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Community Interests in International Law

Whose Interests Are They and How Should We Best Identify Them?

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> We have entered an era of international law in which international law sub-serves not only the interests of individual States, but looks beyond them and their parochial concerns to the greater interests of humanity and planetary welfare.[1]

I. Introduction

The recognition and protection of certain community interests in the normative content and structure of contemporary international law are well established.[2] The various means for their enforcement[3] and the related responsibility regime[4] have also been mapped extensively. However, their exact nature and identification processes in international law[5] and, even more importantly, the legitimacy thereof have not been explored in full detail yet and still need to be assessed.[6]

Curiously, the starting point in the debate is usually, and it is also the case in the famous quote by Judge Weeramantry in the International Court of Justice (ICJ)'s *Gabčíkovo-Nagymaros Project* case,[7] that international lawmaking by states is self-interested by default, on the one hand, and accordingly necessarily conflicts with community interests, on the other. This way of framing the issue is misleading for two reasons.

First of all, states are not necessarily *self-interested*. Even if states were analogous to individuals (as I will explain, they are not, precisely because they are collective agents set up to protect the collective interests of their individual members), it is clear, and I will argue this in detail in the chapter, that, like their individual members, they can pursue both individual interests and collective ones and that the latter can include domestic collective interests as well as global ones. Second, *community interests* are pluralistic and indeterminate. As is the case regarding public interests in domestic law, community interests may therefore conflict, across international law regimes or within each of them, and their identification is likely, I will argue, to trigger reasonable disagreement, thereby raising difficult questions of legitimacy. As a matter of fact, there are other grounds of legitimacy and, more generally, other dimensions of justice at play in the determination of international law that may conflict with community interests. Accordingly, the priority of certain community interests over other values and interests, including states' interests, in the legitimation of international law cannot simply be taken for granted and needs to be justified.

In response, this chapter's aim is, first of all, to discuss the nature and scope of community interests in international law and, second, to assess how they should best be identified. It explains how this can occur legitimately and why it is compatible with the important role played by state consent in international lawmaking.

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[1] Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. Rep. 7, 118 (Sept. 25) (separate opinion of Vice-President Weeramantry) [hereinafter Gabčíkovo-Nagymaros Project].

[2] Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 Collected Courses of The Hague Academy of International Law 217 (1994); Giorgio Gaja, *The Protection of General Interests in the International Community*, 364 Collected Courses of The Hague Academy of International Law 9 (2011); From Bilateralism to Community Interest (Ulrich Fastenrath et al. eds., 2011); The Common Interest in International Law (Wolfgang Benedek et al. eds., 2014).

[3] *See, e.g.*, Christian J. Tams, Enforcing Obligations Erga Omnes in International Law (2005); Christian J. Tams, *Individual States as Guardians of Community Interests*, *in* From Bilateralism to Community Interest, *supra* note 2, at 379; James Crawford, *Chance, Order, Change: The Course of International Law*, 365 Collected Courses of The Hague Academy of International Law 9, 194 (2013).

[4] *See, e.g.*, James Crawford, *Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts*, *in* From Bilateralism to Community Interest, *supra* note 2, at 224; Christian J. Tams & Alessandra Asteriti, *Erga Omnes, Jus Cogens and Their Impact on the Law of State Responsibility*, *in* The International Responsibility of the European Union 163 (Malcolm D. Evans & Panos Koutrakos eds., 2013).

[5] *But see* Shabtai Rosenne, *Bilateralism and Community Interest in the Codified Law of Treaties*, *in* Transnational Law in a Changing Society 202 (Wolfgang Friedmann, Louis Henkin & Oliver Lissitzyn eds., 1982); Fouad Zarbiev, *L'interprétation téléologique des traités comme instrument de prise en compte et de mise en balance des valeurs et intérêts environnementaux*, *in* La circulation des concepts juridiques: le droit international de l'environnement: entre mondialisation et fragmentation 199 (Hélène Ruiz Fabri & Lorenzo Gradoni eds., 2009); Jan Klabbers, *The Community Interest in the Law of Treaties: Ambivalent Conceptions*, *in* From Bilateralism to Community Interest, *supra* note 2, at 768; Kenneth Keith, *Bilateralism and Community in Treaty Law and Practice—of Warriors, Workers, and (Hook-)Worms*, *in* From Bilateralism to Community Interest, *supra* note 2, at 754.

[6] There is no mention of "community interests" as such in the ILC Reports on the identification and formation of customary international law (Michael Wood (Special Rapporteur), *First Rep. on Formation and Evidence of Customary International Law*, U.N. Doc. A/CN.4/663 (May 17, 2013); Michael Wood (Special Rapporteur), *Second Rep. on Identification of Customary International Law*, U.N. Doc. A/CN.4/672 (May 22, 2014); Michael Wood (Special Rapporteur), *Third Rep. on Identification of Customary International Law*, U.N. Doc. A/CN.4/682 (Mar. 27, 2015)) or in the ILC Reports on subsequent agreements and subsequent practice in relation to treaty interpretation (*see, e.g.*, Georg Nolte (Special Rapporteur), *First Rep. on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation*, U.N. Doc. A/CN.4/660 (Mar. 19, 2013); Georg Nolte (Special Rapporteur), *Second Rep. on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties*, U.N. Doc. A/CN.4/671 (Mar. 26, 2014); Georg Nolte (Special Rapporteur), *Third Rep. on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties*, U.N. Doc. A/CN.4/683 (Apr. 7, 2015)).

[7] Gabčíkovo-Nagymaros Project, *supra* note 1, at 118 (separate opinion of Vice-President Weeramantry).

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The structure of the proposed argument is four-pronged. Sections II and III explore what "community interests" amount to, first generally and then as "community interest norms" in international law. Section IV distinguishes the question of the relevance of community interests in international law from related albeit distinct issues in the structure of contemporary international law, such as the universality, generality, hierarchy, and constitutionality of international law. Section V shows how the identification of community interests in international law should not actually be approached as antithetical to some of the other key structural features of international law, but as complementary to them, in particular to state consent, state sovereignty, and state equality.

II. Community Interests and International Law

The term "community interests" is not particularly clear and the great variation in its meaning, across regimes and even within each of them, can affect their identification in international law. In a nutshell, community interests are best understood as interests (i) that are common (ii) and/or belong to a community (iii).[8]

First of all, community interests amount to "interests." These interests are usually referred to as moral and objective "interests and values" or "values and interests" in the practice of international law, and especially the ICJ's case law.[9] This should not come as a surprise to the extent that what are usually at stake are interests that are of value or, conversely, values in which there are interests. This connection between values and interests is even more obvious when what is at stake is a right, to the extent that rights protect interests and are of value.[10] As a matter of fact, community interests, when they are protected as legal norms, usually take the shape of duties (e.g., duties *omnium*), whether or not these duties also correspond to rights (e.g., *erga omnes* duties). The latter is the case, for instance, in international human rights law that protects individual rights that give rise to duties *erga omnes* (owed to all other states besides their individual right-holders) and *omnium* (of all states). By contrast, when these interests give rise primarily to nondirected and unallocated collective responsibilities, they are sometimes referred to as being of concern, as in "common concerns" and the related "common but differentiated responsibilities" in international environmental law. Of course, community interests are plural and often conflict with one another. Some of them are also nested and multilayered.

Second, community interests are "common." What makes interests common, besides their collective holders or, when they give rise to duties, their collective bearers

[8] On other understandings, see, for example, Simma, *supra* note 2, at 233; Isabel Feichtner, *Community Interest*, *in* 2 MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 2 (Rüdiger Wolfrum ed., 2012); Tams, *supra* note 3, at 380; Wolfgang Benedek, Koen De Feyter, Matthias Kettemann & Christina Voigt, *Conclusions: The Common Interest in International Law—Perspectives for an Undervalued Concept*, *in* THE COMMON INTEREST IN INTERNATIONAL LAW, *supra* note 2, at 219. The best one can be found in Gaja, *supra* note 2, at 20–22.

[9] *See, e.g.*, Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Judgment, 1970 I.C.J. Rep. 3, ¶ 33 (Feb. 5) [hereinafter Barcelona Traction case].

[10] *See also id.* ¶ 33.

(the next point actually pertains to their belonging to or being constitutive of a "community"), may be their importance or fundamental character, first of all. If a value is important or fundamental, it is not only in the individual, but also in the common interest to have it protected.[11] Commonality may also be a matter of the collective nature of the values or interests themselves,[12] secondly. This is where a connection can be made between common interests and common or "collective goods."[13] Importantly, the commonality of community interests need not mean that they are aggregative and a sum of individual and/or state interests. Finally, an additional, albeit nonnecessary, dimension may be the dependence of the protection of community interests on collective action or coordination. This is a dimension encountered, for instance, in discussions of so-called "common concerns" in international environmental law.[14]

Either or all of these three dimensions may contribute to considering an interest or value as common.[15] Some authors have also mentioned the "publicity" of community interests to capture their commonality.[16] This conception of community interests would tie in nicely with public interests in domestic law and could help in distinguishing community interests from other kinds of (allegedly "private") interests in international law, be they individual or state interests. The difficulty in international law, however, is that publicity carries with it implications that do not (yet) fit the circumstances of international lawmaking[17] and, more generally, the transposability of the public/private distinction to international law has not (yet) been sufficiently established.[18]

Finally, a matter that is related to the second dimension and may even substitute for it: The commonality of community interests usually translates into the collective identity of their holders and/or bearers, that is, a "community" and, when the latter is universal, the "international community." Community interests are interests "of" a community and, as I explained before, this personal scope is sometimes (although not necessarily) taken as enough to make them "common." Community interests may also actually contribute to constituting their holders or bearers as a community in the first place.

The scope of that community of holders and/or bearers may be universal (e.g., the interests "of" the international community) or purely regional (e.g., community

[11] *Id.*

[12] Importantly, there is a distinction to draw between the collective dimension of a *good*, the collective nature of the *interest* in that good, and the collective nature of the *right-holders or duty-bearers* pertaining to the rights/duties over that good.

[13] *See, e.g.*, Fabrizio Cafaggi & David D. Caron, *Global Public Goods Amidst a Plurality of Legal Orders: A Symposium*, 23 EUR. J. INT'L L. 643 (2012).

[14] *See, e.g.*, Thomas Cottier et al., *The Principle of Common Concern and Climate Change*, 52 ARCHIV DES VÖLKERRECHTS 293 (2014); Jutta Brunnée, *Common Areas, Common Heritage, and Common Concern*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 550 (Daniel Bodansky, Jutta Brunnée & Ellen Hey eds., 2008).

[15] *See also* TAMS, *supra* note 3, at 133.

[16] *See* Jonathan I. Charney, *International Law-Making in a Community Context*, 2 INT'L LEGAL THEORY 38 (1996).

[17] *See, e.g.*, Benedict Kingsbury & Megan Donaldson, *From Bilateralism to Publicness in International Law*, *in* FROM BILATERALISM TO COMMUNITY INTEREST, *supra* note 2, at 79.

[18] See José E. Alvarez, *Beware: Boundary Crossings*, *in* BOUNDARIES OF STATE, BOUNDARIES OF RIGHTS: HUMAN RIGHTS, PRIVATE ACTORS, AND POSITIVE OBLIGATIONS 43 (Tsvi Kahana & Anat Scolnicov eds., 2016).

interests "in" the international community). It may even be purely functional and relate to a certain activity. Importantly, community interests can be at play and protected within the boundaries of domestic polities, as is the case in international human rights law, as much as between them and, more generally, in international relations or in spaces that expand beyond national jurisdiction, as is the case in international law of the sea or in environmental law more generally.[19] What matters is that they are shared by more than one state or by people in more than one state. This is also what the idea of "general" interests captures.[20]

The holders and/or bearers of community interests may be individuals or states, or even both. States may hold or bear those interests as agents of individuals, but also in their own name. This relates to the old chestnut of the identity of the international community as a community "of states" or "as whole."[21] When the community of interests is universal, it is also sometimes used as a placeholder for "humanity."[22] The holders and/or bearers of community interests may be contemporary or even transgenerational, depending on the interests at stake.[23]

When their bearers are a community, most community interests give rise to general duties, that is, duties owed by everyone in that community. This is what duties *omnium* or "multilateral duties" refer to. The relationship between bilateral and multilateral duties is dynamic, however, to the extent that bilateral duties may become multilateral, or vice-versa, through the generalization of a given practice. In cases where community interests require collective action, these general duties will actually amount to collective duties, but this is not necessarily the case. Here, an example in point is international human rights law: Human rights duties bind all states (to international human rights treaties or on grounds of customary international human rights law), but bind them individually and not collectively.[24] Even when community interests do not give rise to general duties, but only to individual ones, they generate duties owed to everyone in the community, that is, duties *erga omnes*, and hence to rights of everyone (rights *omnium*).[25] Again, in the case of duties *erga omnes*, not all right-holders need to exercise their rights together as collective rights and, in some cases, they may do so individually only. International human rights law is an example since international human rights can be invoked individually, whether by their first-order holders (individuals) or by their second-order holders (other states).[26]

[19] *See* Gaja, *supra* note 2, at 23. [20] *Id.* at 21.

[21] *See, e.g.*, Bruno Simma & Andreas L. Paulus, *The "International Community": Facing the Challenge of Globalization*, 9 EUR. J. INT'L L. 266 (1998); Santiago Villalpando, *The Legal Dimension of the International Community: How Community Interests Are Protected in International Law*, 21 EUR. J. INT'L L. 387 (2010).

[22] *See, e.g.*, Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT'L L. 295 (2013).

[23] *See, e.g.*, Edith Brown Weiss, *In Fairness to Future Generations and Sustainable Development*, 8 AM. U. INT'L L. REV. 19 (1992).

[24] *See* Samantha Besson, *The Sources of International Human Rights Law*, *in* THE OXFORD HANDBOOK ON THE SOURCES OF INTERNATIONAL LAW 837 (Samantha Besson & Jean d'Aspremont eds., 2017).

[25] *See* Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. Rep. 422, ¶ 68 (July 20). *See also* TAMS, *supra* note 3; Crawford, *supra* note 3, at 183–204; Institut de Droit International, *Obligations and Rights Erga Omnes in International Law*, 71 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 119 (2005).

[26] *See* Besson, *supra* note 24.

Importantly, the identity of the community holding the interests may not correspond to that of those acting upon or enforcing those interests procedurally in practice. The international community, in particular, is not (yet) institutionalized. The enforcement of community interests is decentralized, as a result, and occurs through single states, but also through (regional or functional) groups of states and international organizations or institutions.[27] The question, of course, is whether there are normative limits as to whom the enforcement of community interests may be delegated to.[28]

III. Community Interest Norms in International Law

International law may contribute to the normative recognition, specification, and/or even creation of community interests. Community interests can take different normative forms in international law—whether nominally expressed as such or not.[29] International legal norms protecting community interests are sometimes referred to as "community interest norms"[30] or even "communitarian norms."[31] There are at least five types of normative instantiations of community interests in contemporary international law. There may also be various overlaps between them.

First of all, and most directly, community interests can amount to the *object* of certain norms or even entire regimes in international law that protect them. This is the case as regards international human rights law, international humanitarian law, international criminal law, international environmental law, international development law, international law of the sea, international common heritage law, or UN collective security law. Other norms or regimes of international law may also protect community interests, albeit in a less central manner. One may think of third-party countermeasures in international responsibility law.

Second, community interests can be protected by different *types* of norms in international law: Duties, rights, and/or principles. Some community interest norms give rise to duties, as in duties of all states or *omnium*. Certain of these duties are directed duties and correspond to rights, as in duties owed to all states or *erga omnes*. However, others do not and remain nondirected responsibilities, as the responsibilities arising from "common concern" in international environmental law. Moreover, community values and interests are often, concurrently or solely, protected as (general or fundamental) principles in international law. Given the ambivalent norm-source nature of general principles of international law,[32] this makes for an interesting dual vehicle for community interests in international law, as we will see in the next chapter. It suffices here to contrast principles protecting community interests in international

[27] *See* Tams, *supra* note 3, at 381.

[28] *See, e.g.*, Antony Duff, *Authority and Responsibility in International Criminal Law*, *in* THE PHILOSOPHY OF INTERNATIONAL LAW 589 (Samantha Besson & John Tasioulas eds., 2010).

[29] *See also* Villalpando, *supra* note 21; Feichtner, *supra* note 8.

[30] *See* Feichtner, *supra* note 8, at 2. [31] *See, e.g.*, Crawford, *supra* note 3, at 204.

[32] *See, e.g.*, Samantha Besson, *General Principles in International Law—Whose Principles?*, *in* LES PRINCIPES EN DROIT EUROPÉEN—PRINCIPLES IN EUROPEAN LAW 19 (Samantha Besson & Pascal Pichonnaz eds., 2011); Pierre d'Argent, *Les principes généraux à la Cour internationale de Justice*, *in* LES PRINCIPES EN DROIT EUROPÉEN—PRINCIPLES IN EUROPEAN LAW, *supra* at 107.

environmental law with individual rights and states' duties arising from the protection of community interests in international human rights law.

Third, community interests can be protected through various dimensions of the *structure* of norms in international law.[33] One should mention, for instance, the multilateral personal scope of *erga omnes* or *omnium* duties just discussed (e.g., in international human rights law), but also the enhanced stringency or peremptory character of certain norms (*jus cogens*), the availability of *actio popularis* and third-party standing in the enforcement of certain norms (e.g., in international responsibility law), the recognition of universal jurisdiction, whether prescriptive or executive (e.g., in international criminal law), including the power to vest certain norms with extraterritorial effects, the emergence of "objective regimes" and third-party obligations in international treaty law (e.g., in international boundary delimitation law), or, last, the development of "joint and several responsibility" regimes in international responsibility law[34] (e.g., in the international responsibility law pertaining to space objects). Many other such communitarian structural features may be identified among international law norms, some procedural and others substantive or even combining both dimensions.

Fourth, community interests can be reflected in the *sources* of international law. This is especially the case regarding general or multilateral sources of law like multilateral treaties, customary international law or general principles of international law (*qua* source this time). Importantly, not all multilateral treaties or customary law do entail general or multilateral duties. Some are bilateral only. It would be wrong therefore to associate all general sources of international law with the protection of community interests.[35] All the same, it remains that multilateral or general duties can only be found within multilateral or general sources of international law. Some of those duties are *erga omnes partes*, if their source is a treaty, or *erga omnes tout court* if their source is customary international law. Importantly, as we will see in the next chapter, the judicial identification and interpretation of those sources also constitute important ways to protect community interests, thereby adding judicial law to the sources of international law that are relevant to community interest norms. One may think of international human rights courts' interpretations of human rights treaties in this respect.

Finally, community interests can function as *aims* or *purposes* of certain norms, or regimes in international law, even when they are not reflected in the actual object, types, structure, or sources of community interest norms.[36] In the case of multipurpose norms or regimes, one cannot preclude internal normative conflicts including community interest norms. One may think of conflicts between community interest norms and other norms (e.g., between individual rights and military security

[33] *See also* Crawford, *supra* note 3, at 325.

[34] *See, e.g.*, Samantha Besson, *La responsabilité solidaire des Etats et/ou des organisations internationales: une institution négligée*, *in* LA RESPONSABILITÉ SOLIDAIRE (Alain Supiot ed., forthcoming 2018).

[35] *See* James Crawford, *Multilateral Rights and Obligations in International Law*, 319 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 333 (2006); TAMS, *supra* note 3, at 123; Crawford, *supra* note 3, at 183–204.

[36] *See also* Gaja, *supra* note 2, at 62; TAMS, *supra* note 3, at 124.

in international humanitarian law) or even between community interest norms (e.g., between peace and justice in UN law or between human rights duties in international human rights law).

IV. Community Interests and the Structure of Contemporary International Law

The increasing relevance of community interests in international law should be carefully delineated and distinguished from other recent developments in the structure of contemporary international law, such as the generality, universality, hierarchy, and constitutionality of international law. Some of them have been associated with the protection of community interests, but the claim defended here is that the latter is best addressed separately.

First, the *generality* of international law: The generality of international law can refer to many dimensions that do not necessarily overlap: Its content (including the "general rules of international law," pertaining e.g. to sources or responsibility), its personal scope, and/or, by extension of the latter, its sources (i.e., customary international law and general principles of international law). As I explained before, one may be tempted to consider that the generality of international law, in the latter sense, necessarily protects community interests and should be equated with them. This is exaggerated, however, to the extent that some general sources of international law do not give rise to general or multilateral rights or duties. Moreover, some treaties entail multilateral duties without, however, belonging to general international law. This actually explains why some community interest norms, like international human rights and duties, may be found in customary international law, others in treaties or even in both, and yet others in other sources.

Second, the *universality* of international law: The universal character of international law in terms of territorial scope may be regarded as fitting nicely the protection of community interests. However, as I explained before, provided they are general in their personal scope, community interests need not be universal to be recognized and protected by international law; some are strictly functional, while others are merely regional. When they are universal, however, the potential universality of international law makes it the most adequate legal order for their protection. This is clear in international environmental law or in international human rights law, but less so in regional economic law and regional human rights law.

Third, the *hierarchy* or *integrity* of international law: Since community interests usually amount to fundamental interests, as I explained before, it is easy to see how one could regard community interests as generating material hierarchies in international law. While it may be the case, there is no necessary connection between the two. First of all, some community interests are not protected by peremptory norms, as confirmed by the now classical debates pertaining to the distinction between *erga omnes* duties and *jus cogens* norms[37] or by the role of international *ordre public* played

[37] *See* TAMS, *supra* note 3; Crawford, *supra* note 3, at 199–201, by reference to the conflation in the Barcelona Traction case, *supra* note 9.

by certain (nonperemptory) international human rights norms.[38] Second, some normative hierarchies under international law do not protect community interests, as confirmed by reference to Article 103 of the United Nations Charter. The same may be argued, by extension, about the potential role community interests may have in solving normative conflicts and especially for the alleged "de-fragmentation" of international law: Their role as rules of conflict is not granted and not all rules of conflict in international law actually protect community interests (e.g., the *lex posterior* or *lex specialis* rules).[39] Of course, this is not to say that community interests cannot help to prevent normative conflicts in international law, for instance through the systemic interpretation[40] of certain treaty norms by reference to community interest norms like international human rights, as we will see in the next chapter, but their role as conflict rules is not established.

Fourth and last, the *constitutionality* of international law: Mainly by reference to their importance, the relevance of community interests in international law is sometimes considered to be a confirmation of the constitutional dimension of international law. The connection between the two derives from the alleged constitutional nature of some or all community values and interests (e.g., international human rights[41]), but also from their alleged constitutive role in and/or of the international community, as I explained before.[42] Again, while there are clear links between the two features of international law, the constitutional discourse ascribes a political and public law dimension to community interest norms, and international law more generally, that they do not necessarily have (yet).[43]

V. The Identification of Community Interests in International Law

The identification and protection of community interests in international law have often been opposed to three structural features of international lawmaking that allegedly make taking community interests into account impossible: State consent, state sovereignty, and state equality. As I will explain, none of them, when properly understood, prevents the identification and protection of community interests in international law. On the contrary, they may even contribute, when conceived and organized

[38] *See, e.g.*, Loizidou v. Turkey, 1996-VI Eur. Ct. H.R., ¶ 93 (1997).

[39] *See also* Alvarez, *supra* note 18.

[40] *See* Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 Int'l & Comp. L.Q. 279, 285–86 (2005); Study Group on the Fragmentation of International Law, *Rep. on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ¶¶ 411–12, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) (finalized by Martti Koskenniemi).

[41] *See* Stephen Gardbaum, *Human Rights as International Constitutional Rights*, 19 Eur. J. Int'l L. 749 (2008).

[42] *See* Gaja, *supra* note 2; Crawford, *supra* note 3, at 322–42.

[43] *See* Samantha Besson, *Whose Constitution(s)? International Law, Constitutionalism and Democracy*, *in* Ruling the World? Constitutionalism, International Law, and Global Governance 381 (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009). *See also* Alvarez, *supra* note 18.

adequately, to paying due attention to community interests and could themselves be considered as community interests.

First, as regards *state consent*, it is often described as being necessarily self-interested and hence as not being conducive to the identification and protection of community interests. Not only is the premise wrong, but state consent actually contributes to the democratic legitimacy of international lawmaking, including in the identification and interpretation of community interest norms.

Generally, the role of state consent in international lawmaking is often misunderstood by authors, and this makes the persistence of the importance of state consent in practice difficult to justify for them, except through pragmatic explanations.[44] On the one hand, state consent cannot be a condition for the validity of international law, including on a positivist account of its validity.[45] This applies even to treaties, because the latter are a source of valid law (whose validity does not depend on a rule that is consensual (*pacta sunt servanda*)) and cannot therefore be conceived (solely) as contracts.[46] Nor, on the other hand, can state consent be a condition for the legitimacy or legitimate authority of international law. Indeed, like domestic law's, international law's justified authority cannot be equated with that of promises for one can consent to do wrong and law cannot bind to do wrong. On the contrary, state consent is best approached as a democratic condition/exception to the legitimacy of international law, and not as a ground for it (that has to be found independently, e.g. in the coordinative, epistemic, or volitive abilities of international law). States can be objectively bound by international law when the distinct justifications for those duties are given, but also have to consent to be bound by them in order for those duties to be democratically legitimate. Requiring state consent for international law to bind gives a voice to the people in (democratic) states. It protects their basic equality in international lawmaking through granting all (democratic) states an equal voice, however imperfect the proportional relation between state and individual equality still is.[47] Because it is required as a way to guarantee individual equality in international lawmaking, state consent should not, however, be invoked to undermine either democracy or international human rights law, given the mutual relationship there is between human rights and democracy in the protection of individual equality.[48] This in turn accounts for some of the inherent limits to the invocability of the exception of (democratic) state consent like *jus cogens* or nondiscrimination rights and principles.

Due its misleading identification with a ground of validity or legitimacy of international law, state consent has also been repeatedly framed as being incompatible with the protection of community interests. There are two reasons for this: State consent

[44] See for a full argument, Samantha Besson, *State Consent and Disagreement in International Law-Making—Dissolving the Paradox*, 29 Leiden J. Int'l L. 289 (2016).

[45] *See, e.g.*, Liam Murphy, What Makes Law—An Introduction to the Philosophy of Law 179 (2014).

[46] *See, e.g.*, Matthew Craven, *Legal Differentiation and the Concept of the Human Rights Treaty in International Law*, 11 Eur. J. Int'l L. 489 (2000).

[47] *See also* Thomas Christiano, *Climate Change and State Consent*, *in* Climate Change and Justice 17 (Jeremy Moss ed., 2015).

[48] *See* Samantha Besson, *Human Rights and Democracy in a Global Context—Decoupling and Recoupling*, 4 Ethics & Global Pol. 19 (2011).

is wrongly approached to imply reciprocity in international lawmaking and is falsely regarded as being necessarily self-interested.

First of all, state consent is often conflated with reciprocity or bilateralism. As a result, the promotion of community interests *qua* multilateral norms (and especially duties) is usually presented as being in tension with state consent.[49] The existence of multilateral and legislative treaties, and especially of multilateral duties in treaties, confirms the conceptual disconnect between state consent and reciprocity, however.[50] And so do many other features of the Vienna Convention on the Law of Treaties (VCLT), as we will see in the next chapter. A second alleged difficulty with state consent in the context of the protection of community interests is, as I explained in the introduction, its assimilation to self-interest. In rational choice approaches to international lawmaking, but also more broadly,[51] state consent is identified with self-interested consent because consent is usually reduced to consent regarding state interests and the latter are conflated with individual interests. Those accounts then necessarily conclude as to the so-called "*status quo* bias" of state consent and its disabling effect in solving collective action problems as these may occur in the context of protecting community interests.[52]

This is a reductionist and misleading approach to state interests and then to state consent relative to those interests, however. First of all, if one is to draw an analogy between states and individuals, it quickly becomes clear that individuals can have and pursue both individual and community interests, and that individual decisions are not always self-interested, as a result. Actually, in the domestic context, the presence of individual interests in political and legal decisionmaking, besides concerns for the moral-political issues at stake, is a well-known feature of democratic processes.[53] There are indeed ways for citizens to combine their private and public interests fruitfully in political deliberation. As a matter of fact, individuals are best considered as pursuing politically both their individual interests and their domestic and global community interests at the same time. Second, one should move away from the individual analogy: States are social institutions set up by their individual members to protect their community interests and cannot therefore be reduced to individuals. It becomes clear then that the interests of institutional agents like states cannot be self-oriented only. They should actually encompass collective interests, especially the domestic community interests of their constituency, but also the latter's global community interests. This is definitely the case regarding democratic states. One should stress, finally, that collective and institutional agents like states can, and should, actually be designed so as to use their consent in international relations to promote other interests than their individual, or even domestic community interests, and so as

[49] *See, e.g.*, Bruno Simma, *Consent: Strains in the Treaty System*, *in* THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW 485 (Ronald St. J. MacDonald & Douglas M. Johnston eds., 1983).

[50] *See also* Klabbers, *supra* note 5, at 778.

[51] *See, e.g.*, Andrew T. Guzman, *Against Consent*, 52 VA. J. INT'L L. 747, 754–55 (2012).

[52] *See, e.g.*, Gabčíkovo-Nagymaros Project, *supra* note 1, at 118 (Separate Opinion of Judge Weeramantry). *See also* Simma, *supra* note 2.

[53] *See* Jane Mansbridge et al., *The Place of Self-Interest and the Role of Power in Deliberative Democracy*, 18 J. POL. PHIL. 64 (2010).

to include their conceptions of the global community interests. This kind of institutional design may require setting up parliamentary or popular checks on the government when concluding international treaties and/or ratifying international judicial mechanisms for the subsidiary review of domestic action pertaining to community interests.

Secondly, as regards *state sovereignty*, it is another vexed structural feature of international law whose opposition to community interests is often emphasized. Here again, once state sovereignty is conceived more clearly, tensions with community interests can be lifted or, when they cannot, they can be approached as reflecting legitimate spheres of political self-determination about community interests.

Generally speaking, state sovereignty is best approached as protecting the autonomy of states understood along the lines of an objective and thick meaning of autonomy, and even more so when these states are democratic. This understanding of sovereignty limits what a state can or cannot consent to as a sovereign to what actually enhances its autonomy, that is, that of its (states)people.[54] In turn, what this implies is that sovereignty amounts to a large extent to what international law says it is,[55] and not the other way around. Transposed into the context of community interest norms, and in light of the previous discussion about the relationship between democratic states' interests and community interests, what this means is that state sovereignty and community interest norms protected under international law are mutually reinforcing.

Importantly, this does not necessarily suggest that whatever legitimate international law requires necessarily lies outside the scope of sovereign decisionmaking. There may indeed be restrictions to sovereignty by legitimate international law that are deemed incompatible with the (objective) autonomy of sovereign states.[56] The legitimacy of international law and the limits to state sovereignty do not therefore match entirely. The importance of residual self-determination in state sovereignty can indeed be explained along the lines of the autonomy-based exception to the *prima facie* legitimacy of law. This is also what Raz calls the "independence condition" of the law's legitimate authority.[57] According to that condition, there are circumstances in which autonomy requires determining what to do oneself despite the fact that one would comply with one's own reasons better if one did not. Protecting such a sphere of autonomy is a necessary requirement of (democratic) legitimacy and every autonomous subject to authority should be left to decide alone on certain matters. This may include democratic states deciding autonomously on certain matters that correspond to community interests under international law. One may think, for instance, of the margin of appreciation of democratic states under international human rights law and of their right to specify and restrict their respective human rights' duties autonomously within that margin.

[54] *See, e.g.*, Besson, *supra* note 44; Timothy Endicott, *The Logic of Freedom and Power*, *in* THE PHILOSOPHY OF INTERNATIONAL LAW, *supra* note 28, at 245.

[55] *See* H.L.A. HART, THE CONCEPT OF LAW 223 (2d ed. 1994).

[56] *See also* Samantha Besson, *The Authority of International Law—Lifting the State Veil*, 31 SYDNEY L. REV. 343, 372–74 (2009).

[57] JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN—ESSAYS IN THE MORALITY OF LAW AND POLITICS 365–66 (1994).

Third and last, *state equality* is another structural feature of international law that is sometimes considered incompatible with the protection of community interests. This is what has been observed in particular with respect to the hindrances set by state equality in the decentralized enforcement of community interests in practice.[58]

In response, and based on my argument pertaining to state consent and sovereignty so far, it is important to stress that respecting state equality in the identification and interpretation of international law may be regarded as a way to bring some democratic legitimacy to bear on international law decisions, including on those that pertain to community interests. As I explained before, just like citizens within these states, democratic states can and, actually, should consider and pursue not only their individual interests, but also domestic and global community interests in the identification of international law. State equality guarantees an equal voice to people in those states about the best way to protect community interests in international law. That is even more important, as community interests are objects of reasonable disagreement, and even more so arguably on the international plane due to the prevailing circumstances of social and moral pluralism. As a result, the top-down identification and interpretation of community interest norms by international institutions, especially by international courts, bring with them the risks of inequality, parochialism, and hegemony we know from the determination of legal norms in all regimes of international law, independently from their content.[59] Those risks entailed in reasonable disagreement about community interests confirm the importance of securing egalitarian deliberation over the identification and interpretation of community interest norms by democratic states. This goal is best served by protecting state equality in international lawmaking.

VI. Conclusions

The nature and scope of community interests in international law are difficult to assess. This chapter has hopefully contributed to clarifying what they amount to, both per se and as community interest norms, and how their protection relates to, while being distinct from, other contemporary developments in international law, like defragmentation or constitutionalization.

Most importantly, the chapter has argued that none of the three structural features of international law that are usually regarded as antithetical to the protection of community interests, namely state consent, sovereignty, and equality, actually implies that states are necessarily self-interested in international lawmaking and unable to identify and protect community interests. Such critiques underestimate the collective nature

[58] *See, e.g.*, Tams, *supra* note 3, at 402–404.

[59] *See* Lisa Chmura, *International Law-Making in a Community Context: Not a True Reflexion of the Community Interest*, 2 Int'l L. Theory 49 (1996); Martti Koskenniemi, *The Subjective Dangers of Projects of World Community*, *in* Realizing Utopia—The Future of International Law 3, 9–11 (Antonio Cassese ed., 2012). Unlike Benvenisti, in this volume (Eyal Benvenisti, *Community Interests in International Adjudication*, *in* Community Interests Across International Law 70 (Eyal Benvenisti & Georg Nolte eds., 2018)), I do not consider it enough to protect community interests *in substance* through judicial decisions without the *procedural* participation of the actual states and individuals whose interests they are.

of states and too quickly assimilate them to individuals, but also ignore the potential role of the institutional design of states, especially democratic states, for the protection of domestic and international community interests. Moreover, in circumstances of widespread and persistent reasonable disagreement about what community interests actually amount to and in the absence of a central international lawmaker able to determine our community interests in a democratic way, we should not too quickly disparage the only dimension of international lawmaking we have that gives people an equal voice in determining their community interests, that is, their democratic states' consent. It is best actually to approach state consent, sovereignty, and equality as factors contributing to the democratic legitimacy of the identification and protection of community interests in international law, and as community interests themselves.

Of course, not all states are democratic and this should limit their right to invoke consent as an exception against international law duties such as community interest norms. As a matter of fact, even democratic states are barred from invoking state consent as exceptions to the legitimate authority of international law norms that protect democracy, human rights, and basic individual equality, most of which may actually be considered as community interest norms. Finally, even those states that are democratic need to be organized, and their institutions designed, so as to effectively promote community interests both domestically and internationally. This is a problem we are familiar with from domestic democracy, however, where the place of private interests in public deliberation and decisionmaking has to be tamed and where the determination and protection of public interests that are plural and indeterminate are not always easy. Not only are these institutional difficulties magnified in international lawmaking, but new problems may arise as well, one of the least amenable of all being the prioritization between domestic and global community interests. International institutions, especially of a judicial nature, may help to guide states in this context and correct some of the (democratic) shortcomings of democratic state consent (in terms of proportional representation and hence individual equality, in particular). Importantly, however, these institutions should—and, by and large, do so, if one refers to their practice of treaty interpretation and custom identification—defer to states' contribution to the democratic legitimacy of international decisions in community interests matters, at least until more direct democratic procedures of international decisionmaking have been devised.

Retreating to substance in matters of community interests protection, as some would like us to, merely because democratic procedures are difficult to set up internationally, may be too high a price to pay: Not only does it err on the presumed determinacy of community interests, but it also runs the risk of hegemony and inequality. The irony is, of course, that this is often done in the name of interests that are allegedly common and hence of equal concern to all.