state affair.[1] Individual states protect their individual interests through mirror-image bilateral relationships. This is a system in which there is no higher law nor sub- or super- state interest.[2] It is a horizontal legal order; a law between states rather than above them.[3]

However, in recent years this private-law-type paradigm appears to have been wearing at the edges, if not rusting right through. The primary rules of international law now extend well beyond the protection of individual state interests.[4] The interests of 'humanity' lie behind the multitude of human rights norms that are now in force.[5] The global environment is now protected by a host of

[1] See e.g. Emer de Vattel, *Le droit de gens ou principes de la loi naturelle*, vol 1 (Apud Liberos Tutior 1758) [348]; Dionsio Anzilotti, *Teoria generale della responsabilita dello stato nel diritto internazionale* (1902); for analysis of Anzilotti's theory, see Georg Nolte, 'From Dionsio 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 European Journal of International Law 1083 1087-1088.

[2] Philip Allott, *Eunomia: New Order for a New World* (Reprint edn, Oxford University Press 2004) 248.

[3] Stephen C Neff, 'A Short History of International Law' in Malcolm D Evans (ed), *International Law* (4th edn, Oxford University Press 2014) 14.

[4] Eyal Benvenisti and Georg Nolte, 'Introduction' in Eyal Benvenisti and Georg Nolte (eds), *Community Interests Across International Law* (Oxford University Press 2018) 4.

[5] See e.g. the preambles to the International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 and the International Covenant on Civil and Political Rights 999 UNTS 171.

international instruments that regulate state conduct even in the absence of transboundary effects.[6] Not only that, but the structures of international law have changed. International law now curbs the contractual freedom of states to make international agreements where it runs counter to a set of 'higher' norms to which they may not have consented.[7] An 'uninjured' state may now invoke responsibility for breaches of obligations owed not to itself but to the 'international community as a whole.'[8] We are in need of a new paradigm and new conceptual tools by which to understand and explain these changes and the modern landscape of international law.

This paper presents the concept of community interest as a solution to this problem. It begins by outlining the traditional, bilateral model and demonstrating why it fails to accurately describe modern international law (II). It then introduces and articulates the concept of community interest (III). The final section explores how community interest can be used to explain certain key aspects of the new international legal order in three key areas: international law-making, the response to international law-breaking, and international law-framing, i.e. how we talk about international law (IV).

II The Bilateralist Model

A. What is Bilateralism?

International law has traditionally been modelled upon the notion of 'bilateralism'.[9] Bilateralism is a structural concept that describes a category of legal relationships. A bilateral relationship is one which exists exclusively as between two actors or entities.[10] It therefore incorporates both a

[6] E.g. Convention on Biological Diversity (1992) 1760 UNTS 79; Convention for the Protection of World Cultural and Natural Heritage (1972) 1037 UNTS 151; Convention on Wetlands of International Importance Especially as Waterfowl Habitat 996 UNTS 245; International Convention for the Regulation of Whaling 161 UNTS 72.
[7] Vienna Convention on the Law of Treaties (1969) 1155 UNTS 332 Article 53.
[8] ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' in *Report of the International Law Commission on its 53rd Session* (23 April-1 June and 2 July-10 August 2001) UN Doc A/56/10 Article 48.
[9] See Nolte (2002) 1087; Anzilotti (1902); Dionsio Anzilotti, *Corso di Diritto Internazionale* (3rd edn, 1928).
[10] Nolte (2002) 1087-1088.

duality (of two parties) and an exclusivity (in that there is no other party nor relevant external relationship).

The bilateralist model may be seen, first, with respect to relationships of *obligation*. A bilateral obligation operates exclusively as between two subjects, where one subject owes to the other the performance of certain conduct.[11] This obligation is necessarily mirrored by the 'correlative right' of the other subject (to whom the obligation is owed) to the performance of that conduct.[12] This model of obligation is essentially subjective (or 'relative')[13] in that the conduct is not owed 'in the absolute, *urbi et orbi*… but only in relation to the particular State.'[14]

There are many 'pure' bilateral relationships of obligation in international law, i.e. those relationships where the obligation is owed exclusively from one subject to another (such as those arising from a bilateral treaty).[15] This is not, however, the only kind of obligation which operates in a bilateral manner. Many multilateral treaties and rules of customary international law generate obligations which may be described as '*bilateralisable'*.[16] Despite deriving from a rule that creates an ostensibly multilateral structure, wherein performance is owed to more than one other subject, these can operate bilaterally when breached. Examples include obligations relating to diplomatic protection,[17] transboundary pollution,[18] and the prohibition of aggression.[19] Such obligations form

[11] Roberto Ago, 'Second Report on State Responsibility' (1970) UN Doc A/CN.4/233 192-3.
[12] Andreas De Hoogh, 'Obligations *Erga Omnes* and International Crimes: A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States' (Proefschrift, Katholieke Universiteit Nijmegen 1995) 18-19. Also referred to as 'subjective right': Ago, 'Second Report on State Responsibility' (1970) 192-3; Julio Barboza, 'Legal Injury: The Tip of the Iceberg in the Law of State Responsibility' in Mauricio Ragazzi (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Brill 2005) 19-20.
[13] Alfred Verdross, *Völkerrecht* (5th edn, Springer 1964) 126.
[14] Bruno Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 Receuil des Cours 217 230. See also Andreas Paulus, 'Reciprocity Revisited' in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford University Press 2011) 122.
[15] E.g. *Case concerning Right of Passage over Indian Territory (Merits) (Judgment of 12 April 1960)* [1960] ICJ Rep 6, 39; Christian Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press 2005) 43-44.
[16] Linos-Alexander Sicilianos, 'The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility' (2002) 13 European Journal of International Law 1127 1133.
[17] See generally Vienna Convention on Diplomatic Relations (1961) 500 UNTS 95.
[18] *Trail Smelter Arbitration (United States v Canada)* [1941] 3 UN Intl Arb Awards 1905.
[19] Charter of the United Nations (1945) 1 UNTS XVI Article 2(4).

'a bundle of interwoven bilateral relationships,'[20] wherein the performance is owed individually to each other subject.[21] There may be many parties bound by the rule, but only two parties to each 'primary legal relationship' of obligation that derives therefrom.[22] The obligation is breached in relation to a state or states individually. These states are considered injured states, while the other parties bound by the rule are not 'a party to the breach' and thus not considered to be injured by it.[23]

The identification of the injured state is of fundamental importance to the bilateralist concept of international legal *responsibility*, where legal responsibility is understood as 'the new legal relationship which arises upon the commission by a state of an internationally wrongful act.'[24] Under the bilateralist model, where a wrongful act is committed by a state, a relationship of responsibility arises as between the wrongdoing and injured states. This is based upon the bilateral obligation—right structure discussed above. The breach of a bilateral(isable) obligation necessarily results in a corresponding violation of the correlative right of the subject to whom the obligation is owed.[25] The violation of this correlative right is understood as the (exclusive) source of legal injury.[26] A bilateralist system of responsibility grants a right of invocation of responsibility only to the state that has suffered such injury.[27] Thus, the exclusively bilateral nature of the relationship is maintained.

As with the notion of obligation under international law, the bilateralist model treats responsibility as based on a subjective relationship rather than an objective state of being. When an obligation is

[20] Sicilianos (2002) 1133; see also Kamen Sachariew, 'State Responsibility for Multilateral Treaty Violations: Identifying the "Injured State" and its Legal Status' (1988) 35 Netherlands International Law Review 273 277.
[21] ILC, 'ARSIWA' (2001) Commentary to Article 42 [8]. See also Sachariew (1988) 277-8.
[22] Sachariew (1988) 276.
[23] Willem Riphagen, 'Fourth Report on the Content, Forms and Degrees of International Responsibility' (1983) UN Doc A/CN.4/366 and Add.1 & Add.1/Corr.1 at 14 [76].
[24] ILC, 'ARSIWA' (2001) Commentary to Part Two [1] p86.
[25] Ago, 'Second Report on State Responsibility' (1970) [46]; Roberto Ago, 'Third Report on State Responsibility' (1971) UN Doc A/CN.4/246 and Add.1-3 [65].
[26] Ago, 'Third Report on State Responsibility' (1971) [74]; see also Barboza (2005) 7.
[27] See Sicilianos (2002) 1132.

breached, responsibility is established 'immediately as between the two states',[28] and exclusively as between those two states. The responsibility of the wrongdoing state thus exists only in relation to the injured state.

B. The Failure of the Bilateralist Model

The bilateralist model can no longer explain nor accurately describe international law. To begin with, there are now many international legal obligations which cannot be broken down into bilateral relationships.[29] First, there an increasing proportion of international legal obligations are *structurally* non-bilateral obligations. 'Integral,'[30] 'absolute,'[31] or 'objective'[32] obligations,[33] unlike bilateral(isable) obligations, cannot be broken down into bilateral relationships. Such obligations are usually created 'when the contents of the rule in question requires each party to adopt a course of conduct which is indivisible and is necessarily performed simultaneously towards all other States parties.'[34] They are owed in parallel and simultaneously to all other parties to the rule.[35] As such, it is impossible to breach the obligation only in relation to only one and not all other parties to the rule. Thus, the obligations relating the protection of internationally significant biodiversity within one's own borders is necessarily owed simultaneously to numerous states.[36] It is impossible to breach this obligation in relation to only one state. There is therefore no injured state. Human rights law is another commonly cited example: if one state fails to protect human rights within its own territory, in relation to its own citizens, this does not cause direct injury to the private interests of any other state.[37] Human rights obligations are objectivised in the sense that

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[28] *Phosphates in Morocco case (Preliminary Objections)* [1938] PCIJ Rep Series A/B No 74 28. See also Ago, 'Second Report on State Responsibility' (1970) 179 [13].
[29] See e.g. Sir Gerald Fitzmaurice, 'Third Report on the Law of Treaties' (1958) UN Doc A/CN.4/115 and Corr.1, p27-8Article 19. See also Sachariew (1988) 281; Tams (2005) 56.
[30] Fitzmaurice, 'Third Report on the Law of Treaties' (1958) Article 19 at p28.
[31] Tams (2005) 55.
[32] Simma (1994) 364-9. See also *Ireland v United Kingdom* [1978] ECHR 1 [239].
[33] There are other types of non-bilateral obligations, i.e. 'interdependent' obligations: Fitzmaurice, 'Third Report on the Law of Treaties' (1958) Article 19 (at p27-8) and commentary (at 44, [91]-[93]).
[34] Sachariew (1988) 281.
[35] Fitzmaurice, 'Third Report on the Law of Treaties' (1958) Article 19 (at p27-8) and commentary (at 44, [91]-[93]).
[36] Convention on Biological Diversity (1992) Articles 5-15.
[37] Georges Abi-Saab, 'Whither the International Community?' (1998) 9 European Journal of International Law 248, 262; Robert McCorquodale, 'International Community and State Sovereignty: An Uneasy Symbiotic Relationship' in

they create a code of conduct to be complied with in and of itself, not only in relation to specific other actors.[38]

This 'restructuring'[39] of obligations in international law also renders the traditional view of responsibility outdated. The bilateral model relies on the existence of an injured state. Legal injury is understood in this sense as the violation of the corresponding right to performance which is the necessary consequence of the breach of a bilateral(isable) obligation.[40] This concept of injury acts as the bridge between the origin of responsibility (the obligation breached) and the invocation and consequences of responsibility.[41] However, with structurally non-bilateral obligations, as discussed, there is no injured state. To apply the bilateral model to such obligations would be to have a system of responsibility in which responsibility for the violation of many obligations is simply uninvocable. It would mean that a state could breach a legal obligation, such as the obligation to protect internationally significant biodiversity on one's own territory, and, although technically responsible, be subject to no further legal consequences for that act.

Beyond these structurally non-bilateral obligations, international law has also seen the development of obligations that may be structurally bilateral(isable) but whose legal effect is generally recognised as extending beyond the bilateral relationship of obligation—right, or perpetrator—injured state. This is notably the case with, for example, obligations *erga omnes*.[42] It is recognised that 'all States can be held to have a legal interest in their protection.'[43] Such obligations therefore do not align with the exclusivity of the two states associated with the bilateralist model. This is reflected in the legal right of standing of *all states* to invoke

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Colin Warbrick and Stephen Tierney (eds), *Towards an 'International Community'? The Sovereignty of States and the Sovereignty of International Law* (BIICL 2006) 252.

[38] James Crawford, 'First report on State Responsibility' (1998) UN Doc A/CN.4/490 and Add. 1–7, at 29 [114].

[39] Sandesh Sivakumaran, 'Impact on the Structure of International Obligations' in Menno T Kamminga and Martin Scheinin (eds), *The Impact of Human Rights Law on General International Law* (Oxford University Press 2009) 150.

[40] Ago, 'Third Report on State Responsibility' (1971) [65], [74]; Ago, 'Second Report on State Responsibility' (1970) [46]; Barboza (2005) 7.

[41] See Sicilianos (2002) 1132.

[42] *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (Judgment)* [1970] ICJ Rep 3 [33]-[34]; ILC, 'ARSIWA' (2001) Article 48.

[43] *Barcelona Traction* [33].

responsibility in the case of a breach of such an obligation.[44] Thus, if state A commits aggression against state B, this has legal consequences beyond these two states – state C, for example, may invoke state A's responsibility. These aspects of modern international law cannot be explained within the bilateral model. They can instead be explained by community interest. We turn now to the definition of this concept.

III Introducing the International Community Interest

'Community interest' is a term used frequently but defined rarely. This section explores the two main aspects that make up the concept by addressing two fundamental questions: what is meant by *interest*, and who (or what) is the international *community*?

A. Interest

'*Interest'* can be a difficult concept to pin down. The term is often used differently in legal and non-legal contexts. There is frequently confusion between the notion of interest itself and the thing in which one may have an interest. Misunderstanding of the lines that distinguish between a legal interest, a rule protecting that interest, and the legal rights that derive therefrom, is common. Furthermore, there are important differences between different kinds of interests that are sometimes overlooked.

What are interests, and how do they work? An interest may be defined as the 'advantage or benefit of a person or group'; a 'stake or involvement in an undertaking.'[45] Interests therefore exist only in relation to the subject to whom this benefit or advantage would accrue. Herein lies the main distinction between interests and values: while interests are inherently dependent on the actor or holder to whom they accrue, values exist independently of those who believe in them – although one may have an *interest* in their protection or promotion.[46] An interest is normative in that it

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[44] *Ibid* [33]; ILC, 'ARSIWA' (2001) Article 48; Barboza (2005) 20.
[45] Oxford English Dictionary, available at <https://en.oxforddictionaries.com/definition/interest> accessed 11.04.2019.
[46] Samantha Besson, 'Community Interests in International Law: Whose Interests Are They and How Should We Best Identify Them?' in Eyal Benvenisti and Georg Nolte (eds), *Community Interests Across International Law* (Oxford

'always manifests itself in relation to a certain desired course of conduct.'[47] In this sense, interests translate non-normative concepts (desired factual situations or abstractions such as values) into normative propositions, dependent upon the holder of the interest.

In order for an interest to have legal effect, however, it must be granted such effect by a legal rule.[48] An interest has no integral or intrinsic legal force. Not all interests are protected by law: *non-legal interests* should be distinguished from *legal interests*, where only the latter benefit from legal protection.[49] This was affirmed by the ICJ in the *South West Africa* cases when it stressed that 'the existence of an "interest" does not of itself entail that this interest is specifically juridical in character.'[50] There must be something more: 'in order to generate legal rights and obligations, [an interest] must be given juridical expression and be clothed in legal form.'[51] It is *rules* that give interests legal force. Most categories of interest, including the community interest, straddle this divide between legal and non-legal interests. Some community interests benefit from legal protection, while others do not.

As was noted above, not all interests are of the same type. There is an important distinction to be made between *individual interests* and *common interests*. The 'community interest' is a particular type of common interest, namely one that is held by the 'international community as a whole'.[52] The distinction between individual and common interests is sometimes misunderstood as a quantitative difference, i.e. whether there is one or more 'holder' of the interest in question. Some present common interests as collective interests: the lowest common denominator or shared individual interests of a group of actors.[53] However, the better approach is to understand the

University Press 2018) 38; Giorgio Gaja, 'The Protection of General Interests in the International Community' (2013) 364 Receuil des Cours 9 20.

[47] De Hoogh (1995) 11.

[48] *South West Africa, Second Phase, Judgment* [1966] ICJ Rep 6 [51].

[49] Gaja (2013) 21; De Hoogh (1995) 12.

[50] *South West Africa* [50].

[51] *Ibid* [51].

[52] See e.g. ILC, 'ARSIWA' (2001) Article 48; Vienna Convention on the Law of Treaties (1969) Article 53.

[53] See e.g. CW Cassinelli, 'Some Reflections on the Concept of the Public Interest' (1958) 69 Ethics 48, in relation to the public interest, at 50, 54.

distinction between this and common interests as qualitative.[54] While 'individual interests' are private interests,[55] 'common interests' are those which are (a) shared by a group of actors and which (b) transcend the individual interests of those actors. They are greater than the sum of individual interests of the members of the group in question, and instead present a quality of commonality that goes beyond the mere coincidental lining up of individual interests.[56] They 'transcend' individual interests.[57]

The superiority of this approach is grounded in the utility of the concept. If a common interest is simply the lowest common denominator of all members of the commonality, there is never any possibility of conflict between the common and individual.[58] If this is the case, then the concept of common (and thus community) interest holds no utility: it is 'purely a rhetorical technique.'[59] This is quite clearly not the case with the community interest, however. As noted above, the community interest, through doctrinal innovations such as *jus cogens*, limits the traditionally unlimited freedom of states to act in pursuance of their individual interests. The balancing of interests between community and individual is inherent within, and an important aspect of, the concept of community interest. In order to understand this fully, we turn next to the concept of 'community'. Who, or what, is the international community whose interest is balanced against that of individual states?

B. International Community

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[54] Pavel Mates and Michal Barton, 'Public versus Private Interest – Can the Boundaries be Legally Defined?' (2011) Czech Yearbook of International Law 171 181.
[55] See Virginia Held, *The Public Interest and Private Interests* (Basic Books 1970) 18-19.
[56] Stephen M King, Bradley S Chilton and Gary E Roberts, 'Reflections on Defining the Public Interest' (2010) 41 Administration and Society 954 957; see also *Reservations to the Convention on Genocide, Advisory Opinion* [1951] ICJ Rep 15, 23.
[57] Benedict Kingsbury and Megan Donaldson, 'From Bilateralism to Publicness in International Law' in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011) 81.
[58] This problem has been explored in relation to the public interest: see William D Zarecor, 'The Public Interest and Political Theory' (1959) 69 Ethics 277 279; Frank J Sorauf, 'The Public Interest Reconsidered' (1957) 19 The Journal of Politics 616 625; Mates and Barton (2011) 181.
[59] Gleider Hernandez, 'A Reluctant Guardian: The International Court of Justice and the Concept of "International Community"' (2013) 83 British Yearbook of International Law 13 19.

The term 'international community' appears in such a diverse range of guises and contexts that it appears to mean both everything and nothing simultaneously. It is used to mean many different things and, in this sense, there is no single, universal definition but rather multiple 'international communities' that signify different things in different contexts. It is clear that there are occasions on which the term is used purely rhetorically.[60]

However, on other occasions, 'international community' (or occasionally 'international community of states') carries a distinct meaning and is reserved to those actors with law-making authority on the level of states. This is particularly the case, for example, with the use of the term 'international community of states' in the context of the recognition of *jus cogens* norms.[61] According to a textual reading of Article 53, the work of the International Law Commission,[62] as well as the practice of judicial bodies, both international[63] and domestic,[64] it would appear that the identification of *jus cogens* norms depends on recognition by the international community as a community of *states*. This would appear to be strong evidence that the community interest is also based on recognition by this community of states. As explained above, rules of *jus cogens* and obligations *erga omnes* are essentially the 'vector' through which the concept of community

[60] See e.g. Foreign Ministers of Canada, France, Germany, Italy, Japan, the United Kingdom and the United States of America, and the EU High Representative, *Statement on the situation in the West of Libya (05.04.19)*, 2019) available at <https://www.diplomatie.gouv.fr/en/french-foreign-policy/french-g7-presidency/events/article/g7-foreign-ministers-statement-on-the-situation-in-the-west-of-libya-05-04-19> accessed 04.05.2019.

[61] Vienna Convention on the Law of Treaties (1969) Article 53.

[62] Dire Tladi, 'Second Report on *Jus Cogens*' in *Report of the ILC on the work of its 69th session (1 May-2 June and 3 July-4 August 2017)* UN Doc A/CN.4/706 46, Draft Conclusion 7(2).

[63] See *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)* [1986] ICJ Rep 14 [190]; *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal) (Judgment)* [2012] ICJ Rep 422 [199]. See also *Prosecutor v Germain Katanga (Decision on the application for the interim release of detained witnesses)* [2013] ICC-01/04-01/07-3405-tENG [30]; *Prosecutor v Stakić (Judgment)* [2003] IT-97-24-T [500]; *Osorio Rivera and Family Members v Peru (Judgment)* [2013] IACHR Series C No 274 [112]; *Mendoza et al v Argentina (Judgment)* [2013] IACHR Series C No 260 [199]; *Nadege Dorzema et al v Dominican Republic (Judgment)* [2012] IACHR Series C No 251 [225]; *Atala Riffo and Daughters v Chile (Judgment)* [2012] IACHR Series C No 239 [79]; *Dacosta Cadogan v Barbados (Judgment)* [2009] IACHR Series C No 204 [5].

[64] *Bouzari and Others v Islamic Republic of Iran* [2013] 71 OR (3d) 675 (Court of Appeal for Ontario) [49]; *On the Application of Universal Recognised Principles and Norms of International Law and of International Treaties of the Russian Federation by Courts of General Jurisdiction (Decision of the Plenary Session of the Supreme Court of the Russian Federation, No. 5)* [2003]; *Arancibia Clavel, Enrique Lautaro s/ Homicidio Calificado y Asociación Ilícita y Otros (Causa No. 259, Judgment)* [2004] (Supreme Court of Justice of Argentina) [29].

interest takes legal effect.[65] Thus, they constitute a useful means by which to analyse the identification of the interest, even though they may only protect certain aspects of it.[66]

In many ways is makes perfect sense for community interest to be dependent upon state recognition. Despite the great influence that other actors may have in international law,[67] states remain the only ones with inherent law-making authority.[68] While the recognition of the *jus cogens* character of a norm is not the same as the creation of a new rule, it has important legal effects. It would be generally consistent with the division between subjects and objects of international law[69] for states to retain this exclusive authority – for now, at least. This is not necessarily to say that other actors may not have such authority in the future.

This conclusion – that the holders of the community interest, or at least those with the legal capacity to recognise it, are limited to states – finds opposition in some quarters. There appears to be an aversion to the notion that the interest of the 'international community as a whole' should be limited to that of the international community of states.[70] However, there is little to no evidence that any other actors have been taken into account by judicial bodies as a means of recognition or identification of community interests. Some claim instead that that the community interest can be linked to the existence of a higher moral law and that particular interests may simply be identified.[71] This 'natural law approach'[72] would appear to confuse the notion of *interest* with that

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[65] Hernandez (2013) 37.
[66] Jure Vidmar, 'Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System?' in Jure Vidmar and Erika De Wet (eds), *Hierarchy in International Law: The Place of Human Rights* (Oxford University Press 2012) 26.
[67] See McCorquodale McCorquodale (2006) 255, 257-261.
[68] This is to be distinguished from the *delegated* law-making authority that is enjoyed by some international organisations, and which may be traced back to the original law-making authority of states through treaty law: *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174 [185].
[69] Gleider Hernandez, *International Law* (Oxford University Press 2019) 105.
[70] See e.g. Dino Kritsiotis, 'Imagining the International Community' (2002) 13 European Journal of International Law 961 973 *et seq*; Santiago Villalpando, *L'émergence de la communauté internationale dans la responsabilité des Etats* (Graduate Institute Publications 2005) 20.
[71] See generally Dan Dubois, 'The Authority of Peremptory Norms in International Law: State Consent or Natural Law' (2009) 78 Nordic J Int'l Law 133; Mary E O'Connell, 'Jus Cogens: International Law's Higher Ethical Norms' in Early Childress II (ed), *The Role of Ethics in International Law* (Cambridge University Press 2012). See also Mauricio Ragazzi, *The Concept of Obligations Erga Omnes* (Oxford University Press 1997) 183.
[72] Dubois (2009).

of *value*. As discussed above, in (A), an interest is not a value, nor is it a freestanding norm; it is dependent upon its holder. In addition, the community interest is evolutive: as with any interest, common or individual, the substantive content of that interest is bound to evolve in accordance with what is considered to be a benefit or advantage in the given circumstance. The community interest is in a constant state of development 'in accordance with the changing requirements of the international community.'[73] There is therefore a movement or fluidity between what is in the community interest and what is not.[74] Its content is not static. This is in contrast to the immutable, inherent, unchanging nature of a higher law in natural law theory.[75]

Nonetheless, attaching community interest to the international community of *states* would certainly appear at first glance to limit the scope and potential of the concept. If this were to imply that the community interest is made up of the individual interests of states, such an interpretation would indeed appear to be scarcely reconcilable with much of the usage of the phrase 'interest of the international community' by international courts and indeed by states themselves.

This concern is, however, an unnecessary one. It is premised upon a misunderstanding of the commonality of common interests. As noted above, the community interest is a common interest. It is not, therefore, the sum total of the individual interests of the 'holders' of that interest. Instead, as explained above, it reflects the values[76] or concerns[77] that are shared by these actors and which *transcend* their individual interests. Thus, the identity of the 'holders' of the interest does not necessarily limit the content of that interest. The 'holders' of the interest *may* be limited to states.

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[73] Vera Gowland-Debbas, 'Judicial Insights into Fundamental Values and Interests of the International Community' in Muller, Raic and Thuransky (eds), *The International Court of Justice: Its Future Role after 50 Years* (Martinus Nijhoff 1996) 363.
[74] This is discussed further below, in section IV.
[75] Dire Tladi, 'First report on jus cogens' in *Report of the International Law Commission on the 68th session* (2 May-10 June and 4 July-12 August 2016) UN Doc A/CN.4/693 [52].
[76] Erika De Wet, 'The International Constitutional Order' (2006) 55 International & Comparative Law Quarterly 51; *Reservations to the Convention on Genocide* 23.
[77] E.g. the concept of the common concern of mankind in international environmental law: Convention on Biological Diversity (1992) preamble.

However, this is not to limit the understanding of the 'international community' to whom the community interest attaches.

The international community in this sense is not a collection of legal actors, but an *idea*. It is a legal fiction to which we impute interests, in very much the same way as we impute interests to the socio-legal construct of 'the public'.[78] In this way, the 'international community' finds definition (at least for these purposes) in the international community *interest*, and not the other way around.

The international community interest is, in sum, a common interest, held by those actors possessing law-making authority in the international legal order (for now, states), but which relates to a legal fiction that transcends the individual interests of all actors in the international sphere. Legal rules either protect the substantive content of the community interest or take the form of secondary norms that integrate the concept of community interest into the international legal order, like obligations *erga omnes* and rules of *jus cogens*. Community interest is therefore a tool by which it is possible to translate values and desired factual situations into normative statements that can then be given legal force by rules. In doing this, the community interest can be seen to have transformed fundamental aspects of the international legal order. This is explored below.

IV Towards a New Legal Order

Despite being a mere 'fiction,' the concept of community interest has had a transformative effect on international law. The following subsections explore fundamental changes that have occurred in the international legal order and how they may be understood and explained through the concept of community interest.

A. Community Interest and International Law-Making

[78] See Sorauf (1957) 630.

First, the concept of community interest has had a dramatic impact on the subject matter that is regulated by international law, and on the structure and effect of international legal rules and obligations. There are two main ways in which legal rules protect community interests.

First, a legal rule may protect a particular interest coincidentally. This is the case with primary rules of international law that protect human rights or the environment. A legal rule that stipulates that a state must take certain actions in order to protect internationally significant biodiversity within its territory furthers the community interest with regard to such environmental concerns.[79] It does so incidentally, however – the rule is inspired by the community interest, but does not protect the concept of community interest directly.

Community interest therefore extends the substantive content of international law beyond those things that are in the individual interest of states.[80] It is this new interest-basis that underlies the 'restructuring'[81] of obligations in international law as discussed above (section II). Obligations aimed towards the protection of internationally significant biodiversity,[82] for example, do not reflect the individual interests of states. They are based instead on the 'intrinsic value' of biodiversity and the role it plays in global ecosystems:[83] a *community* interest that transcends individual state borders and interests.

A different kind of legal rule grants legal force to the concept of the community interest itself. This is where the real transformative potential of community interest lies: at the intersection between community interest and the secondary rules of international law. Rules of *jus cogens* and obligations *erga omnes* in particular represent the most commonly accepted 'doctrinal expressions' of community interest.[84] Both are considered to belong to the same overarching idea: namely, the

[79] E.g. Convention on Biological Diversity (1992) Articles 5-14.
[80] Benvenisti and Nolte (2018) 4.
[81] Sivakumaran (2009) 150.
[82] E.g. Convention on Biological Diversity (1992) Articles 5-14.
[83] *Ibid* preamble [1]-[2].
[84] Simma (1994) 285.

heightened protection of fundamental community interests.[85] These relate thus not to *particular* community interests, but to the *concept* of community interest itself.

The emergence of such 'communitarian'[86] or community interest norms promises to imbed the notion within the normative structures of the international legal system. Thus, *jus cogens* (or peremptory[87]) norms prevent the creation of treaty rules that conflict with rules protecting fundamental community interests.[88] This protection is extended by the non-applicability of circumstances precluding wrongfulness as a means of avoiding or excluding responsibility for the breach of an obligation arising from a *jus cogens* norm.[89] The International Law Commission's Articles on State Responsibility also introduce a differentiated responsibility regime with additional legal consequences incurred in the case of a 'serious breach' of a *jus cogens* norm.[90] With regard to obligations *erga omnes*, the existence of a community interest in the fulfilment of a certain obligation creates a procedural right on the part of every state to invoke responsibility for the breach of that obligation.[91] This is not to say that a *right* of each and every state individually has been violated. It should be recalled that while the recognition of a legal interest may result in the generation of certain rights, the two concepts are distinct.[92]

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[85] Santiago Villalpando, for example, sees obligations *erga omnes* and peremptory norms as having a 'racine commune', namely 'la protection des biens ou valeurs collectifs qui sont d'intérêt de la communauté internationale toute entière': Villalpando (2005) 84. See also Maja Ménard, 'Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Compliance with Peremptory Norms' in James Crawford and others (eds), *The Law of International Responsibility* (2010) 449; ILC, 'ARSIWA' (2001) Commentary to Article 45 [4]; Gowland-Debbas (1996).

[86] James Crawford, 'Responsibility for Breaches of Communitarian Norms: an Appraisal of Article 48 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts' in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford University Press 2011) 229.

[87] See Dire Tladi, 'Third report on peremptory norms of general international law (jus cogens)' (30 April–1 June and 2 July–10 August 2018) UN Doc A/CN.4/714.

[88] Vienna Convention on the Law of Treaties (1969) Articles 53 and 64.

[89] ILC, 'ARSIWA' (2001) Article 26.

[90] *Ibid* Articles 40, 41.

[91] Crawford (2011) 227.

[92] See *Nicaragua v Colombia*, wherein the ICJ stated that, in order to intervene in judicial proceedings as a third party (Statute of the International Court of Justice (1946) UKTS 67, Article 62), a state need not 'establish that one of its rights may be affected,' but simply that it has an interest 'of a legal nature' that may be affected by the Court's decision in the main proceedings: *Territorial and Maritime Dispute (Nicaragua v Colombia) (Application for Permission to Intervene, Judgment)* [2011] ICJ Rep 420 [37]. See also *Barcelona Traction* [46].

The integrated protection of the community interest as a concept also facilitates the dynamism of its content. The integration, through tools such as *jus cogens* and *erga omnes*, allows the legal protection of community interest (the *legal* community interest) to keep up with its changing content.

In a parallel development, international law-making procedures have become increasingly more cooperative in nature, reflecting the community-oriented nature of the subject matter of regulation. We have seen, for example, the dramatic rise of multilateral treaty-making since the 1970s.[93] We are also becoming accustomed to the influential role of international organisations and treaty bodies in the creation of international legal rules,[94] from the impact of General Assembly Resolutions on the formation of customary rules[95] to the law-making and interpretive powers of human rights institutions[96] and environmental treaty bodies.[97] These shifts both reflect and facilitate the turn towards community over individual interest.

Finally, community interest also places limitations on international law-making. While there is much debate over the exact nature and formation of *jus cogens* norms, it is generally accepted that they reflect the fundamental interests of the international community.[98] International legal rules that are in conflict with a rule *of jus cogens* are held to be invalid as a result.[99] Similarly, it would seem that *jus cogens* also operates in a similar manner with regard to customary international law. Instead of invalidating a pre-formed customary rule, however, it would seem more logical that a

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[93] Michael Bowman, 'Righting the World Through Treaties: The Changing Nature and Role of International Agreements in the Global Order' (2007) 7 Legal Information Management 124.
[94] Antônio Augusto Cançado Trindade, 'International Law for Humankind: Towards a New Jus Gentium (I)' (2005) 316 Receuil des Cours 9 129.
[95] Stephen M Schwebel, 'The Effect of Resolutions of the UN General Assembly on Customary International Law' (1979) 73 Proceedings of the Annual Meeting (American Society of International Law) 301.
[96] Geir Ulfstein, 'Law-making by Human Rights Treaty Bodies' in Rain Liivoja and Jarna Petman (eds), *International Law-making: Essays in Honour of Jan Klabbers* (Routledge 2013),
[97] Malgosia Fitzmaurice, 'Law-making and International Environmental Law: The legal character of decisions of conferences of the parties' in Rain Liivoja and Jarna Petman (eds), *International Law-making: Essays in Honour of Jan Klabbers* (Routledge 2013).
[98] Villalpando (2005) 84 ; Ménard (2010) 449; ILC, 'ARSIWA' (2001) Commentary to Article 45 [4].
[99] For treaty rules: Vienna Convention on the Law of Treaties (1969) Articles 53, 64; for custom: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993* [1993] ICJ Rep 325 Separate Opinion of Judge *ad hoc* Lauterpacht [99].

customary rule that was in conflict with a *jus cogens* norm would be prevented from forming.[100] In both these situations, therefore, it may be argued that *jus cogens* norms act as a community-interest-based limitation on the contractual freedom of states.[101]

B. Community Interest and International Law-Breaking

It was noted above that the international law of state responsibility can no longer be reconciled with the bilateralist model. The traditional, bilateralist view of responsibility has been significantly undermined by the notion of community interest. International legal responsibility can no longer be fully understood as a subjective relationship, existing only as between two states.

First, legal injury – which is central to the bilateralist model of obligation, responsibility, and the link between the two[102] – is no longer a requirement for state responsibility.[103] In other words, there can be an internationally wrongful act (the *origin* of responsibility) in the absence of an injured state. This 'fundamental shift'[104] can be seen as an 'objectivisation' of responsibility.[105] In the bilateral model of responsibility, only the injured state is deemed to have a legal interest in the responsibility of a wrongdoing state. The objectivisation of responsibility reflects the interest of the international community in legal responsibility and in the fulfilment of legal obligation more generally.

Further, the *content* of responsibility (the legal consequences arising from the commission of an internationally wrongful act) has changed. The bilateralist model assumes that the content of responsibility is purely reparative.[106] This reflects the notion that responsibility is relative in that

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[100] Vidmar (2012) 29.
[101] Santiago Villalpando, 'The Legal Dimension of the International Community: How Community Interests Are Protected in International Law' (2010) 21 European Journal of International Law 387 402.
[102] See section II.
[103] ILC, 'ARSIWA' (2001) Article 2; Crawford, 'First report on State Responsibility' (1998) [105] 27.
[104] André Nollkaemper, 'Constitutionalization and the Unity of the Law of International Responsibility' (2009) 16 Indiana Journal of Global Legal Studies 535 547.
[105] Alain Pellet, 'The Definition of Responsibility in International Law' in James Crawford and others (eds), *The Law of International Responsibility* (Oxford University Press 2010) 8.
[106] Pierre-Marie Dupuy, 'A General Stocktaking of the Connections between the Multilateral Dimension of Obligations and Codification of the Law of Responsibility' (2002) 13 European Journal of International Law 1053 1054; Paul

it exists purely between wrongdoing and injured state. That, however, is no longer the case.

First, the primary consequence of an internationally wrongful act is now the obligation of cessation rather than the obligation to make reparation.[107] While reparation is concerned with the redressing of injury, i.e. a subjective remedy, cessation essentially means a return to legality.[108] Consequently, argues Shelton, this shift from reparation to cessation 'powerfully express[es] the community and individual interest in the rule of law,'[109] and thus emphasises the objective nature of responsibility.

Second, even the obligation to make reparation has changed to reflect interests wider than those of an injured state,[110] with Article 33 of ARSIWA affirming that that the obligation to make reparation 'may be owed to another state, to several states, or to the international community as a whole.'[111] This is a significant development, and reflects the fact that 'the relevance of the problem transcends the limits of bilateral relations between the wrongdoer and injured states.'[112]

The third and most radical change to the content of responsibility has been the introduction of a differentiated regime of responsibility for 'serious breaches of peremptory norms' under Articles 40 and 41 of ARSIWA.[113] This has essentially created an additional set of consequences that apply only in relation to internationally wrongful acts that are considered to be particularly deleterious towards fundamental community interests.[114]

Finally, there have been significant developments in the *implementation* of responsibility, most notably regarding invocation. Traditionally, only the injured state has *locus standi* to invoke the

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Reuter, 'Principes de Droit Public International' (1961-II) 103 Receuil des Cours 425; FV Garcia-Amador, 'First Report on International Responsibility' (1956) UN Doc A/CN.4/96 [37]-[39].

[107] ILC, 'ARSIWA' (2001) Article 30.

[108] Barboza (2005) 13-15.

[109] Dinah Shelton, 'Righting Wrongs: Reparations in the Articles on State Responsibility' (2002) 96 American Journal of International Law 833 839.

[110] See ILC, 'ARSIWA' (2001) Commentary to Article 33 [1] p95.

[111] *Ibid* Article 33(1).

[112] Alexander Orakhelashvili, 'Peremptory Norms and Reparation for Internationally Wrongful Acts' (2003) 3 Baltic Yearbook of International Law 19 20.

[113] ILC, 'ARSIWA' (2001) Article 41.

[114] See *supra* n 98. 'Peremptory norms' is used interchangeably with 'rules of *jus cogens*': Tladi, 'Third Report' (2018).

responsibility of a wrongdoing state.[115] It was 'up to each state to protect its own rights,'[116] or indeed to choose *not* to do so.[117] As mentioned above, we have seen the development of obligations *erga omnes*: a category of obligations that, like rules of *jus cogens*, reflect community interests.[118] When breached, these obligations generate a right of standing to *all* states to invoke the responsibility of the wrongdoing state.[119] This has been recognised in a number of cases at the ICJ,[120] and has been codified in Article 48 of ARSIWA.[121]

C. Community Interest and International Law-Framing

Finally, the concept of community interest changes how we understand the nature and structure of international law. International law has historically been called a 'primitive'[122] legal order – a mere 'set' of rules as opposed to a true legal 'system';[123] an 'anarchic condition' as opposed to a 'civil' one.[124]

These descriptions may be fairly applied to the bilateral model of international law, with its exclusively interstate relationships and the absence of an overarching community interest or relationships of obligation and responsibility held with respect to the community as a whole. However, as has been demonstrated, this picture of international law is no longer accurate. Community interest has created a legal framework within which the notions of obligation and responsibility are objectivised. It has generated normative structures within which we can understand international law as being 'above' rather than just 'between' states.[125] No longer is the international legal order limited to a web of bilateral arrangements protecting private state

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[115] *Reparation for Injuries* 181-182; see also *South West Africa* [49]-[50]. See also Simma (1994) 230-231.
[116] Simma (1994) 230; see *Reparation for Injuries*.
[117] Simma (1994) 230-231.
[118] *Barcelona Traction* [33]-[34]; Villalpando (2005) 98.
[119] *Barcelona Traction* [33]-[34].
[120] *Ibid* [33]-[34]; *East Timor (Portugal v Australia)* [1995] ICJ Rep 90 102; *Legal Consequences of the Separation of the Chagos Archipelago From Mauritius in 1965, Advisory Opinion* [2019] ICJ Rep 169 [180].
[121] ILC, 'ARSIWA' (2001) Article 48.
[122] Liam Murphy, *What Makes Law* (Cambridge University Press 2014) 145.
[123] H L A Hart, *The Concept of Law* (Clarendon Law Series, 3rd edn, Oxford University Press 2012) 236.
[124] Leslie Arthur Mulholland, 'The Difference Between Private and Public Law' (1993) 1 Jahrbuch für Recht und Ethik 13 116.
[125] See Lassa Oppenheim, *International Law: A Treatise*, vol 1 (2nd edn, Longmans, Green, and Company 1905) 209.

interests. It is a system of rules, institutions, and structures that operates within and is built upon the framework provided by the international community interest.

V Conclusion

This paper has demonstrated the failure of the bilateralist model to describe modern international law. If it ever was an appropriate model, is certainly is no longer. From international law-making, through the international legal response to law-breaking, to the manner in which the international legal system is framed, international law has been transformed. Community interest provides a useful conceptual tool by which to understand and formulate these changes. It facilitates the translation of abstractions, such as values, and other objects or situations considered to be of common global concern, into normative statements that can then be granted legal force by rules. Community interest can also be seen as underlying a new international legal order. In this order, obligation and responsibility are understood objectively rather than as subjective relationships between states. Law no longer operates purely between states individually, but also above the. States and the legal relationships by which they are bound form part of a legal system. Community interest has fundamentally changed how we view the purpose, structures, and possibilities of international law. It forms the catalyst and the contours of the new legal order. This is international law's new paradigm.

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