

# A RELUCTANT GUARDIAN: THE INTERNATIONAL COURT OF JUSTICE AND THE CONCEPT OF ‘INTERNATIONAL COMMUNITY’

## ABSTRACT

The concept of ‘international community’, nebulously defined at best, has the capacity to generate specific, and far-reaching legal effects following certain understandings of it. In this article, the author asserts that the understanding of the judicial function of the International Court of Justice requires a full understanding of the Court’s conception of the community in which it is situated. First exploring the conceptual implications of the various permutations of the concept of international community, the author analyses the Court’s judicial pronouncements to illuminate the Court’s minimalist, cautious definition of the concept of international community. The author pays special attention to the Court’s interpretation and application of peremptory norms (rules of *jus cogens*) and obligations *erga omnes*, two concepts that it has treated with reticence. Arriving at the conclusion that the Court’s understanding of the concept of international community remains profoundly ambivalent and at the rearguard of contemporary international legal debate, the article ends with some reflections as to the continued relevance of the concept of international community beyond the work of the Court, suggesting that although it might remain a purely juridical fiction bereft of legal effect at present, legal scholarship can still use the concept to channel debate on the nature of international law.

Keywords: international community; judicial function; peremptory norms; obligations *erga omnes*; development of international law

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# A RELUCTANT GUARDIAN: THE INTERNATIONAL COURT OF JUSTICE AND THE CONCEPT OF ‘INTERNATIONAL COMMUNITY’

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## A. INTRODUCTION

*La croyance en une communauté plus vaste et plus haute que les unités politiques entre lesquelles se répartissent les hommes répond assurément à une exigence de la raison. Mais, pour être postulée par le droit, cette exigence traduit-elle une réalité politique? Ou ne répond-elle qu'à une aspiration encore trop mal définie, trop peu répandue pour imposer l'idée du droit et s'incarner en institution?*<sup>1</sup>

The term ‘international community’ is invoked *ad nauseam* in international law: it is invoked in almost every context, from General Assembly resolutions on the environment to humanitarian intervention to the realm of investment. Yet this variegated invocation of the term is deceptive: international lawyers still struggle with arriving at a well-defined understanding of the concept of an ‘international community’, whether in identifying the members that compose it, the values and norms that it represents, or the processes which underlie its functioning. In doctrine, the concept remains a ‘constructive abstraction’<sup>2</sup> that is employed without definition, as though its meaning were sufficiently evident that no further detail or consideration is necessary.<sup>3</sup> Yet, any notion of the concept of international community that would carry with it substantive legal effect<sup>4</sup> could signal a conceptual evolution in our understanding of international law.<sup>5</sup>

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<sup>1</sup> C de Visscher, *Théories et réalités en droit international public* (4<sup>th</sup> edn Pedone, Paris 1970) (hereinafter ‘de Visscher, *Théories et réalités*’), 110.

<sup>2</sup> N Tsagourias, ‘International Community, Recognition of States, and Political Cloning’, in C Warbrick and S Tierney (eds), *Towards an ‘International Legal Community’? The Sovereignty of States and the Sovereignty of International Law* (BIICL, London, 2006) 211 (hereinafter ‘Tsagourias’), 212.

<sup>3</sup> D Kritsiotis, ‘Imagining the International Community’ (2002) 13(4) *European Journal of International Law* 961 (hereinafter ‘Kritsiotis, ‘Imagining the International Community’), 964.

<sup>4</sup> As is partially exemplified in Article 53 of the Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (hereinafter ‘VCLT’ or ‘Vienna Convention’), and Article 48 in

It may seem curious that a term mentioned neither in the Charter nor the Statute<sup>6</sup> would be relevant to understanding the Court's judicial consciousness. However, any definition of 'international community' adopted by the Court will necessarily give rise to fundamental questions regarding the Court's judicial function with respect to the development of international law; it will, moreover, constitute a statement as to the Court's view on the nature of the international legal system.<sup>7</sup> Given the Court's claimed place at the 'apex'<sup>8</sup> of international judicial institutions, an understanding of its judicial consciousness requires one to discern whether the Court's definition of the concept transcends mere rhetoric and has become substantive.

The first section of this Article will thus explore what is meant by the 'international community' through a survey of its various phenotypes so to establish the parameters for examining the Court's judicial pronouncements. The primary focus of this section will be to explore the traditional distinction between the 'law of coexistence', through which a consensually-constructed legal system regulates interactions between States,<sup>9</sup> and the 'law of

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International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, in (2001) Ybk Int L Commission, Report of the Commission to the General Assembly on the work of its fifty-third session, Vol II, Part II (United Nations, New York 2007), UN Doc A/CN.4/SER.A/2001/Add.1 (emphasis added) (hereinafter 'ILC Commentary to the ASR'). See Section D, *infra*, for more extensive discussion on the legal effects of these two provisions.

<sup>5</sup> M Virally, 'Panorama du droit international contemporain' (1983) 183 Recueil des Cours de l'Académie de Droit International 9, 28-29.

<sup>6</sup> The closest approximation in the UN Charter is the passing exhortation in Article 1(4) to pursue 'common ends' and the preamble's grand invocation of 'We the peoples'; however, it is difficult to impute the existence of an 'international community' from this particular wording: see eg R Wolfrum, 'Article 1', in B Simma (ed), *The Charter of the United Nations: A Commentary* (3<sup>rd</sup> edn Oxford University Press, Oxford 2012), 42.

<sup>7</sup> See eg the claim in JE Álvarez, *International Organizations as Law-makers* (Oxford University Press, Oxford, 2005) 539, that judgments by the ICJ 'have affirmed vital values for the international community'. But cf de Visscher, *Théories et réalités*, 412, arguing that sovereignty had always been understood by the Court as the 'centre et le symbole des résistances' to any assertion of a role in the development of international law; and M Koskenniemi, *From Apology to Utopia: the Structure of International Legal Argument* (Cambridge University Press reissue, Cambridge, 2005) (hereinafter 'Koskenniemi, *From Apology to Utopia*') 322, who notes that the Court's statements on 'elementary considerations' or 'fundamental norms' were often used to moderate a purely State-centric, voluntarist interpretation of international norms.

<sup>8</sup> 'Speech by Sir Robert Jennings, President of the International Court of Justice, to the UN General Assembly', UN Doc A/48/PV.31 (8 November 1993) 2, reprinted in (1994) 88(2) American Journal of International Law 421, 424.

<sup>9</sup> See generally W Friedmann, *The Changing Structure of International Law* (Stevens & Sons, London, 1964) (hereinafter 'Friedmann, *Changing Structure*'), esp 60-62. R Kolb, *Théorie du ius cogens international* (Presses universitaires de France, Paris, 2001) (hereinafter 'Kolb, *Théorie du ius cogens international*'), 78-79 argues that the law of coexistence is inherent

cooperation’, which situates the international community rather as a rationalised legal construction that reflects a set of shared understandings as to the nature of the legal system and its underlying principles, whether these be mere imperatives of social life or a set of institutionalised values.<sup>10</sup> Does the concept of ‘international community’ remain a mere flourish in the Court’s judicial pronouncements, retaining significance merely as an ‘essentially stylistic’<sup>11</sup> invocation of State consensus? Or has the concept of ‘international community’ gained currency as the embodiment of a true *civitas maxima*, a so-called *plérôme* rendering certain community values legally operative?<sup>12</sup> Although references to communitarian concepts by the Court are ‘terse’<sup>13</sup> and relatively scarce, the few which exist are illustrative of the disjunction between considerations of justice and of legality that defines the Court’s consistent understanding of its own judicial function.<sup>14</sup>

The second Part of this Article contains a limited analysis of obligations *erga omnes* and rules of *jus cogens*, in relation to how they are understood and applied by the Court.<sup>15</sup> Both concepts

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in any legal order to avoid anarchy, whereas the idea of community or cooperation is by its very nature normative, *ibid* 79-80.

<sup>10</sup> The latter are defended robustly by G Abi-Saab, ‘Whither the International Community’ (1998) 9 *European Journal of International Law* 248; G Abi-Saab, ‘La «communauté internationale» saisie par le droit—Essai de radioscopie juridique» in *Paix, développement et démocratie—Mélanges Boutros Boutros-Ghali* vol 1 (Bruylant, Bruxelles 1998) 84; and H Lauterpacht, ‘Règles générales du droit de la paix’, (1937) 62 *Recueil des Cours de l’Académie de Droit International* 95 (hereinafter ‘Lauterpacht, Recueil des Cours’), 191-92.

<sup>11</sup> P Weil, ‘Le droit international en quête de son identité’ (1992) 237 *Recueil des Cours de l’Académie de Droit International* 9 (hereinafter ‘Weil, Recueil des Cours’), 307.

<sup>12</sup> As claimed in T Franck, *Fairness in International Law and Institutions* (Oxford University Press, Oxford, 1995) 371, the development of the ‘notion of a global community begins to reshape the terms of the discourse’, by ‘articulating substantive international law’.

<sup>13</sup> J Stone, ‘International Court and World Crisis’ (1962) 536 *International Conciliation* 31 (hereinafter ‘Stone, ‘International Court and World Crisis’), 40 (citations omitted). *See also* RA Falk, *Reviving the World Court* (University Presses of Virginia, Charlottesville, 1986), 16.

<sup>14</sup> Weil, Recueil des Cours, 284, cautions against an ‘enthousiasme débridé’ for the ‘élan communautaire’ of universal norms that might not be expressed in the law.

<sup>15</sup> Recent, comprehensive studies of the two concepts abound: *see eg* Kolb, *Théorie du ius cogens international*; M Ragazzi, *The Concept of International Obligations Erga Omnes* (Clarendon, Oxford 1997); C Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press, Cambridge, 2005) (hereinafter ‘Tams, *Enforcing Obligations Erga Omnes*’); and A Orakelashvili, *Peremptory Norms in International Law* (Oxford University Press, Oxford, 2006) (hereinafter ‘Orakelashvili’).

potentially raise larger questions about the characterisation of international law as a consent-based system. For, frequently, these concepts are invoked so as to safeguard the ‘higher interest of the whole international community’<sup>16</sup> over that of individual States.<sup>17</sup> This Part focuses purely on the question of whether the concepts incorporate some sense of the Court of a role as guardian of an ‘international public order’<sup>18</sup>, or whether these are interpreted purely through the prism of classical legal positivism, with an emphasis on sovereignty and consent.

## B. THE CONCEPT OF ‘INTERNATIONAL COMMUNITY’

*La communauté internationale est avant tout une idée qui ne cesse de hanter le discours des juristes internationalistes, comme si la répétition incantatoire du terme pouvait permettre d’ancrer un peu plus son existence dans la réalité et la transformer en un fait tangible et concret.*<sup>19</sup>

Any proper discussion of the Court’s treatment of the ‘international community’ requires an exploration of the definitions and understandings most commonly attached to the concept, which indicates the need for a brief review of the concept’s evolution in international legal

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<sup>16</sup> A Verdross, ‘*Jus Dispositivum* and *Jus Cogens* in International Law’, (1966) 60 *American Journal of International Law* 55, 58.

<sup>17</sup> M Koskeniemi, ‘What Is International Law For?’ in M Evans (ed), *International Law* (3rd edn Oxford University Press, Oxford, 2010) 32, (hereinafter Koskeniemi, ‘What is International Law For?’), 48, argues that the role of peremptory norms, as legal forms, might be ‘precisely to counteract the ideological effects of instrumentalism’.

<sup>18</sup> Authors who consider the relationship between *ordre public international* (or a form of international ‘public policy’) and *jus cogens* norms include: A McNair, *The Law of Treaties* (Oxford University Press, Oxford, 1961) 213-214; A Verdross, ‘Forbidden Treaties in International Law’ (1937) 31 *American Journal of International Law* 571 (hereinafter ‘Verdross, ‘Forbidden Treaties’), 572; Kolb, *Théorie du ius cogens international*, 172-81 (although to him the concepts do not have complete identity); at 177, *jus cogens* is defined as a sub-category of the international *ordre public*; at 172, *ordre public* is claimed to be a notion of material law and *jus cogens*, a juridical technique); CW Jenks, *The Prospects of International Adjudication* (Stevens & Sons, London, 1964) 457-458; H Thirlway, *International Customary Law and Codification* (Sijthoff, Leiden, 1972) 29-30; T Meron, *Human Rights Law-Making in the United Nations* (Clarendon, Oxford, 1986) 198; J Dugard, *Recognition and the United Nations* (Grotius, Cambridge, 1987), 149; P-M Dupuy, ‘L’unité de l’ordre juridique international’ (2002) 297 *Recueil des Cours de l’Académie de Droit International* 9 (hereinafter ‘P-M Dupuy, *Recueil des Cours*’), 282-283; H Lauterpacht, ‘Report on the Law of Treaties’ (1954-II) *Ybk Int L Commission*, 154-155; CHM Waldock, ‘Report on the Law of Treaties’ (1963-II) *Ybk Int L Commission*, 52; W Niederer, *Einführung in die Allgemeine Lehren des Internationalen Privatrechts* (Verlag, Zurich 1956) 289; R Monaco, ‘Cours général de droit international public’ (1968) 125 *Recueil des Cours de l’Académie de Droit International* 93, 202-212; CE Rousseau, *Droit international public* (11<sup>th</sup> edn Dalloz, Paris, 1970), 130; and A Cassese, *International Law* (2<sup>nd</sup> edn Oxford University Press, Oxford, 2005) (hereinafter ‘Cassese, *International Law*’), 16.

<sup>19</sup> E Jouannet, ‘La communauté internationale vue par les juristes’ (2005) VI *Annuaire français de droit international* 3 (hereinafter ‘Jouannet, ‘La communauté internationale’), 3. *See also* Lauterpacht, *Recueil des Cours*, 188 *et seq.*

discourse,<sup>20</sup> and its discursive or ‘process’ aspects.<sup>21</sup> In this respect, it will be useful to distinguish between whether the concept is advanced as a pure normative argument (of policy) or as a rational premise justifying the application of legal rules (as law). It is the latter category that is of heightened relevance, as it would be this dimension of the concept of international community that would affect the Court’s work.

(i) Defining the term ‘community’

The principal international law dictionaries provide a convenient starting-point for a definition of the term. The *Dictionnaire de droit international public* defines ‘community’ as an ‘[e]nsemble, groupement de personnes physiques ou morales qu’unissent un ou plusieurs éléments communs ou la poursuite de certains objectifs communs’.<sup>22</sup> The older *Dictionnaire de la terminologie du droit international* offers two separate definitions for ‘international community’: first, a ‘rapport moral et juridique’ which governs the relationship between States; secondly, the ‘ensemble des États’ brought together by the sense of community described in the first definition which transforms them into a collectivity governed under international law.<sup>23</sup> This binomial

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<sup>20</sup> For surveys of the different interpretations of the concept from the Salamanca School onwards, see S Villalpando, *L’émergence de la communauté internationale dans la responsabilité des États* (Press universitaires de France, Paris, 2005) (hereinafter ‘Villalpando, *L’émergence de la communauté internationale*’), 43-60; and E Jouannet, ‘L’idée de communauté humaine’ (2003) 47 *Archives de philosophie du droit: La mondialisation entre illusion et utopie* 191.

<sup>21</sup> For discussion of these aspects, see Franck, *Fairness in International Law*, 12 *et seq*; and T Franck, *The Power of Legitimacy Among Nations* (Oxford University Press, Oxford, 1990) (hereinafter Franck, ‘*The Power of Legitimacy*’) 51, where he defined ‘community’ as ‘a permanent system of multilateral, reciprocal interaction which is capable of validating its members, its institutions, and its rules’; he apparently is inspired by Dworkin’s concept of ‘rulebook community’: see R Dworkin, *Law’s Empire* (Harvard University Press, Cambridge, Mass., 1986) (hereinafter ‘Dworkin, *Law’s Empire*’), 211.

<sup>22</sup> AL Paulus, *Die internationale Gemeinschaft im Völkerrecht* (Beck, Munich, 2001), 9 *et seq*, 439 *et seq*, distinguishes ‘community’ from ‘society’ through invoking the normative element of ‘subjective cohesion’ ascribed to the social bond between members the former; and F Tönnies, *Gemeinschaft und Gesellschaft* (1887) (8<sup>th</sup> edn Buske, Leipzig, 1935), who distinguishes ‘community’, (a group based on family and neighbourhood bonds and an inherent sentiment of togetherness) from ‘society’ (a group consensually formed to further specific objectives). See also J Salmon (ed), *Dictionnaire de droit international public* (Bruylant, Bruxelles, 2001) (hereinafter ‘*Dictionnaire de droit international public*’) 203; 205-206, enumerating definitions of the international community of States as a whole: a) ‘(e)nsemble des États pris dans leur universalité’; b) the ‘[e]nsemble plus vaste incluant, à côté des États, les organisations internationales a vocation universelle, les particuliers et l’opinion publique internationale’; and c) the ‘[e]xpression de la solidarité commune des États transcendant leurs oppositions particulières’.

<sup>23</sup> *Dictionnaire de la terminologie du droit international* (Sirey, Paris 1960) (hereinafter ‘*Dictionnaire terminologique*’), 131-32.

distinction is reprised in the first edition of the Max-Planck *Encyclopaedia*,<sup>24</sup> suggesting that two basic permutations of the concept may be distilled: the first being a community of constituents, with membership flowing purely from their formal identity as individuals or ‘moral persons’ (States *qua* States), and the second being a community being built on the shared pursuit of certain common objectives.

The *Dictionnaire terminologique* and the Max-Planck *Encyclopaedia* distinguish the two definitions as alternatives, whilst the *Dictionnaire de droit international public* sees them as interchangeable; and here lies the crux of the problem. For the term ‘international community’ to have any legal significance, one must distinguish between the mere identification of members of the community and the functions for which that community exists. In an international community conceptualised purely as a collection of States *qua* States, the concept is bereft of legal substance and exists simply to emphasise a consensus reached by States.<sup>25</sup> Under this consent-based theory of community, States, the ‘authors’ of the international legal system, ‘cannot countenance a competing source of binding laws’<sup>26</sup> as international law; it is only through their consent, whether direct or delegated, that law-creation on the international plane may occur.

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<sup>24</sup> H Mosler, ‘International Legal Community’ in RL Bindschedler et al (ed), *Encyclopaedia of Public International Law*, (Max Planck Institute) vol 7 (North-Holland, Amsterdam, 1992) 309-312. Curiously, the 2012 edition of the Max-Planck Encyclopaedia does not have an entry for the term. Cf H Mosler, *The International Society as a Legal Community* (Sijthoff/Noordhoff, Alphen aan der Rijn, 1980) (hereinafter ‘Mosler, *International Society as a Legal Community*’) 2: ‘two elements are necessary for the existence of an international legal community: *the fact that a certain number of independent societies organised on a territorial basis exist side by side, and the psychological element in the form of a general conviction that all these units are partners mutually bound by reciprocal, generally applicable, rules granting rights, imposing obligations and distributing competences*’ (emphasis in original). See also AL Paulus, ‘The Influence of the United States on the Concept of the “International Community”’ in M Byers and G Nolte (eds), *United States Hegemony and the Foundations of International Law* (Cambridge University Press, Cambridge, 2003) 57; and the Commentary of M Koskenniemi on Paulus’ chapter (hereinafter ‘Koskenniemi, Comment on Paulus, “The Influence of the United States”’), *ibid* 91.

<sup>25</sup> See eg J Tasioulas, ‘In Defence of Relative Normativity: Communitarian Values and the *Nicaragua* Case’ (1996) 16(1) Oxford Journal of Legal Studies 85 (hereinafter ‘Tasioulas, ‘In Defence of Relative Normativity’’), 116-117, where ‘[S]tates form the irreducible units of the international community and, given the absence of a system of organic representation, the idea of such a community is nothing other than the sum total of its states’; and Mosler, *International Society as a Legal Community*, 42, who claims that States, as the constituent members of international society, ‘determine its political shape and thus constitute the society as a community.’ See also Cassese, *International Law*, 15-17; and R McCorquodale, ‘International Community and State Sovereignty’, in C Warbrick and S Tierney (eds), *Towards an International Legal Community? The Sovereignty of States and the Sovereignty of International Law* (BIICL, London, 2006) 241 (hereinafter ‘McCorquodale’), 244-8.

<sup>26</sup> W Conklin, ‘The Peremptory Norms of the International Community’ (2012) 23(3) European Journal of International Law 837, 849.



As such, even if the concept of community is essentially relational (in that it is determined and defined by its participants<sup>27</sup>), the term ought, if it is to generate substantive legal effects, to encompass a further degree of cohesion deriving from the solidarity of its members, as well as the preservation of certain shared collective interests. Such interests must transcend common individual interests<sup>28</sup> and include a mutual and necessary co-dependence of members in the pursuit of a '*profit collectif*'.<sup>29</sup> They may, alternatively, encompass a shared understanding of the importance of certain values.<sup>30</sup> In any event, any articulation of the concept that is capable of generating legal effects requires a move beyond the realisation of individual interests of States towards an 'international common interest':<sup>31</sup> otherwise, the invocation of 'international community' remains purely a rhetorical technique.

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<sup>27</sup> McCorquodale, 'International Community and State Sovereignty', 251.

<sup>28</sup> JS Reeves, 'La communauté internationale', (1924) 3 Recueil des Cours de l'Académie de Droit International 1, 68, where maritime interests of States were considered to be of such a nature. Reeves also interprets Grotius as grounding international legal society on the 'communauté d'intérêts résultant de la convenance personnelle de chaque État', *ibid* 28.

<sup>29</sup> Villalpando, *L'émergence de la communauté internationale*, 27-29 argues that the content of any such interest enjoys an existence and definition which is separate from any individual interests of the community's members. In other words, the 'objective' and 'subjective' aspects of solidarity are important: the former relates to their material interdependence; the latter, their will and desire to work collectively in the fulfillment of those goals. *Cf* E de Wet, 'The International Constitutional Order' (2006) 55 International and Comparative Law Quarterly 51 (hereinafter 'de Wet, "The International Constitutional Order"'), 55-56, who defines the international community as a set of overlapping communities, 'each with its own normative (value) system'.

<sup>30</sup> *ibid* 26. The concept also transcends the legal: *see* RA Falk, 'To what Extent are International Law and International Lawyers Ideologically Neutral?' in A Cassese and JHH Weiler (eds), *Change and Stability in International Law-Making* (Gruyter, Berlin, 1989) 137, 139: '... one of the least appreciated ideological battles concerns the degree to which a traditional view of the law-making process continues to be attributed validity by international jurists. ... this is inevitably a political choice. There is no technical solution to this choice, and we must have the integrity not to hide behind professional arguments, but to confront its implications directly and honestly'.

<sup>31</sup> *See eg* de Visscher, *Théories et réalités*, 123, warning that 'la solidarité internationale est un ordre en puissance dans l'esprit des hommes, elle ne correspond pas à un ordre effectivement établi'; and C de Visscher, 'Positivism et *jus cogens*' (1955) 75 Revue générale de droit international public 5 (hereinafter 'C de Visscher, "Positivism et *jus cogens*"'), 8. *See also* SJ Toope, 'Emerging Patterns of Governance and International Law', in M Byers (ed), *The Role of Law in International Politics* (Oxford University Press, Oxford, 2000) 91, 103: '[m]y understanding of the possibilities of international normativity is predicated upon the view that there no such thing as the "international community", though generations of UN Secretaries-General would have us believe otherwise'.

(ii) Towards the international common interest?

The primary argument put forward in favour of an expansive definition of international community suggests that logical and systemic imperatives, rooted in ethical and moral considerations and a ‘community of values’<sup>32</sup>, justify an expansive concept of community. This argument has given rise to a narrative of progress through which international law is expected to progress into a state of ‘maturity’, with a robust judicial function key in safeguarding the community’s core values. These somewhat inchoate propositions have substantial overtones of morality and natural law that are anathema to classical legal positivism. The concept of the ‘international community of States’, which will be addressed separately, has thus been developed at least partly to move beyond the tired debates between naturalism and positivism.<sup>33</sup>

A number of prominent thinkers have defined ‘international community’ as a concrete legal term<sup>34</sup>, consistent with the Augustinian maxim ‘*[i]n necessariis unitas, in dubiis libertas, in omnibus caritas*’ most prominently embraced by Verdross.<sup>35</sup> All suggest that the imperative necessities of social interaction on the international level require a wider, substantive conception of the ‘international community’; and as will be demonstrated, all rely on the melding of these with moral or ethical considerations. Franck’s vision of the international community rests on a rational construction, or a ‘community of principle’, sharing a coherent ethos and a well-defined set of rights and obligations.<sup>36</sup> Tomuschat relies on a method of ‘pure deduction’ from ‘the core

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<sup>32</sup> C Tomuschat, ‘International Law: Ensuring the Survival of Mankind on the Eve of a New Century’ (1998) 281 *Recueil des Cours de l’Académie de Droit International* 9 (hereinafter ‘Tomuschat, General Course’), 75-6.

<sup>33</sup> See Section B(iv), *infra*.

<sup>34</sup> Too numerous to enumerate fully: see H Lauterpacht and CHM Waldock (eds), *The Basis of Obligation in International Law, being the collected papers of the late James L Brierly* (Stevens & Sons, London, 1958) (hereinafter ‘Brierly, *The Basis of Obligation*’), 1-80; V Gowlland-Debbas, ‘Judicial Insights into Fundamental Values and Interests of the International Community’, in AS Muller, D Raić and JM Thuránszky (eds), *The International Court of Justice, Its Future Role after Fifty Years* (Martinus Nijhoff, The Hague, 1997) 327, 363; and G Abi-Saab, ‘“La communauté internationale” saisie par le droit. Essai de radioscopie juridique’, in B Boutros-Ghali, *Amicorum Discipulorumque Liber Paix, Développement, Démocratie* (Bruylant, Brussels, 1998) 81, 86-87.

<sup>35</sup> A Verdross and B Simma, *Universelles Völkerrecht* (3<sup>rd</sup> edn Duncker und Humblot, Berlin, 1984) 917.

<sup>36</sup> T Franck, ‘Legitimacy in the International System’ (1988) 82 *American Journal of International Law* 705, 705; T Franck, *The Power of Legitimacy among Nations* (Oxford University Press, Oxford, 1990), 175, 181-2.

philosophy of humanity as it is enshrined in the—unwritten—constitution of the international community as well as in the Charter’.<sup>37</sup> A self-declared ‘enlightened’ positivist,<sup>38</sup> Tomuschat conceptualises the international community as an overarching legal order, replacing its own structures of co-ordination with hierarchical elements no longer subordinated to State consent,<sup>39</sup> to embody the common principles of all States and, indirectly, of mankind: *ubi jus, ibi societas*.<sup>40</sup> He even recasts the function of the State as an agent of the international community, reversing the traditional relationship.<sup>41</sup>

Others have focussed similarly on bypassing State sovereignty: Lauterpacht considered that ‘the sanctity and supremacy which metaphysical theories attach to the State must be rejected from any scientific conception of international law’,<sup>42</sup> as did Scelle, who condemned States as a mere ‘abstraction anthropomorphique’<sup>43</sup> and a ‘circonscription de la société internationale globale’<sup>44</sup> in a global society dominated by the relationship between individuals.<sup>45</sup> Dupuy rooted his rejection of the concept of State in the reality of their co-existence in a world:

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<sup>37</sup> See C Tomuschat, ‘Obligations Arising for States Without or Against Their Will’ (1993) 241 *Recueil des Cours de l’Académie de Droit International* 195 (hereinafter ‘Tomuschat, ‘Obligations’’), 303; Tomuschat, *General Course*, 28.

<sup>38</sup> *ibid.*

<sup>39</sup> *ibid* 48-49. R Collins, ‘Constitutionalism as Liberal-Juridical Consciousness: Echoes from International Law’s Past’, (2009) 22 *Leiden Journal of International Law* 251, 266, argues that Tomuschat’s perception is that States have willed such an order into existence, and it remains only for the international lawyer (and perhaps the judge) to complete what is already underway.

<sup>40</sup> Tomuschat, *Obligations*, 227. In Tomuschat, *General Course*, 45-47, he had premised the authority of international law in ‘the acceptance of the system as a comprehensive body, with all its institutions and mechanisms’ before arguing that the social function of legal rules rests with the promotion of the common interest. *See also* H Bull, *The Anarchical Society: A Study of Order in World Politics* (3<sup>rd</sup> edn Columbia University Press, New York, 2002), 14.

<sup>41</sup> Tomuschat, *Obligations*, 237. For him, although the State remains the most important actor on the international plane, statehood is instrumental as a means to implement the core legal values of the international community, which he seems to understand at times as an underlying premise (or social substratum) (*ibid* 88) for his construction of the international legal order (the ‘community interest’, *ibid* 346), and at other times, he invokes it as a collective subject of international law (*ibid* 305, 431). Above all, he presents it as a community of values enshrined in obligations *erga omnes* and *jus cogens* norms, 75.

<sup>42</sup> H Lauterpacht, *The Function of Law in the International Community* (Clarendon Press, Oxford, 1933) (hereinafter ‘Lauterpacht, *Function of Law*’), 431. *See also* Lauterpacht, *Recueil des Cours* 113-116, where he viewed States as merely instruments of an overarching legal order.

<sup>43</sup> G Scelle, *Manuel de droit international public* (2<sup>nd</sup> edn Montchrestien, Paris, 1948), 17.

<sup>44</sup> *ibid.*

...devenu exiguë du fait de l'essor des communications et des échanges de toutes sortes qui rendent les peuples interdépendants, cependant que les disparités de développement, la poussée exponentielle d'une démographie déséquilibrée, les dégradations de l'environnement, accumulent sur le monde des menaces qui mettent en cause sa propre survie. Les hommes sont désormais condamnés à assumer une communauté de destin.<sup>46</sup>

Brierly has argued that '[a] society needs a spiritual as well as a material basis; it cannot exist without what Rousseau called the *volonté générale*, a sentiment among its members of community and of loyalty, of shared responsibility for the conduct of a common life, and it is just here that doubts of the existence of an international society find their justification.'<sup>47</sup> Charney defends the concept of international community as serving the practical interests of States, as '[t]he rules of the system also permit members to avoid conflict and injury, and promote beneficial reciprocal and cooperative relations. They may even promote values of justice and morality.'<sup>48</sup> Finally, Allott's more radical critique of international law decries the artificiality of so-called 'State-societies', which by their very existence negate the possibility of forming an international society under law'.<sup>49</sup>

This enumeration *seriatim* of arguments rooted in logical, ethical, or moral justifications should demonstrate that such content-based conceptions of international community necessarily conflict with the classical positivist view of the international legal system as based on coherent,

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<sup>45</sup> G Scelle, *Droit international public* (Domat-Montchrestien, Paris, 1944) 19-20. See also R-J Dupuy, *La communauté internationale entre le mythe et l'histoire* (Economica, Paris, 1986) 180, and Brierly, *The Basis of Obligation*, 52.

<sup>46</sup> R-J Dupuy, *Dialectiques du droit international: souveraineté des états, communauté internationale et droits de l'humanité* (Pedone, Paris, 1999) 310. See also Tasioulas, 'In Defence of Relative Normativity', 119, who regarded a communitarian approach as 'an ethical-political imperative that is emergent upon a basic datum of modern international life: the ongoing process of increased interdependence among states and their citizens, and the consequent 'global' character of many of the most serious problems that confront human beings.'

<sup>47</sup> J.L. Brierly, 'The Rule of Law in International Society', in Brierly, *The Basis of Obligation*, 251. This *leitmotiv* permeated Brierly's thinking in many of the other pieces collected in that volume.

<sup>48</sup> JI Charney, 'Universal International Law' (1993) 87 American Journal of International Law 529 (hereinafter 'Charney, 'Universal International Law'), 532.

<sup>49</sup> P Allott, *Eunomia: A New Order for a New World* (Oxford University Press, Oxford, 1990) (hereinafter 'Allott') 309 *et seq.* Allott conceives of the State as an 'external' process, lacking 'legal powers which are original, natural, and inherent. To speak legal powers which are [so] is to utter a contradiction in terms .... Legal powers, far from being original and natural and inherent, are socially derived and socially formed and socially delegated.' See also P Klein, 'Les problèmes soulevés par la référence à la "communauté internationale" comme facteur de légitimité', in O Corten and B Delcourt (eds), *Droit, légitimation et politique extérieure: l'Europe et la guerre du Kosovo* (Bruylant, Brussels, 2000) (hereinafter Klein, 'Problèmes soulevés'), 293-94.

apolitical rules and norms, whose validity is posited purely on the consent of States. The problems with justifying a shared communitarian ethos in concrete, legally valid terms has led to a parallel attempt to elucidate the concept of international community as a legally autonomous, self-standing concept, one whose validity is established institutionally, rather than being justified by its content.<sup>50</sup>

(iii) The international community and the international judicial function

An open question in the preceding conceptions of the ‘international community’ concerns the role of international judicial institutions in the elaboration, development, and enforcement of communitarian norms. In a very concrete sense, if common interests are given legal effect within a legal order, the judicial bodies within that order must interpret and apply them as part of the applicable law, thus constraining State action when in conflict with that ‘common interest’ shared by all members.<sup>51</sup> It may even be that no community can exist ‘without being able to discern an all-embracing judicial function safeguarding an even operation of the law within such a community’.<sup>52</sup>

It was the work of Hersch Lauterpacht that attempted to transform the concept of international community into tangible legal principles that could be applied and enforced by an international judiciary central to the international legal system. Lauterpacht’s communitarian

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<sup>50</sup> Tomuschat, General Course, 78-9: ‘... the litmus test for the fruitfulness of the concept of international community must be whether, impelled by its driving force, rules, procedures and mechanisms have been established with a view to vindicating and enforcing the common intent recognized by all states.’

<sup>51</sup> See also Friedmann, *Changing Structure*, 367, where he explains that a community of ‘interests’ constitutes a redefinition of international law away from a mere ordering of national interests; and G Schwarzenberger, *The Dynamics of International Law* (Professional Books, Abingdon, 1976) 107-129. As explained in Villalpando, *L’émergence de la communauté internationale*, 62, Friedmann’s ‘law of cooperation’ is *rationae materiae* by definition: it emerges and crystallises when the object of regulation requires it. See also Kritsiotis, ‘Imagining the International Community’, 964.

<sup>52</sup> S Oeter, ‘The International Legal Order and its Judicial Function’, in P-M Dupuy et al (eds), *Common Values in International Law: Essays in Honour of Christian Tomuschat* (NP Engel Verlag, Kehl, 2006) 582 (hereinafter ‘Oeter, ‘The International Legal Order’’); at 587-8, calling the ICJ yet another arbitral body which is a ‘surrogate’ for compulsory adjudication, he maintains that ‘each legal order ... necessitates an orderly procedure of adjudication’, and that only compulsory adjudication (and *a fortiori* excluding the Court) fulfils that condition formally and substantively, 590-91. But cf M Koskeniemi & P Leino, ‘Fragmentation of International Law? Postmodern Anxieties’, (2002) 15 Leiden Journal of International Law 553, 566-67.

sensibility animated his major treatises and writings as well as his judicial opinions, most prominently in *The Function of Law in the International Community*,<sup>53</sup> but this was with great hesitation, being generally descriptive in its approach.<sup>54</sup> Grounded in the Kelsenite faith in ‘peace through law’,<sup>55</sup> Lauterpacht advocated the *creation* of an *institutional* international community, which could protect against the totalitarian ‘global state’ and act as a centralising force to overcome the recalcitrance of certain dissenting States. He did not treat it as a settled matter.

The notion of an institutionalised community was the mechanism through which Lauterpacht was able to build a link between the international community and its judiciary. He argued that the function of the international legal order was to maintain the peace, a ‘morally indifferent’ concept ‘inasmuch as it involve[s] the sacrifice of justice on the altar of stability and security. Peace is eminently a legal postulate.’<sup>56</sup> As an agent of that legal order, the international judge was charged with the duty of safeguarding that ultimate purpose,<sup>57</sup> thus partially negating the classical doctrine of State sovereignty which underlies international legal positivism, as

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<sup>53</sup> Although the term features prominently in the title *The Function of Law in the International Community*, Sir Hersch denies the existence of the concept as a matter of positive law: Lauterpacht, *Function of Law*, 414: ‘although international law owes its existence to a certain solidarity of international interest, it does not owe it to a single collective international interest. There is no such collective interest. There is, apart from the domain regulated by expressly accepted international obligations, no international community.’ Later, *ibid* 421-23, very much as a matter of progressive development, he proposes the maxim *voluntas civitatis maximae est servanda* to supplant *pacta sunt servanda* as a new *Gründnorm* for the international legal order: ‘by courageously breaking with the traditions of a past period, [it] incorporates the rational and ethical postulate, which is gradually becoming a fact, of an international community of interests and functions.’

<sup>54</sup> Although he characterized the lack of the legal or factual existence of the international community, as a community of moral and political views, as a ‘défaut’ of international law: Lauterpacht, *Recueil des Cours*, 193-195. By 1941 he seemed to have modified his stance, arguing that an ‘essential and manifold solidarity ... constitutes a harmony of interest’ which had constituted a ‘community of fundamental moral standards and political notions’: H Lauterpacht, ‘The Reality of the Law of Nations’, in E Lauterpacht (ed), *International Law, being the Collected Papers of Hersch Lauterpacht* (Cambridge University Press, Cambridge, 2004) Vol V, 26.

<sup>55</sup> H Kelsen, *Peace Through Law* (University of North Carolina Press, Chapel Hill, 1944) 73, argued that ‘[t]he foundation of all legal organisation as of any legal community is the judicial process’; in his proposal for a successor to the League, he devoted thirty-three articles to the functions of a future Court of Justice endowed with compulsory jurisdiction, but only one each to a future Council and Assembly. At *ibid* 13-15, he argued that the failure of the League to impose a strong international judiciary was the ‘fatal error of design’ which consigned it to failure.

<sup>56</sup> Lauterpacht, *Function of Law*, 438.

<sup>57</sup> *ibid* 66-67. Lauterpacht considered that it is a rule of customary international law that the international judge would be entitled to go beyond the rules of customary and treaty law to general principles of law in order to resolve a dispute, as it was implied in the enumeration of sources of international law in Article 38 of the PCIJ Statute, which he interpreted to state that the function of a judge within any given community is to prevent violence.

Lauterpacht intended that the rule of law—an *a priori* principle requiring no consent by States—take priority over State sovereignty.<sup>58</sup> He argued that international law ought to be recast as a law of ‘subordination-command,’ binding States even against their will;<sup>59</sup> in this respect, he was willing to entrust to an ‘impartial institution’ (which in 1937 must have been the PCIJ) the competence to invalidate ‘immoral treaties’.<sup>60</sup>

Lauterpacht’s argument situating the Court as an ‘arbiter of the common interest’, speaking to the community as a whole,<sup>61</sup> charges the Court with upholding the very existence and the common values of the international community, rather than acting as a mere mediator between disputing parties.<sup>62</sup> These ideas can be broadly analogised to Dworkin’s later arguments that an institutionalised legal community can offer a coherent conception of justice which can safely be left for elucidation by judges:<sup>63</sup>

The judicial function [of the International Court] surely includes developing and applying international law to hitherto untested situations in order to obtain socially desirable and enlightened results. International law can never develop beyond the rudimentary state if the Court feels that the distinction between *lex lata* and *lex ferenda* forever prevents it from applying international law in a progressive manner in hitherto untested situations. Judicial decisions are an acknowledged source of law; they must play their part in law development.<sup>64</sup>

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<sup>58</sup> *ibid* 68-69.

<sup>59</sup> A Carty, ‘The Continuing Influence of Kelsen on the General Perception of the Discipline of International Law’ (1998) 9(2) *European Journal of International Law* 344, 353.

<sup>60</sup> Lauterpacht, *Recueil des Cours*, 308.

<sup>61</sup> The Court’s references to the ‘international community’ suggest its cognisance of this role: H Ruiz-Fabri, ‘La motivation des décisions des juridictions internationales’ (2009) 108(1) *Kokusaiho Gaiko Zasshi* 1, 19-20.

<sup>62</sup> G Abi-Saab, ‘The ICJ as a World Court’ in V Lowe and M Fitzmaurice, *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Grotius, Cambridge, 1996) 3 (hereinafter ‘Abi-Saab, ICJ as World Court’), 7; *see also* G Abi-Saab, ‘Cours général de droit international public’ (1987) 207 *Recueil des Cours de l’Académie de Droit International* 9 (hereinafter ‘Abi-Saab, Recueil des Cours’), 258-259, who argues that the Court has emerged as an ‘organe de droit international’ and no longer one beholden to the parties.

<sup>63</sup> Dworkin, *Law’s Empire*, 225. Tomuschat, *Recueil des Cours*, 222-223 asserts that Article 53 of the Vienna Convention recognises ‘the existence not only of a, but the, international community ... the justification for the superior legal force of a peremptory norm must be sought in its contents, inasmuch as it reflects common values essential for upholding peace and justice in the world.’ At 226, he emphasises the ‘juridical connotation’ of the concept of international community.

<sup>64</sup> R Higgins, ‘Aspects of the Case Concerning the Barcelona Traction, Light, and Power Company, Ltd.’, (1970-71) 11 *Virginia Journal of International Law* 327, 341. This early sentiment is echoed throughout her individual opinions as a judge of the Court: *see eg* *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 (hereinafter ‘*Nuclear Weapons*’), Dissenting Opinion of Judge Higgins, 590-591: ‘[t]he judicial lodestar, whether in difficult questions of interpretation of humanitarian law, or in resolving claimed tensions between competing norms, must be those values that international law seeks to promote and protect’.

Problems persist with any expansive definition of international community, in that the latent indeterminacy and imprecision surrounding the concept<sup>65</sup> threaten the coherence of the legal order. What is more, a communitarian conception of international law can be totalising, upholding as it does the absolute supremacy of certain ethical convictions, certain prevalent standards of decent conduct, and a shared conception of the common good.<sup>66</sup> Without a clear understanding of the process through which such convictions are embodied in the law, however, the concept denies international actors the possibility to participate in their elucidation. Such faith in ethical convictions tends towards a naturalism<sup>67</sup> that veers dangerously towards the *idées civilisatrices*<sup>68</sup> that once defined international law. With regard to the judicial function in particular, courts would be faced with ‘a task of staggering magnitude’ in defining relevant community policies such as ‘overriding objectives of human dignity’ with any degree of precision.<sup>69</sup> The structure of the Court’s Statute, with its emphasis on consent of the parties and its lack of power to enforce its judgments, seems in fact designed precisely to prevent such an eventuality.

(iv) The concept of the ‘international community of States’

For these reasons, a compromise position has emerged, favouring the will of the ‘international community of States’, a concept first articulated in Article 53 of the Vienna Convention, which respects a ‘core’ set of community interests transcending individual State interests. These may be due to a common consensus as to the values to be protected through the

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<sup>65</sup> Koskeniemi, *From Apology to Utopia*, 109, calls it the ‘hegemonic technique’. As BS Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (Sage, New Delhi 1993) 80 explains, official elites in particular have a particular say in dictating ‘community expectations’.

<sup>66</sup> Stone, ‘International Court and World Crisis’, 5.

<sup>67</sup> *ibid* 51.

<sup>68</sup> De Visscher, *Théories et réalités*, 123-24. See also N Onuf, ‘International Legal Order as an Idea’ (1979) 73 *American Journal of International Law* 244, 247.

<sup>69</sup> A very recent illustration may be found in H Fox, ‘The Fundamental Rights of the Person and the Immunity from Jurisdiction in International Law’, (Report of the 3<sup>rd</sup> Commission to the Naples Session of the Institut de Droit International, available online at [http://www.idi-iil.org/idiF/3rd\\_Commission\\_Naples.pdf](http://www.idi-iil.org/idiF/3rd_Commission_Naples.pdf)), 39-40, where she struggles with the complexity of defining ‘fundamental rights of the person’.



legal systems, or simply justified by ‘l’impérativité de sa nécessité sociale’,<sup>70</sup> and may be elucidated through the traditional processes of interpretation and application. Simma’s 1994 Hague Lectures nicely illustrate this compromise concept, suggesting that it represents ‘a consensus according to which respect for certain fundamental values is not to be left to the free disposition of States individually or *inter se* but is recognized and sanctioned by international law as a matter of concern to all States.’<sup>71</sup>

The vision of the ‘international community of States’ departs from a strictly bilateralist, State-centric vision of international law where, due to the lack of any overarching sovereign authority, international law constitutes a mere *Gesellschaft* which cannot presuppose more than factual contacts among a number of individual subjects who happen to deal with one another.<sup>72</sup> As Simma points out, that argument is circular: ‘the assumption that a society/community could be held together by means of legal norms alone overestimates the capacity of law and, conversely, underestimates the necessity of a societal consensus as a precondition for the formation of, and in particular the respect for, legal rules.’<sup>73</sup> Yet the concept of ‘international community of States’ also serves to assuage the concerns over the form and nature of international law wrought by a morally or ethically-informed conception: it articulates a vision of the international community

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<sup>70</sup> P-M Dupuy, ‘Le juge et la règle générale’, (1989) 93(2) *Revue générale de droit international public* 569, 598. This did not go unnoticed during negotiations leading to the Vienna Convention on the Law of Treaties: see intervention by H Groepper (FR Germany) 2 UN Conference on the Law of Treaties, Official Records (19th plenary meeting), (14 May 1969) 95-96, UN Doc A/Conf 39/11/Add. 1.

<sup>71</sup> B Simma, ‘From Bilateralism to Community Interest’, (1997) 250 *Recueil des Cours de l’Académie de Droit International* 229 (hereinafter ‘Simma, Recueil des Cours’) 233. At *ibid* 248, he oscillates between representing an aggregated and a fully autonomous sense of international community. See also B Fassbender, ‘The United Nations Charter as Constitution of the International Community’ (1998) 36 *Columbia Journal of Transnational Law* 529, 597; S Rosene, ‘Is the Constitution of an International Organization an International Treaty’, (1966) (12) *Comunicazioni e studi* 21; E Suy, ‘The Constitutional Character of Constituent Treaties of International Organizations and the Hierarchy of Norms’, in *Mélanges R Bernhardt* (Berlin, 1995) 267; and K Skubiszewski, ‘Remarks on the Interpretation of the United Nations Charter’, in *Mélanges H Mosler* (Springer Verlag, Berlin/Heidelberg/New York, 1983) 891, for a similar definition.

<sup>72</sup> *ibid* 245; see also P Fauchille, *Traité de droit international public* vol 1 (Librairie A Rousseau, Paris, 1922), 9.

<sup>73</sup> *ibid*; although he does recall that the starting-point for progress remains the ‘traditionally patterned bilateralist international law’, *ibid* 234. See also B Simma and AL Paulus, ‘The “International Community”: Facing the Challenge of Globalization’ (1998) 9(2) *European Journal of International Law* 266 (hereinafter ‘Simma and Paulus’), 277 [citations omitted].

that remains composed of sovereign States,<sup>74</sup> institutionalising their community interest. As such, it is closer to Ago's 'functionalist' definition of community, identifying peremptory norms as such because concerted action involving all States is required to uphold them.<sup>75</sup> States remain at the heart of the elaboration of those norms; obligations devolve primarily upon them, as do the rights to enforce them, although the question of who is entitled to represent that community remains nebulous.

### C. THE PURELY ORNAMENTAL USE OF THE TERM 'INTERNATIONAL COMMUNITY' IN THE CASE LAW OF THE COURT: THE 'TRIED AND TRUE' CASES RE-EXPLAINED

The paucity of judgments which can be relied upon as authority for the view that the Court incorporates an expansive definition of 'international community' into its practice calls into question whether the Court defines it at all.<sup>76</sup> In fact, as will be demonstrated below, the actual practice of the Court reveals that whilst the concept might be invoked to produce grandiloquent statements about the international legal order, it has never been relied upon to generate even the semblance of a legal effect.<sup>77</sup>

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<sup>74</sup> *ibid.* See also R St John Macdonald, 'The International Community as a Legal Community', in R St John McDonald and DM Johnston, *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (Martinus Nijhoff, Leiden/Boston, 2005) 853 (hereinafter 'Macdonald, 'International Community'), 869, who also envisages the interplay between State and individual rights as the lynchpin of his 'global constitutionalism'—the transformation of the international legal order into a 'constitution-like' system. See also R Higgins, *The Development of International Law through the Political Organs of the United Nations* (Oxford University Press, London, 1963) 11-12, who defined the international community as strictly a 'community of nations' with 'shared long-range objectives'. Cf Tsagourias, 'In Defence of Relative Normativity', 217, who criticises this notion of community as mere 'mechanical solidarity'.

<sup>75</sup> R Ago, 'Communauté internationale et organisation internationale', in R-J Dupuy (ed), *Manuel sur les organisations internationales/A Handbook on International Organizations* (2<sup>nd</sup> edn Martinus Nijhoff, Dordrecht/Boston/London 1998) 3 (hereinafter 'Ago'), 8-9.

<sup>76</sup> AA Cançado Trindade, 'International Law for Humankind: Towards A New *Jus Gentium*—General Course on Public International Law' vol I 316 *Recueil des Cours de l'Académie de Droit International* 9 (hereinafter 'Cançado Trindade, *Recueil des Cours*'), 174-184, who calls for the resolution of the *vexata quaestio* of compulsory jurisdiction', and in ch XXV calls for the entrenchment of compulsory jurisdiction as the fulfilment of the need for a 'sustained law-abiding system of international relations', 218. At 222-223, he criticises the current Optional Clause as indicative of the failure of the international judicial function to follow the evolution of the international community as a legal order.

<sup>77</sup> Simma, *Recueil des Cours*, 298 criticised the 'lip-service' paid to obligations *erga omnes*: 'it is ironic that the very Court that spelled out the concept in the first place has now subjected it to the procedural rigours of traditional bilateralism.'

(i) *Corfu Channel, Reparations and Reservations to Genocide*: the early cases

There are three *de rigueur* citations from the Court's early judgments upon which rests the argument defending an expansive interpretation of international community in the Peace Palace. The first is *Corfu Channel's* invocation of 'elementary considerations of humanity'<sup>78</sup> in its finding of Albania's responsibility. Seemingly rooted in a naturalistic impulse, especially when juxtaposed to the Court's somewhat self-aggrandising claim to act as 'guarantor of the integrity of international law',<sup>79</sup> 'considerations of humanity' in fact did not affect the outcome of the judgment. Instead, they were merely invoked to give moral suasion to the Court's judgment, which turned upon a construction of responsibility, an obligation of prevention, and an obligation to provide reparations for damages suffered. No community interest justifies any material part of the Court's reasoning.

Two early advisory opinions are similarly lauded, yet equally misinterpreted. In the first, *Reparations for Injuries*, when recognising the United Nations' international legal personality, the Court premised such personality on the 'needs of the community', claiming that '[t]hroughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane'.<sup>80</sup> Yet, the very ability to create

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<sup>78</sup> *Corfu Channel (United Kingdom v Albania)* (Judgment) [1948] ICJ Rep 4, 22.

<sup>79</sup> *ibid* 35. A similar sentiment was reflected in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* [2002] ICJ Rep 3 (hereinafter '*Arrest Warrant*'), Separate Opinion of Judge *ad hoc* Bula-Bula, 107; and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (United Kingdom v Libyan Arab Jamahiriya; United States v Libyan Arab Jamahiriya)* (Provisional Measures) [1992] ICJ Rep 3, Separate Opinion of Judge Lachs, 26: '[i]n fact the Court is the guardian of legality for the international community as a whole, both *within and without* the United Nations. One may therefore legitimately suppose that the intention of the founders was not to encourage a blinkered parallelism of functions but a fruitful interaction'. See also PM Dupuy, 'Les «considérations élémentaires d'humanité» dans la jurisprudence de la Cour internationale de Justice' in R-J Dupuy (ed), *Mélanges en l'honneur de Nicolas Valticos* (Pedone, Paris, 1999) 117, 127: elementary considerations of humanity had 'l'avantage indubitable d'intégrer elles-mêmes, dans un même concept, et la règle morale et la règle coutumière qui lui correspond. La considération élémentaire d'humanité apparaît ainsi comme l'instrument judiciaire de la liaison normative entre les fondements éthiques de la norme juridique et cette norme elle-même'. See also PH Mendelson, 'Formation of International Law and the Observational Standpoint', in connection with 'The Formation of Rules of Customary (General) International Law', in International Law Association, Report of the Sixty-Third Committee (Warsaw, 21-27 August 1988), 944.

<sup>80</sup> *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 178.

entities with objective legal personality is nothing new: the entire constitutive theory of recognition of States is premised upon that very ability of States to do so. The communitarian consensus upheld in *Reparations* is functional rather than conceptual: the community remains the member States of the United Nations, and the only values defended are those of the UN Charter, a multilateral instrument consented to by States alone. The *Reparations* opinion could take on a communitarian colour were the Charter read as a normative constitutional document; the Court's silence on that point, however, makes imputing any such interpretation to it untenable. The Court simply explained that UN Members could create objective legal personality; it did not create a new normative framework for international law.<sup>81</sup>

In *Reservations to the Genocide Convention*, a community interest is recognised more expressly: '[t]he Convention was manifestly adopted for a purely humanitarian and civilizing purpose. In such a convention, the contracting States do not have any interest of their own; they merely have, one and all, a common interest'.<sup>82</sup> It was further concluded that '...a denial of the rights of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity which is contrary to moral law'.<sup>83</sup> Such strong wording could easily have served as the conceptual framework for articulating how this 'common interest' and the 'conscience of mankind' could play a role within international law; but if one studies the wording

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<sup>81</sup> While instead raises questions as to the function of the United Nations and the role of the Court as the interpreter or guarantor of the UN Charter, it by no means settles the question of the Court's concept of international community.

<sup>82</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15 (hereinafter '*Reservations to Genocide*'), 23. See also P-M Dupuy, *Recueil des Cours*, 31, who suggested this opinion was an example of the Court issuing its opinion from a value-oriented framework in contexts where 'la norme éthique s'intègre dans la norme juridique, l'analyse requiert ... d'intégrer la prise en compte du fondement et des visées éthiques portés par les normes considérées.'

<sup>83</sup> *ibid* 23. See also *Reservations to Genocide Convention* (Advisory Opinion), [1951] ICJ Pleadings 380, pleadings of Sir Hartley Shawcross (United Kingdom), suggesting that the Genocide Convention and others of its type would be 'illusory unless there is some machinery as that of appeal to the International Court of Justice'. Cf *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)* (Jurisdiction and Admissibility) [2006] ICJ Rep 6 (hereinafter '(2006)'), Joint Separate Opinion of Judges Higgins, Kooijmans, Elaraby, Owada and Simma, 71, where Sir Hartley's discomfort is echoed in the concern of the judges: '[i]t is a matter for serious concern that at the beginning of the twenty-first century it is still for States to choose whether they consent to the Court adjudicating claims that they have committed genocide ... [i]n the instant case, the Court was precluded ... from the appropriate administration of justice.'

carefully, the Court seems to be focussed primarily on the policies animating the drafters of the Convention, and not suggesting a legally-differentiated status for the Convention or a different rule of interpretation to apply to it. What is more, the Court declined to provide a determinate rule for the admissibility of reservations, the question in fact motivating the Assembly's request.<sup>84</sup> The closest the Court came to such a statement, in suggesting that reservations must be compatible 'with the object and purpose' of a convention,<sup>85</sup> contained no elaboration as to the consequences of incompatibility, has only provided marginal guidance to other judicial bodies, which have interpreted these differently in their own case law.<sup>86</sup>

(ii) *South West Africa* cases, *Barcelona Traction*, *Namibia*, *Teheran Hostages*

The *South West Africa* cases represented the beginning of a spate of judicial pronouncements which seemed to define the international judicial function *vis-à-vis* an international 'common interest'. In these judgments, the Court oscillated between non-consensual and consensual aspects of the Mandate given to South Africa over Namibia, beginning with *International Status of South West Africa*, where it emphasised the non-consensual nature of the mandate, 'created in the interests of the inhabitants of the territory, and of humanity in general.'<sup>87</sup> Álvarez's dissent in that case, in which he claims that the 'spirit of new

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<sup>84</sup> *ibid* 24; the Court explained that 'the object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them. It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation.'

<sup>85</sup> *Reservations to Genocide Convention*, 29.

<sup>86</sup> Human rights judicial and quasi-judicial bodies have broken with the Court and endorsed the severability doctrine of impermissible reservations: see eg *Rawle Kennedy v Trinidad & Tobago* (2002) UN Doc CCPR/C/67/D/845/1999; *Loizidou v Turkey*, Preliminary Objections (App no 15318/89) (1995) 20 EHRR 99; *Belilos v Switzerland*, App no 10328/83 (1988) 10 EHRR 466; and *Anglo-French Continental Shelf Case* [1979] 18 ILM 397. See also *Armed Activities in the Congo* (2006), Joint Separate Opinion of Judges Higgins, Kooijmans, Elaraby, Owada and Simma, 65, 71. A presumption on the severability of impermissible reservations to multilateral, normative treaties was defended vigorously in B Simma and GI Hernández, 'Legal Consequences of an Impermissible Reservation to a Human Rights Treaty: Where do we Stand?' in E. Cannizzaro (ed.), *The Law of Treaties beyond the Vienna Convention: Essays in honour of Professor Giorgio Gaja* (Oxford University Press, Oxford, 2011) 60; and ultimately recommended by Special Rapporteur Pellet in the Addendum to the Fifteenth Report on Reservations to the International Law Commission (26 May 2010): UN Doc A/CN.4/624/Add.1, esp. 35, para 465.

<sup>87</sup> *International Status of South West Africa* (Advisory Opinion) [1950] ICJ Rep 128 (hereinafter '*International Status of South West Africa*') 132-136 (emphasis added), 132. See also *South West Africa (Ethiopia v South Africa; Liberia v South*

international law' had been introduced, illuminates the difficulty the Court must have faced in justifying the opinion. According to Álvarez, the decision suggested that the 'community of States, which had hitherto remained anarchical, has become in fact an organized international society.'<sup>88</sup> Álvarez elaborated further on this issue, stating that the Court 'creates the law; it creates it by modifying classical law' and then qualifying that by claiming that a 'new and important purpose' of the Court consists in declaring the law.<sup>89</sup> Similarly, McNair's separate opinion in *International Status of South West Africa* ascribes a similar normative role for the United Nations framework, arguing that a sort of 'new legal order' might have emerged from the Charter, 'extending beyond the limits of the actual contracting parties, and giving it an *objective existence* ... when some *public interest* is involved'.<sup>90</sup> However, McNair does not go so far as to endorse Álvarez's view that a new legal order has in fact emerged.<sup>91</sup>

The jurisprudential thread begun in *International Status of South West Africa* cannot be read in isolation from the Court's blunt finding in *South West Africa (Second Phase)*: '[h]umanitarian considerations [are] not in themselves sufficient to generate legal rights and duties. A court of law

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*Africa*) (Preliminary Objections) [1962] ICJ Rep 319, 335-337, where it was likened to a humanitarian obligation, not a mere contractual mandate, and where the Mandate was a considered a 'sacred trust' of humanity. This was not contradicted in 1966, when the Court held only that these were insufficient to justify a 'legal interest' on the part of Ethiopia and Liberia: see *South West Africa (Ethiopia v South Africa; Liberia v South Africa)* (Second Phase) [1966] ICJ Rep 6 (hereinafter '*South West Africa* (Second Phase)'), 23.

<sup>88</sup> *ibid*, *International Status of South West Africa*, Dissenting Opinion of Judge Álvarez, 175.

<sup>89</sup> *ibid* 177. The 'new spirit of international law' was a *leitmotif* of Álvarez's individual opinions. In *Conditions of Admission of a State to Membership in the United Nations* (Advisory Opinion) [1948] ICJ Rep 57, Dissenting Opinion of Judge Álvarez, 67, he argued that as the 'most authoritative organ for the expression of the juridical conscience', '[t]he Court has a free hand to allow scope to the new spirit which is evolving in contact with the new conditions of international life: there must be a renewal of international law corresponding to the renewal of this life.' In *International Status of South West Africa*, Dissenting Opinion of Judge Álvarez, 179-84, he expressed similar thoughts on the 'universal conscience of peoples' which would entrench not only the law-creating function of the International Court but a complete shift in the rules of treaty interpretation by the Court, so that all treaties be interpreted in a manner consonant with the 'new international law'. Finally, in *Anglo-Iranian Oil Company (United Kingdom v Iran)* (Preliminary Objection) [1952] ICJ Rep 93, Dissenting Opinion of Judge Álvarez, 130-1, he recast the jurisdiction of the Court, arguing certain rights resulting from the 'revitalized conscience of the people which takes account of the general interest' did not create direct obligations between States and that the Court had jurisdiction over any dispute regarding these rights.

<sup>90</sup> *International Status of South West Africa*, Separate Opinion of Judge Lord McNair, 153.

<sup>91</sup> *South West Africa* (Second Phase), Separate Opinion of Judge Jessup, 425: '[i]nternational law has long recognised that States may have legal interests in matters which do not affect their financial, economic or other "material", or, say, "physical" or "tangible" interests'.

[cannot] take account of moral principles unclothed in legal form'.<sup>92</sup> The watertight division between law and policy in this highly controversial judgment led to scathing denunciations of the Court from many academics<sup>93</sup> and governments (especially from the newly-independent States of Africa and Asia), and it is reasonable to assume that the celebrated—and curious—*Barcelona Traction dictum* may have emerged as a response to mitigate that reaction:<sup>94</sup>

... an essential distinction should be drawn between obligations of a State towards the international community as a whole and those arising *vis-à-vis* another State in the field of diplomatic protection. By their nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.<sup>95</sup>

Again, however, community interest was an ancillary part of the Court's reasoning: *Barcelona Traction* primarily concerned diplomatic protection and the nationality of corporations. Although

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<sup>92</sup> *South West Africa* (Second Phase), 4. Tams, *Enforcing Obligations Erga Omnes*, 63-70 argues that the Court's methodology in arriving at its findings should be understood as a restrictive interpretation of the League Covenant and that international condemnation of this judgment is often an over-simplification, as neither Ethiopia nor Liberia had relied upon the concept of *actio popularis*, but instead had interpreted art 7(2) of the League Covenant separately: in essence, that the judgment constitutes a restrictive interpretation of *treaty-based* standing. This will be highly pertinent in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment of 20 July 2012 (hereinafter '*Obligation to Prosecute or Extradite*'). With regard to a community interest, this was particularly contested in the Dissenting Opinion of Judge Tanaka, 276, which stated that the Mandate system created legal obligations to the "organized international community" which was only represented by the United Nations but had an objective legal existence outside that organisation. To a certain extent, Judges Padilla Nervo, 433, 463-64, Jessup, 325, 438-39, and Wellington Koo, 216, 234, also adopted some of this reasoning when they emphasised the importance of the dynamic interpretation of treaty obligations.

<sup>93</sup> For some acerbic criticism, see R Higgins, 'The International Court and South West Africa: the Implications of the Judgment' (1966) 42 *International Affairs* 573, 589, 592-3 ('an attempt to dodge uncomfortable questions'); E McWhinney, *The World Court and the Contemporary International Law-Making Process* (Sijthoff & Noordhoff, Alphen aan den Rijn, 1979) 17 ('the new judicial majority had sought to invoke proceduralisms to mask a substantive, policy decision of a politically conservative or reactionary character'); JHW Verzijl, 'The South West Africa Case (2<sup>nd</sup> Phase)' (1966) 3(2) *International Relations* 87; W Friedmann, 'The Jurisprudential Implications of the South West Africa Case' (1967) 6 *Columbia Journal of Transnational Law* 1, 14 ('[a] judgment which distorted legal reasoning beyond the limits of generally accepted doubts of construction'); and R Falk, 'The Southwest Africa Cases' (1967) 21 *International Organization* 1, 7 ('[w]ritten upon tortured prose, dwells upon hypertechnical elaborations of its basic conclusions, and seems utterly unconvincing in its main argument').

<sup>94</sup> ILC Commentary to the ASR, 127, para 7, fn 725, explaining that Article 48 of the Articles gives effect to this so-called *dictum* and represents a deliberate repudiation of its judgment in *South West Africa (Second Phase)*. See also L Gross, *The Future of the International Court of Justice* (Oceana, Dobbs Ferry, 1976) 748. The most complete analysis of the Court's treatment of the situation remains that of J Dugard, *The South West Africa/Namibia Dispute: Documents and Scholarly Writings on the Controversy between South Africa and the United Nations* (University of California Press, Berkeley, 1973).

<sup>95</sup> *Barcelona Traction, Light, and Power Company, Limited (Belgium v Spain)* (Second Phase) [1970] ICJ Rep 3 (hereinafter '*Barcelona Traction*'), 32. The last part, on the importance of the rights involved, is crucial—the obligation is qualitatively different from norms of general international law (in that case, of diplomatic protection), due to its *material importance*: see Tams, *Enforcing Obligations Erga Omnes*, 129. Moreover, the recognition that obligations *erga omnes* are the concern of all States also puts paid to the argument that the international community as a whole is the sole titulary of the legal interest in their violation.

the *dictum* intimated at a change in the Court's perception of its judicial function, in no way did it affect the settlement of that dispute. The *Namibia* Advisory Opinion is similar in this regard, containing a characterisation, the 'sacred trust' of civilisation,<sup>96</sup> which conceivably lends itself to a communitarian vision of international law violated by South Africa's imposition of apartheid in Namibia. However, the Opinion turned on a careful legal analysis of the nature of the Mandate, a 'sacred trust of civilisation' under Article 23 of the League Covenant, and the transfer of supervisory functions over such mandates to the United Nations. The legal succession of the United Nations to the supervision of the mandate system was the principal issue in this Opinion, not the affront to international public order wrought by apartheid; and even if an objective communitarian interest animated the Court's Opinion, this was not the legal justification upon which it relied. The Court gently intimated at the legal effects of violating a peremptory norm: States should refrain from lending support or assistance to the maintenance of *apartheid* in Namibia, or from entering into treaty relationships or diplomatic contacts with South Africa when it acted on behalf of Namibia.<sup>97</sup> It did not suggest, for example, that international agreements concluded in violation of these exhortations would be invalid.

The Court followed a similar line in *Teheran Hostages*, where it emphasised the international community's 'fundamental interest' in the orderly conduct of diplomacy;<sup>98</sup> again, just as in *Reparations*, the 'interest' here was functional in nature and not legal. That judgment turned

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<sup>96</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (Advisory Opinion) [1971] ICJ Rep 3 (hereinafter '*Namibia*'), 56: 'all States should bear in mind that the injured entity is a people which must look to the international community for assistance in its progress towards the goals for which the sacred trust [of civilisation] was instituted.' E McWhinney, 'The International Court of Justice and International Law-making: The Judicial Activism/Self-Restraint Antinomy' (2006) 5(1) *Chinese Journal of International Law* 3, 11, pinpoints the tendency towards any 'conscious and deliberate judicial approach to decision-making' on the part of the Court to the circumstances surrounding the drafting of *Namibia*.

<sup>97</sup> *ibid* 54-5, paras 119, 122-4; 58, para 133.

<sup>98</sup> *United States Diplomatic and Consular Staff in Teheran (United States v Iran)* [1980] ICJ Rep 3 (hereinafter '*Hostages*') 43: 'the Court considers it to be its duty to draw the attention of the entire international community, of which Iran itself has been a member since time immemorial, to the irreparable harm that may be caused by events of the kind now before the Court. Such events cannot fail to undermine the edifice of law carefully constructed by mankind over a period of centuries, the maintenance of which is vital for the security and well-being of the complex international community of the present day'.



not on the nullity of a treaty, but rather in characterising Iran's behaviour; the Court's phrases served more to chastise Iran rhetorically than to render operative the concept of the international community, as in any event, the fundamental nature of the rules of diplomatic relations did nothing to modify the relations between the parties in that case, whether at the jurisdictional phases or at the merits.

(iii) *Nicaragua and Oil Platforms*

The Court's judgment in the dispute between Nicaragua against the United States<sup>99</sup> suggested the beginning of a new phase for the Court, and has been heralded as a paradigm shift in the Court's conception of the international legal order into a 'natural embrace' of its communitarian obligations.<sup>100</sup> The case is indeed noteworthy, as in many respects it represents the closest the Court has come to actually basing its judgment (although *sub silentio*, as the Court relied principally on 'fundamental general principles of international humanitarian law'<sup>101</sup>) on the enforcement of a community interest.<sup>102</sup> Yet one should not overstate the claim: Court's reasoning is firmly rooted in classical legal positivism, and the Court relies upon the language of customary law to justify its reasoning. For example, whilst both parties did not hesitate in characterising the prohibition on the use of force as being of a peremptory nature,<sup>103</sup> the Court itself declined to confirm their submissions in this regard.<sup>104</sup> Moreover, it should be remembered

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<sup>99</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Merits) [1986] ICJ Rep 14 (hereinafter '*Nicaragua (Merits)*'),

<sup>100</sup> See eg Abi-Saab, 'ICJ as World Court'; and Tasioulas, 'In Defence of Relative Normativity'.

<sup>101</sup> *Nicaragua (Merits)*, 113-114. It did note, *ibid* 134, that 'where human rights are protected by international conventions, [their] protection takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided for in the conventions themselves', suggesting that *erga omnes partes* claims are certainly possible, but it did not foreclose the possibility of an *erga omnes* claim on the basis of customary international law alone.

<sup>102</sup> Tasioulas, 'In Defence of Relative Normativity', 108. However, it should be recalled that in *Nicaragua (Merits)*, 108, the communitarian interest remains buried under particularised language concerning the principle of non-intervention 'on matters in which each State is permitted, by the principle of State sovereignty, to decide freely.'

<sup>103</sup> *ibid* 100-01.

<sup>104</sup> *ibid* 119. See also V Vereshchetin and R Müllerson, 'International Law in an Interdependent World' (1990) 28 Columbia Journal of Transnational Law 291.

that the *Nicaragua* case turned on the attribution of State responsibility rather the application or legal effects of community norms.<sup>105</sup>

In the more recent *Oil Platforms* case, the United States again recognised the importance of the law of the use of force. It was a fact not lost on the Court, which quoted the US Rejoinder to justify taking jurisdiction in that case.<sup>106</sup> *Oil Platforms* turned upon the interpretation of a bilateral treaty and whether it should be interpreted in the light of the general law on the prohibition on the use of force, as Iran claimed. The Court ultimately found that the prohibition to be a ‘relevant rule’ of general international law applicable under Article 31(3)(c) of the Vienna Convention, thus adopting a contextual analysis of the treaty.<sup>107</sup> Whatever this outcome, any further qualification of the nature of the prohibition of the use of force was scrupulously avoided.<sup>108</sup>

(iv) The recent advisory opinions: *Nuclear Weapons*, *Israeli Wall*, and *Kosovo*

The Court’s advisory opinions have not been substantively different from its judgments in contentious cases in that both are characterised by their careful avoidance of explicit reliance upon community norms. The *Nuclear Weapons* Advisory Opinion given to the General Assembly went so far as to use the term ‘international community’ eight times,<sup>109</sup> yet none of these

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<sup>105</sup> *ibid* 103-04. See P Visscher, ‘Cours général de droit international public’ (1972-II) 136 Recueil des Cours de l’Académie de Droit International 1, 111: whilst *jus cogens* norms have entered as a ‘concept de droit positif’, it nevertheless remains for them to ‘acquérir un contenu matériel positif’.

<sup>106</sup> *Oil Platforms (Iran v United States)* (Merits) [2003] ICJ Rep 161 (hereinafter ‘*Oil Platforms*’), 181. The Court echoed its own pronouncement regarding ‘its own responsibilities in the maintenance of peace and security under the Charter and the Statute of the Court’ in *Legality of Use of Force (Yugoslavia v Belgium and others)* (Provisional Measures) [1999] ICJ Rep 124 (hereinafter ‘*Legality of the Use of Force* (Provisional Measures)’), 132.

<sup>107</sup> E Jouannet, ‘Le juge international face aux problèmes d’incohérence et d’instabilité du droit international: quelques réflexions à propos de l’arrêt CIJ du 6 novembre 2003, Affaire des Plates-formes pétrolières’, (2004) 108 *Revue générale de droit international public* 917, 937, argues that the Court attempts to transcend mere dispute-resolution and in fact affirm itself as the primary interpreter of international law.

<sup>108</sup> *Oil Platforms*, 182. This curious situation was noted in the Separate Opinion of Judge Higgins, 225, 238, who argued that the Court had ‘replaced the terms of Article XX, para 1(d) with those of international law on the use of force’; the Separate Opinion of Judge Buergenthal, 270, 279, who argued that the qualification of a rule as *jus cogens* was of no import for the interpretation of a bilateral treaty which did not refer to that norm; and the Separate Opinion of Judge Simma, 324, 329, who argues that the Court’s chosen formulation downgraded the relevance and importance of the Charter rules on the use of force.

<sup>109</sup> *Nuclear Weapons*, paras 62, 63, 67, 73, 82, 96, 100, 103.

references suggested anything more than rhetorical flourish: each time, the term was devoid of any legal substance. In fact, the only substantive finding was in reference to ‘intransgressible principles of international customary law.’<sup>110</sup> A few more revelatory statements may be found in the individual opinions, yet if anything these serve to confirm, by way of comparison, the minimalistic conception ascribed by the Court’s Opinion to the concept of ‘community’. President Bedjaoui outlined the emergence of the concept and its sometimes successful attempts at ‘subjectivization’,<sup>111</sup> claiming that ‘[t]he resolutely positivist, voluntarist approach of international law...has been replaced by an objective conception of international law, a law more readily seen as the reflection of a collective juridical conscience and a response to the social necessities of States organised as a community.’<sup>112</sup> Judge Shahabuddeen’s dissent also took the line that the international community ‘as a whole’ was a different construction than the ‘international community of States’, arguing that the latter was not so sovereign as to annihilate itself and with it, mankind: ‘any such use would be repugnant to the conscience of the community.’<sup>113</sup> Judge Weeramantry’s dissenting opinion also draws upon the different major lines of communitarian argument outlined at the beginning of this piece. First, he claims that ‘elementary considerations of humanity’ and the ‘dictates of public conscience’ became entrenched because of their universal existence throughout various cultures rather than any inherent rationality;<sup>114</sup> this is a pluralist, not value-based, communitarian argument. Later, he argues that the Charter and the Universal Declaration of Human Rights in particular have

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<sup>110</sup> *ibid* 257.

<sup>111</sup> *ibid*, Declaration of President Bedjaoui, 270.

<sup>112</sup> *ibid*.

<sup>113</sup> *ibid*, Dissenting Opinion of Judge Shahabuddeen, 387. This is similar to the Declaration of Judge Oda in *Application of Genocide Convention* (1996), 626-28, who argued that the Genocide Convention only protects the rights of individuals and not of States, thus dismissing the standing of individual States to bring ICJ proceedings in response to breaches of obligations *erga omnes*. At 399, whilst conceding the primary role of States as components of the international community, Judge Shahabuddeen categorically rejected that they were its exclusive members, and questioned the necessity of enquiring into their *opinio juris* when the ‘moral repugnance of mankind for its own destruction’ was in question.

<sup>114</sup> *ibid* 429, 479-90.

transformed humanitarian standards, fundamental human rights and the protection of the environment into ‘particularly essential rules of general international law’;<sup>115</sup> in short, that there has, through the practice of States, emerged a genuine community of values. Finally, he invokes the language of logical imperative in favour the prohibition against nuclear weapons, arguing that the ‘premise of the continued existence of the community served by that law’ was an indispensable requirement for the validity of a legal system, ‘however attractive the juristic reasoning on which it is based.’<sup>116</sup>

The Court’s advisory opinion in *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory* hews to a similar line of reasoning. *Prima facie*, the *Israeli Wall* opinion seems to have recognised ‘[c]ore obligations of international humanitarian law’ as fundamental community norms.<sup>117</sup> However, the majority opinion should be interpreted carefully: as Judge Higgins correctly points out, any superficial communitarian sensibility in the principal opinion is denuded of legal force,<sup>118</sup> and is carefully submerged in language consistent with a positivist, State-centric conception of the Court’s function. Two specific points merit mention. First, the Court’s treatment of the legal nature of the Palestinian mandate belies this narrower view. Recalling the characterisation of the Mandate system in *South West Africa* (1950) as being of interest ‘to humanity in general’ and the ‘sacred trust of civilization’,<sup>119</sup> which admittedly had not been

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<sup>115</sup> *ibid*, 490-491.

<sup>116</sup> *ibid* 520.

<sup>117</sup> *Legal Consequences of the Construction of a Wall In Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 (hereinafter ‘*Israeli Wall*’), 199. At 200 (para 159), the Court explained that all States were ‘to see to it that any impediment ... to the exercise by the Palestinian people of its right to self-determination is brought to an end’. *See also United States Diplomatic and Consular Staff in Tehran (United States v Iran)* (Provisional Measures) [1979] ICJ Rep 7, 19, the Court characterised the ‘institution of diplomacy’ as ‘an instrument essential for effective cooperation in the international community’; in its Judgment, 43, it reiterated how the rules of diplomatic immunity were ‘vital for the security and well-being of the complex international community of the present day.’

<sup>118</sup> *ibid*, Separate Opinion of Judge Higgins, 217, who flatly dismissed the possibility any normative implication deriving from use of the term ‘*erga omnes*’: ‘the invocation of “the *erga omnes*” nature of violations of humanitarian law seems equally irrelevant. These intransgressible principles are generally binding because they are customary international law, no more and no less.’

<sup>119</sup> *ibid* 165 *et seq.*

sufficient to ground an *actio popularis* in 1966, the Court followed with a lengthy description of Israeli plans for the occupied territories, and the conclusion that the legal status of the territory was in any event irrelevant, given the applicability of international humanitarian norms to Israel.<sup>120</sup> Arguably, this conclusion is a product of the relative ease of applying customary norms to the territory over arguing a ‘communitarian interest’.<sup>121</sup> Secondly, the Court found that States are obliged not to recognise and render assistance when continuing breaches of obligations *erga omnes* were in question.<sup>122</sup> The Court was silent as to what other legal consequences might flow from their breach, in particular for United Nations organs.<sup>123</sup>

Finally, in the *Kosovo* advisory opinion,<sup>124</sup> the Court buried its reasoning in technicalities such as the international nature of the Constitutional Framework promulgated by the Special Representative of the Secretary-General<sup>125</sup> and the identity of the authors of the declaration of independence.<sup>126</sup> In so doing, it managed to avoid making any pronouncements on matters of potential communitarian concern at issue in that opinion. The extent of the Kosovar people’s

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<sup>120</sup> *ibid* 177.

<sup>121</sup> This may also be as a response to the submissions of different States and organisations to the Court: *see eg Israeli Wall*, Pleadings (2004) 62 *et seq*, esp 65, where the League of Arab States argued an *erga omnes* claim based on the self-determination of the Palestinian people, devolved from the League, and the General Assembly’s obligation to *veiller*, but not on a more general notion of the international community’s ‘sacred trust’.

<sup>122</sup> *Israeli Wall*, *ibid*, Advisory Opinion, 200, para 159, reproduced in document A/ES-10/273: ‘The obligations *erga omnes* violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law ... . Given the *character and the importance of the rights and obligations involved*, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall ...’ (emphasis added). This last phrase echoes the wording of *Barcelona Traction*, 32.

<sup>123</sup> G Gaja, ‘Obligations and Rights *Erga Omnes* in International Law’, (2005) 71-I *Annuaire de l’institut de droit international* 119 (hereinafter ‘Gaja, ‘Obligations and Rights *Erga Omnes*’), 126 suggests that non-State entities, including individuals, may be entitled to redress in certain circumstances when there is a breach of an obligation *erga omnes*, although he also concedes that the International Court has no role in facilitating such redress.

<sup>124</sup> *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403 (hereinafter ‘*Kosovo*’).

<sup>125</sup> *ibid* 440-1, paras 89-93.

<sup>126</sup> *ibid* 444-8, paras 102-109.

right to self-determination under international law was addressed with pregnant silence,<sup>127</sup> as was discussion of the exact limits on the Security Council's powers acting through UNMIK (and the possible international responsibility of the United Nations) for the unilateral declaration of independence at issue in that case.<sup>128</sup> The only tantalising hint offered by the Court in *Kosovo* was a suggestion that declarations of independence 'connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*)',<sup>129</sup> would for this reason render unlawful a declaration of independence. It is conceivable to argue that this passing reference concretises the legal effect of a violation of *jus cogens* in relation to a certain category of unilateral acts, in a similar manner as does Article 53 of the Vienna Convention; but the throwaway comment does little more, being drafted so tersely as to avoid all possibility of a more generalised interpretation.

The cautious, qualified statements in the *Nuclear Weapons*, *Israeli Wall* and *Kosovo* advisory opinions are illustrative of the difficulty in imputing a consistent line of reasoning to the Court. Although Guillaume's withering dismissal of the international community as 'ill-defined' in *Arrest Warrant*<sup>130</sup> may be symptomatic of the difficulty faced by the Court, the concept continually resurfaces in its case law through its struggle to define norms *jus cogens* and obligations *erga omnes*, the *normes d'élite* of the international legal system. These concepts, which necessarily impress a

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<sup>127</sup> The normative communitarian implications of any pronouncement by the Court on this point were evident: see R. Falk, 'The Kosovo Advisory Opinion: Conflict Resolution and Precedent' (2011) 105(1) *American Journal of International Law* 50, 57-8, suggesting the Court's minimalistic, non-textual interpretation of Security Resolution 1244 gave 'muted and indirect encouragement' to Kosovo's aspirations, even whilst recognising the Kosovar people's right to self-determination, which itself has 'destabilizing potentialities'. See also J. Vidmar, 'The *Kosovo* Advisory Opinion Scrutinized' (2011) 24(2) *Leiden Journal of International Law* 355, 361-8.

<sup>128</sup> A tantalising issue analysed in D Jacobs and Y Radi, 'Waiting for Godot: An Analysis of the Advisory Opinion on Kosovo', (2011) 24(2) *Leiden Journal of International Law* 331, 344-8.

<sup>129</sup> *Kosovo*, 437-8, para 81. See also concurrence with this finding in the Dissenting Opinion of Judge Cançado Trindade, paras 213-4, who argued that the Court should in fact have gone further in addressing the legal effects of violations of *jus cogens*.

<sup>130</sup> *Arrest Warrant*, Separate Opinion of President Guillaume, 43.

hierarchy of norms upon the international legal order,<sup>131</sup> would constitute the vector through which the international community of States becomes legally effective. Accordingly, it is to understanding the mechanics of these concepts that the next section will turn.

#### D. PEREMPTORY NORMS

(i) The extra-legal dimension to peremptory norms

The source whence peremptory norms derive their validity remains a basic challenge in international law, and underscored much of the debate that led to the adoption of Article 53 of the Vienna Convention on the Law of Treaties. The question arises as to whether rules of *jus cogens* include, through the very nature of the content embodied in the rules, an element of ‘objective justice’<sup>132</sup> which has, to put it mildly, proven controversial,<sup>133</sup> especially given the traditional emphasis of classical legal positivism on the legal validity of a rule deriving from its source in the will of States.<sup>134</sup> Yet Lauterpacht’s First Report on the Law of Treaties to the International Law Commission suggested that ‘rules of international morality so cogent’ could

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<sup>131</sup> *Prosecutor v Furundžija*, Case No IT-95-17/1-T, Judgment (10 December 1998), 121 ILR 218, at 58, para 153. In doctrine, this argument is seen both by defenders of normativity (JA Carrillo Salcedo, ‘Reflections on the Existence of a Hierarchy of Norms in International Law’, (1997) 8 European Journal of International Law 583; and MacDonald, ‘International Community’, 871) and its detractors (Weil, *Recueil des Cours*, 262-63; G Guillaume, ‘*Jus cogens* et souveraineté’, in E Belliard *et al* (eds), *Mélanges en l’honneur de Jean-Pierre Puissechot* (Pedone, Paris 2008) 127 (hereinafter ‘Guillaume, *Jus cogens* et souveraineté’), 130, 136). See also M Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Oxford University Press, Oxford, 1999) (hereinafter ‘Byers, *Custom*’), 194.

<sup>132</sup> See eg Cançado Trindade, *Recueil des Cours*, vol II, 92; see also A Verdross, ‘Les principes généraux du droit dans la jurisprudence internationale’ (1935-II) 35 *Recueil des Cours de l’Académie de Droit International* 191, 202-203. But cf Simma, *Recueil des Cours*, 291-293; Byers, *Custom*, 187-95; Kolb, *Théorie du ius cogens international*, 66-67; and the Arbitral Tribunal in *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)* (1990) 83 ILR 126, para 44, who all argue that *jus cogens* may fully be separated from natural law.

<sup>133</sup> Besides the traditional positivist critique that denies any validity of a legal rule based on its content alone, see also GI Tunkin, *International Law* (Progress, Moscow, 1986) 223, dismissed the concept of ‘fundamental norm’ as purely a logical, abstract construction which did nothing ‘to explain the ‘historical development of international law and the real co-relation of the norms of international law itself’. See, generally, G Tunkin, ‘International law in the International System’ (1974) 148 *Recueil des Cours de l’Académie de Droit International* 1, where the *leitmotif* was the nature of international law as a law of ‘pacific coexistence’.

<sup>134</sup> An excellent treatment of the background behind the positivist tradition in international law is that of R Ago, ‘Positive Law and International Law’, (1957) 51 *American Journal of International Law* 691, esp. 698-702 (history of the concept), 708-14 (the various forms of ‘positive law’ in international law).

constitute principles of international public policy that void treaties.<sup>135</sup> This is tightly enmeshed with Verdross' position that the 'higher interests of the whole international community' were capable of voiding 'immoral treaties'<sup>136</sup> in violation of a compulsory norm of general international law or *contra bonos mores*.<sup>137</sup> More cautiously, Jennings argued that the existence of *jus cogens* norms was the consequence of positive international law's more advanced, institutionalised state of development, claiming already that in 1965, 'that stage has been reached'.<sup>138</sup> Whatever justification is used, all theories seem to ground the coherence of the legal order outside of law itself, and all seek some justificatory metaphysical principle outside the positive law.<sup>139</sup> Even Kelsen places his *Gründnorm* outside the positive law: 'elle n'est pas édictée, posée—*ce n'est pas une norme positive*—mais supposée; elle fonde simplement l'unité des normes positives.'<sup>140</sup>

Perhaps due to this extra-legal dimension,<sup>141</sup> rules of *jus cogens* cannot be easily accommodated within classical legal positivist theories on the sources of international law.<sup>142</sup> Such rules are not

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<sup>135</sup> H Lauterpacht, 'First Report on the Law of Treaties', (1953) Ybk Int L Commission Vol II, Part 2, 154-156, at para 4. Michael Akehurst in fact favours the reverse approach: morality underpins the process through which conventional or customary rules acquire a peremptory character: see M. Akehurst, 'Notes: The Hierarchy of Sources in International Law' (1975) XLVII (47) British Year Book of International Law 273, 283.

<sup>136</sup> 'Immoral' being understood as falling below some 'ethical minimum' recognised by all States in the international community: Verdross, 'Forbidden Treaties', 574. See also A Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (Springer, Vienna, 1926), 21 *et seq.*

<sup>137</sup> *ibid* 577.

<sup>138</sup> RY Jennings, 'Nullity and Effectiveness in International Law', in D Bowett (ed), *Cambridge Essays in International Law: Essays in Honour of Lord McNair* (Stevens & Sons, London, 1965) 64, 74. For a similar argument, see H Triepel, *Droit international et droit interne* (Pedone, Paris, 1920), 80-81; D Anzilotti, *Cours de droit international* (Sirey, Paris, 1929), 45.

<sup>139</sup> A comment in the International Law Commission's debates on the relationship between *jus cogens* norms and positive law is illustrative of the underlying tension: '... if the term "positive law" was understood to mean rules laid down by States, then *jus cogens* was *by definition not positive law*. But if "positive law" was understood to mean the rules in the practice of the international community, the *jus cogens* was indeed positive law'. (1963) Ybk Int L Commission Vol I, Part 1, 75 (Statement of Mr De Luna (Spain)) [emphasis added].

<sup>140</sup> H Kelsen, 'Les rapports de système entre le droit interne et le droit international public' (1926) 14 Recueil des Cours de l'Académie de Droit International 256.

<sup>141</sup> One recognised in R Ago, 'Positive Law and International Law' (1957) 51 American Journal of International Law 691, 719-20; and GG Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law', in J.H. Verzijl and F.M. van Asbeck (eds), *Symbolae Verzijl: présentées au Professeur J.H. Verzijl à l'Occasion de son LXX-ième anniversaire* (Martinus Nijhoff, The Hague 1958), 164.



merely widespread and universal by virtue of acclamation by States; if so, they would merely be some form of special customary law.<sup>143</sup> The rules of *jus cogens* cannot be merely treaty law, as evidenced by the wording of Article 53 of the Vienna Convention itself, which requires that rules of *jus cogens* be accepted and recognised by the ‘international community of States as a whole’. They cannot be purely customary law, both because of their non-derogable status, but given the lack of accommodation to the consent of, and objection to, individual States.<sup>144</sup> Finally, the very concept of *jus cogens* norms embodies a natural law component<sup>145</sup> that cannot simply be shoehorned into the category of ‘general principles common to civilised nations’ under Article 38(1)(c) of the Statute<sup>146</sup> simply because both categories look beyond international treaty practice

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<sup>142</sup> P Allott, ‘Reconstituting Humanity—New International Law’ (1992) 3 European Journal of International Law 219, 250, suggests that, barring a new social theory or the adoption of an international constitution, only the intervention of a ‘Hammurabi or a Solon’ would make possible to assert the existence of peremptory rules.

<sup>143</sup> M Byers, ‘Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes* Rules’, (1997) 66 Nordic Journal of International Law 211, 221, suggests that the non-derogable character of *jus cogens* is justified by ‘something like *opinio juris*’, through which States regard *jus cogens* rules as so important that the standard rules of consent and objection cannot apply, although he does concede later, 222-3, the difficulties in locating the source of *jus cogens* in customary international law, due in part to the fact that *jus cogens* rules deny the standard rules of customary international law. See also Conklin, 842, rejects the customary law theory on the validity and source of peremptory norms and rights, which to him embody ‘something more’ than the consent of States. It is true, as points out A Orakhelashvili, ‘A Reply to William E Conklin’, (2012) 23(2) European Journal of International Law 863, 866, that there can be overlap between the content of rules of *jus cogens* and ordinary sources of law: and the latter may in fact reaffirm substantively the validity of the former. He is also correct that one must distinguish between the content of a peremptory norm and its effect. Yet neither of these points can satisfactorily address the extra-legal component on which is premised the validity of the concept of norms *jus cogens*.

<sup>144</sup> The Court, in both *Lotus*, PCIJ Ser A No 10 (1927), 18, and *Nicaragua (Merits)*, 135, para 269, recalled emphatically the consensual basis behind the existence of a rule of customary law. It is true that *jus cogens* rules and customary law do share certain important attributes, notably, that the acceptance as such by States that a rule is binding in either category;

<sup>145</sup> B Simma, ‘The Contribution of Alfred Verdross to the Theory of International Law’ (1995) 6(1) European Journal of International Law 1 (hereinafter ‘Simma, “The Contribution of Verdross”’), 22; See also Charney, ‘Universal International Law’, 541; P-M Dupuy, *Recueil des Cours*, 202; de Visscher, ‘Positivism et *jus cogens*’, 9; R Kolb, ‘Théorie du *ius cogens* international’, (2003/1) *Revue belge de droit international* 14; Orakhelashvili, *Peremptory Norms*, 38; de Wet, ‘The International Constitutional Order’, 57. The natural law component to rules of *jus cogens* cannot, however, constitute its essence, given how most scholars conceptualise natural law as static, objective rules that pre-date any legal system posited by humans. As recalls the Commentary to Article 50 of the VCLT, ‘it would clearly be wrong to regard even rules of *jus cogens* as immutable and incapable of modification in the light of future developments’: see International Law Commission, *Draft Articles on the Law of Treaties, with Commentaries*, United Nations Conference on the Law of Treaties: Official Records (Documents of the Conference) (United Nations, New York 1971) 7, 68.

<sup>146</sup> As suggested Hersch Lauterpacht in the ‘First Report on the Law of Treaties’, 155, and P Reuter, *Introduction au droit des traités* (3<sup>rd</sup> edn Presses universitaires de France, Paris, 1995), 128. Kolb, *Théorie du ius cogens international*, 68-69 instead links *jus cogens* to the protection of common systemic interests, arguing that it is bereft of naturalist connotations. Finally, see PM Dupuy, ‘Le juge et la règle générale’, 93 *Revue générale de droit international public*

and custom. Even if the source and validity of a general principle and a rule of *jus cogens* might be the same, the *effect* of the norm remains different.

It is the uncertainty described above regarding the source through which peremptory norms are legally validated that leads to the challenge wrought to the international judicial function, as the Court must, in the exercise of its function, address the effects of peremptory norms whilst being unable to test their validity. This is particularly so in the case of rules of *jus cogens*: at a minimum, the ability of such rules to transcend positive law<sup>147</sup> requires the Court to review the validity of treaties against these rules and to declare invalid any treaties in violation of them.<sup>148</sup> To do so sets international law decisively on a path away from its classical foundations as a system regulating relations between completely sovereign States and erected purely through their willed consent: ‘avec le droit impératif, surgit un principe de transcendance qui va à l’encontre de l’autonomie de la volonté, naturelle dans un ordre de juxtaposition.’<sup>149</sup> Rules of *jus cogens*, hierarchically superior to the *jus dispositivum*, exist precisely to modify and place limits on the traditional processes of international law-formation, although it is unclear whether this is due to their status as primary rules which embody aspects of secondary rules (in the Hartian sense, with respect to rules of recognition), or whether they have somehow ascended to some form of ‘constitutional rules’.<sup>150</sup> Even if *jus cogens* norms are not defined in terms of their content, their

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569, 584-85, who argues that *jus cogens* and general principles together can articulate a new theory of sources of international law.

<sup>147</sup> Orakhelashvili, *Peremptory Norms* 36-38. G Schwarzenberger, ‘The Problem of International Constitutional Law’ in J Delbrück, K Ipsen and D Rauschning (eds), *Recht im Dienst des Friedens: Festschrift für Eberhard Menzel zum 65. Geburtstag am 21. Januar 1976* (Duncker & Humblot, Berlin, 1975) 241, 249 conceptualised *jus cogens* as the *de facto* norm upon which the international legal order rests.

<sup>148</sup> The violation of rules of *jus cogens*, even if merely theoretical, leads to the absolute invalidation of treaties irrespective of their actual implementation under Articles 53, 61 and 64 of the Vienna Convention (*‘nullité draconienne’*: see Weil, *Recueil des Cours*, 268).

<sup>149</sup> R-J Dupuy, ‘Communauté internationale et disparités de développement’ (1979) 165 *Recueil des Cours de l’Académie de Droit International* 9 (hereinafter ‘R-J Dupuy, *Recueil des Cours*’), 196-197.

<sup>150</sup> As Byers, ‘Conceptualising’, 212, 219-20 suggests: ‘they limit the ability of States to create or change rules of international law, and prevent States from violating fundamental rules of international public policy, when the resulting rules or violations of rules or violations of rules would be seriously detrimental to the international legal system and how that system, and the society it serves, define themselves’.

existence places the Court at the heart of a conceptual tension, requiring it to choose between consent and an ‘objective’ law.

(ii) Obligations *erga omnes* distinguished

Obligations *erga omnes* are not in complete identity with rules of *jus cogens* norms,<sup>151</sup> but they are the closest procedural vehicle for the upholding of these. Obligations *erga omnes*, ‘owed to all’ members of the international community,<sup>152</sup> imply the creation of a procedural remedy for their breach. So far as concerns the judicial function, thus, obligations *erga omnes* can be distinguished from rules of *jus cogens* in that the former entail, by logical deduction, an expansion of the rules on standing so as to allow courts to be seised by any State upon their breach.<sup>153</sup> To conclude as much is not unnatural, as the term is of the Court’s own making in the oft-quoted *Barcelona Traction dictum*,<sup>154</sup> and it is on this concept that hope has been pinned that the community interest might prevail in the Court.<sup>155</sup> Such an interpretation of the concept has allowed it to develop,

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<sup>151</sup> Although the relationship between the two concepts is close. As Tams, *Enforcing Obligations Erga Omnes*, 140 points out, the four examples in *Barcelona Traction* of obligations *erga omnes*—acts of aggression, genocide, protection from slavery and racial discrimination—also are examples of *jus cogens* norms. Finally, it would seem that ‘all *jus cogens* norms are by definition *erga omnes*’, although not all *erga omnes* norms are necessarily imperative: see (1998-II) Ybk Int L Commission Vol II, Part 2, 69, 76; Byers, ‘Conceptualising’, 212; and Tams, *Enforcing Obligations Erga Omnes*, 149, who cites the *Pinochet* order of the Brussels Court of First Instance (6.xi.1998), 119 ILR 355; and the 2001 judgment on genocide of the German *Bundesverfassungsgericht*: see 54 Neue Juristische Wochenschrift (2001), 1849.

<sup>152</sup> Simma, *Recueil des Cours*, 297-301. At *ibid* 125, he concedes that ‘the world of obligations *erga omnes* is still the world of the “ought” rather than of the “is”’, as does Villalpando, *L’émergence de la communauté internationale*, 106.

<sup>153</sup> Tams, *Enforcing Obligations Erga Omnes*, 28-31 describes standing as a ‘normative concept’ which vehicles the protection of certain interests; at 32, he explains the subjective perception of interests and rights in this regard. Moreover, at 158-196, he expressly links the notion of standing before the Court as a primary means for the enforcement of obligations *erga omnes*. See also A de Hoogh, *Obligations Erga Omnes and International Crimes* (Kluwer, The Hague, 1996), 91, who bases his definition of ‘international community’ upon ‘community organs’ entrusted with the enforcement of law, which is similar to Ago linking the concept of a ‘personified’ international community to international institutions of ‘universal vocation’: see R Ago, ‘Second Report on State Responsibility’, (1970-II) Ybk Int L Commission 177, 184. The recent judgment of the Court in *Obligation to Prosecute or Extradite* rests on claims that the principle *aut dedere aut judicare* is an obligation *erga omnes partes* as well as *erga omnes* under customary international law.

<sup>154</sup> *Barcelona Traction*, 32. But see also Tams, *Enforcing Obligations Erga Omnes*, 197: ‘[w]here jurisdiction is established, all States can institute proceedings against State principally responsible for violations of obligations *erga omnes*.’ The jurisdictional questions raised by the concept will be addressed later.

<sup>155</sup> As Judge Higgins wryly notes in her Separate Opinion in *Israeli Wall*, 216, the *dictum* ‘is frequently invoked for more than it can bear.’

without further intervention by the Court, in various areas of international law.<sup>156</sup> Having said that, one cannot easily justify a sea change in international legal argument merely due to its acceptance within the substance of international law.

Three salient features characterise the impact of obligations *erga omnes* on international law. First, to claim that the international community, ‘distinct from its members’, may enter into legal relations with all its members, remains bound up with the fact of recognition of that community as such.<sup>157</sup> Secondly, obligations *erga omnes* are understood simultaneously to be horizontal (in that they are owed to the international community as a whole) and vertical (in that as they bind not merely States but also organs and agents thereof, and even individuals).<sup>158</sup> Thirdly, obligations *erga omnes* are not tightly enmeshed with communitarian norms, as they make no formal statement on the content of such rules:<sup>159</sup> the classification *stricto sensu* of a right as *erga omnes* suggests only that it is the mirror image of an obligation *erga omnes*, namely, an obligation owed to all States individually<sup>160</sup> which is based on collective interest and which is to be enforced by all States.

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<sup>156</sup> CJ Tams and A Tzanakopoulos, ‘*Barcelona Traction* at 40: The ICJ as an Agent of Legal Development’, (2010) 23 *Leiden Journal of International Law* 781 (hereinafter Tams and Tzanakopoulos, ‘*Barcelona Traction* at 40’), 793.

<sup>157</sup> Tams, *Enforcing Obligations Erga Omnes*, 3 explains how it has ‘become one of the rallying cries of those sharing a belief in the emergence of a value-based international public order based on law’; yet cf Weil, *Recueil des Cours*, 311, suggests that it is a mere ‘fiction commode’ for States to hide behind their responsibilities. Weil had previously elaborated on this theory in P Weil, ‘Towards Relative Normativity in International Law’ (1983) 77 *American Journal of International Law* 413, 441: ‘the concepts of “legal conscience” and “legal community” may become code words, lending themselves to all kinds of manipulation, under whose cloak certain states may strive to implant an ideological system of law that would be a negation of the inherent pluralism of international society.’

<sup>158</sup> Cançado Trindade, *Recueil des Cours*, Vol I, 353-354. He lauds the emergence of international criminal law as embodying that accountability of individuals for violations of human rights law, refugee law, and international human rights law, *ibid*, Vol II, 151-158.

<sup>159</sup> One can see this in the ILC Commentaries to Article 40 of the ILC Commentary to the ASR, para 3, which present *jus cogens* norms as ‘substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic values’. This is a qualitative assessment of *jus cogens* and not a systemic approach which covers rules inherent in the system, which would include, for example, the sovereign equality of States, *pacta sunt servanda*, and good faith: see Kolb, *Théorie du ius cogens international*, 115-120, 171-187; Abi-Saab, *Recueil des Cours*, 259.

<sup>160</sup> Tams, *Enforcing Obligations Erga Omnes*, 122-23 explains clearly that *Barcelona Traction* was not articulating a concept of *erga omnes partes* (treaty-based obligations) but of *erga omnes simpliciter*, obligations existing in which all States, by virtue of their subjecthood under international law, have a legal interest. The Court’s discussion, paras 33-34, of the judgment wraps the discussion of the concept of *erga omnes* in the question of standing and legal interest.

Moreover, despite suggestions that obligations *erga omnes* redefine the bilateralist basis of international law,<sup>161</sup> this may be overstated: almost all obligations of customary international law are obligations *erga omnes* in the sense that they are owed towards each and all States, on a bilateral basis.<sup>162</sup> The same goes for Article 48 of the 2001 ILC Articles on State responsibility, according to which the obligation is owed by the violating State to each and every other State individually.<sup>163</sup> This formula preserves the bilateral, reciprocal structure of the obligation in international law. The enforcement of an obligation *erga omnes* under Article 48 is a right vested in each and every State *as its own right*, which is actually a right *omnium*.<sup>164</sup>

However, the fact that all States may have a legal *right* of protection to claim for a violation of the obligation<sup>165</sup> does, to a point, suggest that they are more than rules whose bilateral relationships have been fully generalised. According to this line of reasoning, each State not only has rights and obligations with respect to the substantive content of the rule, but is also subject to a series of additional, non-bilateralised rights and obligations with respect to the addressee of the

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<sup>161</sup> See Section B(iv), *supra*.

<sup>162</sup> R Ago, 'Obligations *Erga Omnes* and the International Community' in J Weiler, A Cassese, & M Spinedi (eds), *International Crimes of States. A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (De Gruyter, Berlin, 1989) 237, 237. For further examination of the distinction between obligations and rights *erga omnes*, see Gaja, 'Obligations and Rights *Erga Omnes*', *passim*.

<sup>163</sup> Villalpando, *L'émergence de la communauté internationale*, 101. The legal effects of *erga omnes* and *jus cogens* characterisations is also different: concrete violations of obligations *erga omnes* may lead to any number of consequences, in the field of State responsibility; the taking of jurisdiction; the general principles of waiver or estoppel; and the emergence of a duty not to recognize effects of *erga omnes* breaches: see Tams and Tzanakopoulos, 'Barcelona Traction at 40', 794.

<sup>164</sup> The term '*omnium*' was first used by G Arangio-Ruiz, 'Fourth Report on State Responsibility' (1992-II) Ybk Int L Commission, (1), 44. There are several mentions of 'rights *erga omnes*' in the case law of the Court: *Barcelona Traction*, 32; *East Timor (Portugal v Australia)* [1995] ICJ Rep 90 (hereinafter '*East Timor*') 102, para 29; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Preliminary Objections) [1996] ICJ Rep 595 (hereinafter '*Application of Genocide Convention (1996)*') 616, para 31; *Nuclear Weapons*, 257; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)* [2001] ICJ Rep 40, 100; *Israeli Wall*, 172, 199, paras 155-7; *Armed Activities in the Congo* (2006), 31-32, para 64; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43 (hereinafter '*Application of Genocide Convention (2007)*'), 104; and *Obligation to Prosecute or Extradite*, paras 67-70.

<sup>165</sup> Byers, 'Conceptualising', 232.

obligation (each and every other State).<sup>166</sup> It is the additional rights that *enable* a State to make claims against any State which is bound by and violates the substantive rule, and not the rights and obligations contained *within* the substantive rule, that give obligations *erga omnes* their multilateralised character.

(iii) The effects of peremptory norms on international law

It has been suggested that the *form* of *jus cogens* norms and *erga omnes* obligations allows for the articulation of more types of claims and even of a wider set of claimants as members of a ‘pluralistic community.’<sup>167</sup> It is here where the effects of peremptory norms becomes evident. But it is the manner in which this is done that is relevant: the crystallisation of *jus cogens* norms and obligations *erga omnes* has consistently been formulated in consensualist language centred on States. Neither Article 53 of the Vienna Convention on the Law of Treaties nor Article 48 of the 2001 ILC Articles on State responsibility represent a return to natural law: the former emphasises the importance of the norm to the ‘community of States as a whole’, whilst the latter suggests that only States have ‘a legal interest in the breach of an obligation owed to the international community as a whole.’<sup>168</sup> Moreover, the Vienna Convention and the ILC Articles are pregnantly

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<sup>166</sup> *ibid.*

<sup>167</sup> Koskeniemi, *From Apology to Utopia*, 106. See also Klein, *Problèmes soulevés*, 270, 274, 278 who explores how the various actors in the Kosovo intervention—States and international organisations—juxtaposed the ‘international community’ and its interest against the United Nations as a superior entity exterior to it; this is similar to the argument of Tsagourias, ‘In Defence of Relative Normativity’, 213, that as a source of legitimacy and authority for an undertaken action, a community becomes ‘personified’.

<sup>168</sup> This term was first used in reference to the controversial idea of ‘International Crimes of State’: see R Ago, ‘Fifth Report on State Responsibility’ (1976-II) Ybk Int L Commission, Vol II, Part 2, 95, 119. In R Ago, ‘The Concept of “International Community as a Whole”: A Guarantee to the Notion of State Crimes”, in J Weiler, A Cassese, & M Spinedi (eds), *International Crimes of States. A Critical Analysis of the ILC’s Draft Article 19 on State Responsibility* (De Gruyter, Berlin 1989) 252, 252-253, Ago interpreted Article 19 as representing the consensus of ‘all essential components of the international community’: ‘if a rule were regarded as *jus cogens*, let us say by the group of Western States but not the Eastern States, or else by both but not by the group of University Press of Third World States ... if there is opposition to considering it a rule of *jus cogens*, then it is better for the answer to be “no”, rather than to say “yes” on the basis of a conception that prevails among only a part of mankind.’ See also JHH Weiler, ‘On Prophets and Judges: Some Personal Reflections on State Responsibility and Crimes of State’, in J Weiler, A Cassese & M Spinedi (eds), *International Crimes of States. A Critical Analysis of the ILC’s Draft Article 19 on State Responsibility* (De Gruyter, Berlin 1989) 319, 321-22.

silent as to the *content* of peremptory norms.<sup>169</sup> As neither qualifies the validity of these norms and obligations by way of ethical, sociological or other extra-legal justifications, peremptory character is acquired purely through State consent: it is ‘*purement endogène*’.<sup>170</sup> If these two texts accurately represent international law in its present state, they represent the reconfirmation and not a dismantling of the voluntarist edifice upon which the international legal order rests.<sup>171</sup> Accordingly, the debate concerning the nature of *jus cogens* norms or obligations *erga omnes* can also move beyond ruminations as to their theoretical bases,<sup>172</sup> and focus also on the question of their application and legal effects. As regards the Court, the latter considerations are intimately related to its perception of its role within the international legal system, as the next section will seek to demonstrate.

## E. RULES OF *JUS COGENS* AND OBLIGATIONS *ERGA OMNES* IN THE CASE LAW OF THE COURT

*...peu des notions ont suscité autant de controverses et déchaîné autant de passions—passions d’autant plus vives, paradoxalement, que les applications concrètes de cette notion iconoclaste sont restées rarissimes et que c’est autour de ses virtualités plutôt que de ses effets réels que le débat fait rage!*<sup>173</sup>

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<sup>169</sup> Weil, *Recueil des Cours*, 270: ‘s’il est difficile de définir comment se forme une règle coutumière, il est impossible de déterminer comment voit le jour une norme impérative.’

<sup>170</sup> *ibid* 267. But *cf* Kolb, *Théorie du ius cogens international*, 131-134, who attempts to separate concept of nullity from the hierarchy of application of norms, arguing that *jus cogens* is limited to the latter. He likens Article 53 of the Vienna Convention to Article 103 of the Charter.

<sup>171</sup> Villalpando, *L’émergence de la communauté internationale*, 79, decries this position, arguing in favour of rendering operative such norms so to concretise the legal effect of the concept of international community. *Cf* Weil, *Recueil des Cours*, 91, who highlights the ‘valeurs morales et solidaristes’ embodied through obligations *erga omnes* and cautions that ‘quels que soient ses attraits, la théorie de l’obligation *erga omnes* exige une maîtrise et une élaboration qui jusqu’à présent font défaut.’

<sup>172</sup> Report of the Study Group of the International Law Commission finalised by M Koskenniemi, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’, UN Doc A/CN.4/L.682 (13 April 2006) (hereinafter ‘ILC Fragmentation Report’), 206, where they were termed ‘signals of argumentative possibilities and boundaries for institutional decision-making.’ *See also* A-C Martineau, ‘The Rhetoric of Fragmentation: Fear and Faith in International Law’, (2009) 22(1) *Leiden Journal of International Law* 1, 6.

<sup>173</sup> Weil, *Recueil des Cours*, 263.

(i) Peremptory norms and ‘international public order’

Peremptory norms are hardly new to the language of the Court. As early as 1934, the separate opinion of Judge Schücking in the *Oscar Chinn* case made reference to the concept of *jus cogens* and linked it expressly to international public morality.<sup>174</sup> After the Second World War, peremptory norms were at the heart of Lauterpacht’s shift regarding international public order.<sup>175</sup> However, the relatively small number of the Court’s majority judgments addressing the concepts of *erga omnes* and *jus cogens* begs caution: there are only eight examples of when either notion was so much as acknowledged.<sup>176</sup> In general (with the notable exception of *Jurisdictional Immunities of the State*),<sup>177</sup> the notions of *jus cogens* or *erga omnes* played little to no part in the legal reasoning behind any of these judgments, which ultimately provide little clarification about their possible legal effect. Whatever clarification has been proffered has nearly always been to suggest their irrelevance. For example, although the Court in the *Application of Genocide Convention* (1996) case affirmed that the Genocide Convention contained obligations *erga omnes*,<sup>178</sup> the Court certainly did not go so far as to use this qualification to extend its jurisdictional mandate and has subsequently,

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<sup>174</sup> *Oscar Chinn case* (1934) PCIJ Series A/B No 63, Separate Opinion of Judge Schücking, 149, 150.

<sup>175</sup> As mentioned above, in his 1937 Hague Lectures, Lauterpacht denied the existence of an international public order: see Lauterpacht, *Recueil des Cours*, 306. By 1953, his position had evolved somewhat, and he strongly advocated the inclusion of the category of *jus cogens*: see (1953-II) Ybk Int L Commission, Vol II, 154, following directly on Brierly’s own statements at the ILC: see (1950-II) Ybk Int L Commission, Vol II, 304, 309, endorsing the inclusion of the term ‘international public order’ in a preliminary report on the establishment of an international criminal jurisdiction. One also sees this *volte face* in Lauterpacht’s individual opinions: for example, in *Norwegian Loans (France v Norway)* [1957] ICJ Rep 9, 94-95, and *Interhandel (Switzerland v United States)* [1959] ICJ Rep 6, 65-66, he used the principle of effectiveness in the interpretation of treaties to claim that the real issue was ‘whether it can be part of the duty of the Court to administer and to give the status of a legal text to instruments which in fact do not create legal rights and duties’. In *Admissibility of Hearings of Petitioners of Petitioners by the Committee on South West Africa* (Advisory Opinion) [1956] ICJ Rep 23, 48-9, he also raised the principle of effectiveness in concluding as to the validity of the international mandate over South West Africa, claiming that the law must find means to remove obstacles and fill *lacunae* to maintain the integrity of the system, and that certain treaty obligations, transcending mere contractual relation must continue, ‘being subject to adaptation to circumstances which have arisen’.

<sup>176</sup> *Barcelona Traction; East Timor; Application of Genocide Convention* (1996); *Israeli Wall; Armed Activities in the Congo* (2006); *Application of Genocide Convention* (2007); *Application of CERD; Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)*, Judgment of 3 February 2012 (hereinafter ‘*Jurisdictional Immunities of the State*’); and *Obligation to Prosecute or Extradite*

<sup>177</sup> Discussed *infra*, Section E(iv).

<sup>178</sup> *Application of Genocide Convention* (1996), 616.



in its 2007 judgment on the merits, clearly explained that it sees itself as neither empowered nor capable of doing so.<sup>179</sup> It was similarly formalistic in *Obligation to Prosecute or Extradite*, blandly recognising Belgium's standing under the Torture Convention as *erga omnes partes* and saying little more.<sup>180</sup> It is only in the separate and individual opinions of the Members of the Court where any elaboration on the nature and possible legal effects of rules of *jus cogens* or obligations *erga omnes* may be found.<sup>181</sup> It is thus important to consider the Court's actual judicial pronouncements, so

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<sup>179</sup> But cf. *Application of Genocide Convention* (2007), 104, where it explained that '[i]t has no power to rule on alleged breaches of other obligations under international law, not amounting to genocide, particularly those protecting human rights in armed conflict. That is so even if the alleged breaches are of obligations under peremptory norms, or of obligations which protect essential humanitarian values, and which may be owed *erga omnes*.' For further discussion on this point, see A Cassese, 'The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', (2007) 18(4) *European Journal of International Law* 649.

<sup>180</sup> *Obligation to Prosecute or Extradite*, discussed in Section E(ii), *infra*.

<sup>181</sup> The list includes: *Application of the Convention of 1902 Governing the Guardianship of Infants (the Netherlands v Sweden)* (Judgment) [1958] ICJ Rep 55, Separate Opinion of Judge Moreno Quintana, 106 (distinguishing between national *ordre public*, the issue at hand, and the abstract question of 'international *ordre public*'; the latter 'operates within the limits of the system of public international law when it lays down certain principles ... respect for which is indispensable to the legal-coexistence of the political units which make up the international community'); *North Sea Continental Shelf (FR Germany/Denmark; FR Germany/Netherlands)* (Judgment) [1969] ICJ Rep 3, Separate Opinion of Judges Padilla Nervo, 97, and Separate Opinion of Judge Sørensen, 248; *ibid*, Dissenting Opinion of Judge Tanaka, 182; *Barcelona Traction*, Separate Opinion of Judge Ammoun, 325: 'the Court should have standing to ensure respect for the "principles of an international or humane nature, translated into imperative legal norms" (*jus cogens*)'; *Nicaragua (Merits)*, Separate Opinion of President Nagendra Singh, 153: 'a bar to the settlement of the dispute by the Court would be to miss a major opportunity to state the law so as to serve the best interests of the community. The Court as the principal judicial organ of the United Nations has to promote peace, and cannot refrain from moving in that direction'; *ibid*, Separate Opinion of Judge Sette-Camara, 199 *et seq*; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)* (Provisional Measures) [1993] ICJ Rep 3, Separate Opinion of Judge *ad hoc* Lauterpacht, 440; *Nuclear Weapons*, Declaration of President Bedjaoui, 273; Dissenting Opinion of Judge Weeramantry 496; and Dissenting Opinion of Judge Shahabuddeen (all three declaring fundamental humanitarian law norms as *jus cogens*); *Legality of the Use of Force (Yugoslavia v United States)* (Provisional Measures) [1999] ICJ Rep 916, Dissenting Opinion of judge *ad hoc* Kreća, 965: 'the capacity of *jus cogens* norms to override was 'based on the peremptory or absolutely binding nature of *jus cogens* norms, expressing in the normative sphere the fundamental values of the international community as a whole'; *Arrest Warrant*, Dissenting Opinion of Judge Al-Khasawneh, 95, para 3: 'effective combating of grave crimes has arguably assumed a *jus cogens* character reflecting recognition by the international community of the vital community interests and values it seeks to protect and enhance.'; *ibid*, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, 64, explaining the importance of balancing 'the interest in the community of mankind to prevent and stop impunity of grave crimes against its members [and] the interest of the community of States to allow them to act freely on the inter-State level without unwarranted interference; *ibid*, Dissenting Opinion of Judge *ad hoc* Van Der Wyngaert, 185 where she assesses the 'balance' differently: '[t]he Court has not engaged in the balanced exercise that was crucial for the present dispute. Adopting a minimalist [sic] and formalistic approach, the Court has *de facto* balanced in favour of the interests of States in conducting international relations, not the international community's interest in asserting international accountability of State officials suspected of war crimes and crimes against humanity'; *Oil Platforms*, Separate Opinion of Judge Buergenthal, 279 (although only to disavow their relevance in that case); *Oil Platforms*, *ibid*, Dissenting Opinion of Judge Simma, 327; *Armed Activities in the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ Rep 168 (hereinafter '*Armed Activities in the Congo (Congo v Uganda)*'), Separate Opinion of Judge Simma, 334, 349-50, on the community interest inherent in 'the core of the obligations deriving from the rules of international humanitarian and human rights law [as] valid *erga omnes*'; *Armed Activities in the Congo* (2006), Separate Opinion of Judge *ad hoc* Dugard, 89-91, on the effect to be given by the Court to *jus cogens* norms as a 'blend of principle of policy', 89, para 10; and *Obligation to Prosecute or Extradite*, Dissenting Opinion of Judge Cançado

as to discern the full extent of the Court's reluctance to give rules of *jus cogens* or obligations *erga omnes* any legal effect.

(ii) Obligations *erga omnes* and the International Court

The Court itself has expressly refused to recognise procedural vehicles such as *actio popularis* in its upholding of obligations *erga omnes*.<sup>182</sup> Although some judgments and individual opinions have made reference to such obligations,<sup>183</sup> the Court has treated the concept with strict parsimony. It was only in *East Timor*, with Portugal invoking an *erga omnes* right as the basis for the jurisdiction of the Court,<sup>184</sup> that further guidance was given. Even that was minimal: without further illuminating how obligations *erga omnes* operate in practice,<sup>185</sup> the Court dramatically

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Trindade, on the protection of fundamental rights of the person affecting the rules on standing, para 23, and on how obligations *erga omnes* transcend the rules on treaties and modify State responsibility, where State consent no longer is opposable to *jus cogens* norms, para 71; *Abmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits [2010] ICJ Rep 639 (hereinafter '*Diallo*'), Dissenting Opinion of Judge Cançado Trindade, paras 82-92, arguing on a different interpretation of human rights treaties from general treaties, due to their nature; and *Application of the Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Preliminary Objections), Judgment of 1 April 2011 (hereinafter '*Application of CERD*'), Dissenting Opinion of Judge Cançado Trindade, paras 71-78, on how the *erga omnes* nature of a right could change the interpretation of the Court's Optional Clause.

<sup>182</sup> *South West Africa (Second Phase)*, 35; *East Timor*, 102; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)* (Provisional Measures) [2002] ICJ Rep 218 (hereinafter '*Armed Activities in the Congo* (2002)'), 241; and *Armed Activities in the Congo* (2006), 32. See Rosenne, *Law and Practice*, 1158-1159: 'the interest protected by Article 63 of the Statute ... is usually a bilateral matter and breach gives rise of an instance of state responsibility as a bilateral relationship.'

<sup>183</sup> The relatively sparse references include *Barcelona Traction*, 32; *Nuclear Tests (Australia v France; New Zealand v France)* [1974] ICJ Rep 253, Joint Dissenting Opinion of Judges Onyeama, Dillard, Jimenez de Aréchaga and Waldock, 369-71; Dissenting Opinion of Judge de Castro, 387 (who rejected the concept); Separate Opinion of Judge Petráň, 303; Judge *ad hoc* Barwick, 437; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Provisional Measures) [1984] ICJ Rep 169, Dissenting Opinion of Judge Schwebel, 196; *East Timor*, Dissenting Opinion of Judge Weeramantry, 172; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 7, Dissenting Opinion of Judge Weeramantry, 88, 117-18; *Application of Genocide Convention (1996)*, 616; *Israeli Wall*, 172, 199; *Application of Genocide Convention* (2007), 104.

<sup>184</sup> *East Timor*, 90, 95. Conversely, the International Criminal Tribunal for the former Yugoslavia has not shied away from declaring obligations as being owed to the 'international community as a whole', or *erga omnes* (although not *eo nomine*): as early as 1997, in *Prosecutor v Tihomir Blaskić* (Appeals Chamber Subpoena Decision) (29 October 1997) ICTY-95-14-AR108bis, para 26, the Tribunal held that obligations of judicial cooperation between States were *erga omnes partes*. One must however question the propriety and accuracy of accepting the interpretation of a tribunal, with no jurisdiction to entertain State claims, with regard to a concept determining obligations which every State has a legal interest to enforce.

<sup>185</sup> As Tams, *Enforcing Obligations Erga Omnes*, 118 explains, the Court has been rather opaque on the process whereby it 'beatifies' obligations as *erga omnes*; yet on the question of standing, *ibid* 158-59, he links the manner in which the Court interprets standing before it to enforce obligations *erga omnes* to its interpretation of the concept itself.

rejected the argument that such norms created a legal interest sufficient to override State consent.<sup>186</sup> By focusing on the relation between obligations *erga omnes* and the indispensable third-party rule—a defensible strategy, in that States principally responsible for breaches of obligations *erga omnes*, and not mere accomplices, should be held responsible for such breaches<sup>187</sup>—the Court clearly set *erga omnes* obligations within the traditional State-centric framework.<sup>188</sup> Yet, as several individual opinions there noted, the question of the sufficiency of a State’s legal interests was left open.<sup>189</sup> A similar approach permeated the Court’s 2011 judgment in *Application of CERD*, where it reiterated its position that the nature of *erga omnes* obligations is bereft of legal effect in so far as its taking of jurisdiction is concerned.<sup>190</sup>

The recent case between Belgium and Senegal before the Court is equally laconic in its elucidation of the contours of the concept of obligations *erga omnes*. At the time of the alleged offences, none of the victims was of Belgian nationality. Belgium had raised claims under treaty law, to have suffered an injury due to the *aut dedere aut judicare* obligation in Articles 6(2) and 7 of the Convention against Torture, alongside claims that there were violations of customary

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<sup>186</sup> *ibid* 102: ‘the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things. Whatever the nature of the obligation invoked, the Court could not rule of the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is a right *erga omnes*.’ and echoing, *sub silentio*, its highly-contested ruling in *South West Africa (Second Phase)*.

<sup>187</sup> Tams, *Enforcing Obligations Erga Omnes*, 184-85.

<sup>188</sup> Simma, *Recueil des Cours*, 298.

<sup>189</sup> *East Timor*, Dissenting Opinion of Judge Shahabuddeen, 213-216. In Dissenting Opinion of Judge Weeramantry, 139, and Dissenting Opinion of Judge Ranjeva, both expressly state that Portugal’s standing did not depend on its special status as a former administering power.

<sup>190</sup> The Court’s clear position on this point arguably affected Georgia’s litigation strategy in *Application of CERD*, where Georgia chose to formulate its claims to jurisdiction exclusively in the form of treaty-based obligations, even though in *Barcelona Traction*, 32, the Court expressly qualified the prohibition on racial discrimination as *erga omnes*. That reticence to engage with the legal effect of a peremptory norm only softened when prodded by a question by Judge Cançado Trindade, on whether the nature of human rights treaties such as CERD could have a bearing or incidence on the interpretation and application of a compromissory clause contained therein (ICJ, CR 2010/11, 35-6). In its written reply to that question (ICJ, GR 2010/19, 24 September 2010, 3-4, reproduced in the Dissenting Opinion of Judge Cançado Trindade, para 74), Georgia recalled how the prohibition on racial discrimination was listed as an obligation *erga omnes* in *Barcelona Traction*, to conclude that ‘[t]he character of human rights treaties—in particular their non-synallagmatic character—provides a reason for the broad interpretation of compromissory clauses, and not for their narrow or restrictive interpretation’. Needless to say, the Court did not accept Georgia’s submissions on this point.

international law,<sup>191</sup> the latter of which would have required the Court to pronounce itself on Belgium's standing in relation to obligations *erga omnes* not based in treaty law. The Court, concluding that it was not competent in respect of such claims, given that no dispute existed between the Parties on this point, took as determinative the fact that Belgium had not raised them in its correspondence with Senegal.<sup>192</sup>

In respect of both treaty and customary law claims, Belgium claimed not only its rights as an injured State *erga omnes*;<sup>193</sup> it claimed that it was a specially affected State under Article 42 *b*) i) of the ILC Articles on State responsibility,<sup>194</sup> on the basis of the refusal of its request for the extradition of Mr Habré to Belgium.<sup>195</sup> With little fanfare or analysis, the Court simply concluded that all States had a common, legal interest in compliance with the obligations contained in the Torture Convention,<sup>196</sup> and endorsed the admissibility of the *erga omnes partes* standing claimed by Belgium. It declined altogether to pronounce on any 'special interest' on its part. Although the first concrete application of an obligation *erga omnes*, the Court gave the narrowest possible interpretation to the scope of rights of protection based on violations of obligations *erga omnes*, situating them purely within a treaty regime. In so doing, it contributed nothing to settling the argument that the right to claim for such violations can exist without a special written

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<sup>191</sup> *Obligation to Extradite or Prosecute*, Memorial, paras 4.60 *et seq.*

<sup>192</sup> *ibid*, Judgment, para 54. The Court's reasoning here was criticised by Judge Abraham in his Separate Opinion, paras 6, 11-14 on the basis that whatever might have existed before the dispute had arisen, at present there was a dispute on questions of customary international law. He recalled in particular the Court's judgment in *Application of the Convention for the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Preliminary Objections) [2008] ICJ Rep 412, 441, para 85, where the Court had suggested that the 'sound administration of justice' could permit it to view the condition of the existence of a dispute more flexibly. See also Separate Opinion of Judge Cançado Trindade, paras 141-2, who also took pains to emphasise that the Court's rejection of jurisdiction for violations of customary international law was purely factual, and did not concern whether there is a '*legal basis of jurisdiction* over claims of alleged breaches' of such obligations [emphasis in original].

<sup>193</sup> *Obligation to Prosecute or Extradite*, Memorial of Belgium, paras 5.15-5.16.

<sup>194</sup> *ibid*, Memorial of Belgium, paras 5.14, 5.17.

<sup>195</sup> *ibid*, Memorial of Belgium, para 5.17.

<sup>196</sup> *ibid*, Judgment, paras 68-70.

‘empowerment’.<sup>197</sup> Any sense of dissatisfaction of the majority’s treatment of the question is reinforced by the various individual opinions, several of which devoted some paragraphs to a fuller treatment of the question of the admissibility of Belgium’s claims.<sup>198</sup>

(iii) The belated recognition of *jus cogens*, and the ‘hollowing-out’ of the concept

As with obligations *erga omnes*, the Court has a long tradition of a reticence in addressing rules of *jus cogens*. This is, of course, notwithstanding the fact that the Court has repeatedly referred to ‘general and fundamental principles which lie beyond contractual treaty-relations’ in its reasoning, which might allow for the suggestion that it has in fact applied the concept in substance.<sup>199</sup> It may even be slowly giving guidance as to what legal effects might attach to the consequences for violating a peremptory norm, but this is nearly always *sub silentio*. A recent example is the merits judgment in *Diallo*:<sup>200</sup> whilst carefully refraining from using the terms ‘peremptory’ or *jus cogens*, the Court concluded there that the ‘prohibition of inhuman and degrading treatment is among the rules of general international law which are binding on States in all circumstances, even apart from any treaty commitments’.<sup>201</sup> Curiously, when addressing the reparation due in that case, the Court held that compensation was the appropriate remedy, due ‘in particular’ to ‘the fundamental character of the human rights obligations breached’.<sup>202</sup> No further

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<sup>197</sup> Tams and Tzanakopoulos, 792.

<sup>198</sup> See eg the Separate Opinion of Judge Owada, paras 15-23 (emphasising that Belgium’s standing derived purely from the Convention, ‘and nothing else’ (para 15), and that in so doing, Belgium’s claim of injury due to the non-execution of its extradition request should accordingly fail); the Separate Opinion of Judge Skotnikov, paras 8 *et seq.*, who took issue with the non-resolution of Belgium’s claim for extradition on this basis; the Separate Opinion of Judge Cançado Trindade, para 108 (lauding the Parties for the ‘proper understanding’ of the nature of the obligations flowing from the Convention); the Dissenting Opinion of Judge Xue and Judge *ad hoc* Sur, both of whom disputed that *erga omnes partes* obligations giving rise to standing could arise under the Torture Convention (Xue: paras 13-23; Sur: paras 26-46).

<sup>199</sup> ILC Fragmentation Report, 192, para 372,

<sup>200</sup> See the Judgment in *Diallo*,

<sup>201</sup> *ibid* para 87. The Court relied on Guinea’s invocation of Article 10, paragraph 1, of the International Covenant on Civil and Political Rights (adopted 16 December 1969, entered into force 23 March 1976) 999 UNTS 171, which prohibits such treatment whilst in detention, and added the general prohibition against torture and cruel, inhuman or degrading treatment or punishment as contained in Article 7 of the Covenant.

<sup>202</sup> *ibid* para 161.

explanation was proffered as to the link between the categorisation of a norm or obligation as ‘fundamental’ or ‘intransgressible’ and the remedy to be pursued; and the Court did not further elaborate as to what legal effect it attached to such terms.<sup>203</sup>

The Court’s hesitation is not merely stylistic: it has consistently dismissed arguments that the bases of its jurisdiction might be modified as a result of a *jus cogens* or peremptory norm in similar fashion, holding consistently that whatever the nature of the substantive primary rules in issue, the applicable secondary rules on jurisdiction remain unaffected. As with *East Timor*, in the Canada-Spain *Fisheries Jurisdiction* case, it upheld Canada’s reservation to its Statute by distinguishing ‘between the acceptance by a State of the Court’s jurisdiction and the compatibility of particular acts with international law.’<sup>204</sup> Holding that the substance of the legal relations between the two was a matter of the law of the sea and thus susceptible of derogation *inter se*, the Court avoided having to deal with *jus cogens* norms. Again, it was in the separate and dissenting opinions where the tension between members of the Court was more apparent, as certain judges suggested that had the norms been of a *jus cogens* character, the outcome might have been different.<sup>205</sup> Yet, as noted above, in the *Nicaragua*, *Oil Platforms* and *Armed Activities in the Congo* (*Congo v Uganda*) judgments, the imperative character of the prohibition of the use of force was

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<sup>203</sup> The Court’s use of the term ‘fundamental’ here, similar to the Court’s use of ‘intransgressible’ in *Nuclear Weapons* and *Israeli Wall*, should not automatically be equated with the character of ‘peremptory’; the Court’s deliberately obfuscating use of terms in fact raises the question whether it regards ‘fundamental human rights obligations’ as a category distinct from *jus cogens* norms: see A Vermeer-Künzli, ‘The Subject Matters: The ICJ and Human Rights, Rights of Shareholders, and the *Diallo* Case’, (2011) 24(3) *Leiden Journal of International Law* 607, 618-9.

<sup>204</sup> *Fisheries Jurisdiction (Spain v Canada)* [Jurisdiction] [1998] ICJ Rep 432, 456-57. See also *Legality of the Use of Force (Yugoslavia (Serbia and Montenegro) v Belgium et al)* (Preliminary Objections) [2004] ICJ Rep 279 (hereinafter ‘*Legality of the Use of Force*, Preliminary Objections’) 328; and *Armed Activities in the Congo* (2006), 31-33.

<sup>205</sup> See eg *ibid*, Dissenting Opinion of Judge Weeramantry, 502: ‘[c]ould any application concerning the commercial exploitation of children be excluded under the reservation, on the argument that this constituted a “a commercial issue”?’; Dissenting Opinion of Judge Vereshchetin, 575: ‘[t]he Court would be failing in its duties of an “organ and guardian” of international law should it accord to a document the legal effect sought by the State from which it emanates, without having regard to the compatibility of the said document with the basic requirements of international law’; and the Dissenting Opinion of Judge Bedjaoui, 534, where he stated that the Court should not hesitate to invalidate ‘impermissible’ reservations, the said reservations being those which sought to deny the Court from hearing cases concerning international crimes or exercising its *compétence de la compétence*.

given no legal effect.<sup>206</sup> As for *Nuclear Weapons*, although it did state the relative platitude ‘whether a norm is part of *jus cogens* relates to the legal character of the norm’,<sup>207</sup> this was not further elaborated. Otherwise, it was content to refer to ‘cardinal’ principles of international humanitarian law and their ‘intransgressible’ nature,<sup>208</sup> all before explaining that it need not consider them.<sup>209</sup>

(iv) *Jus cogens* recognised: *Armed Activities in the Congo* and *Jurisdictional Immunities of the State*

Two recent judgments merit further examination: the *Armed Activities in the Congo (Congo v Rwanda)* judgment, notable for being the first majority judgment of the Court where *jus cogens* norms are recognised *eo nomine*,<sup>210</sup> and *Jurisdictional Immunities of the State*, an important recent judgment where the Court was obliged to take an unequivocal position as to the effect of a legal rule being characterised as *jus cogens*.

a. *Armed Activities in the Congo*, 2006

In its judgment upholding Rwanda’s preliminary objections, the Court’s handling of the two concepts was directly impacted by the manner in which the parties framed the dispute. Congo’s submissions to the Court were straightforward in their embrace of *jus cogens*: they asked the Court to adjudge and declare that Rwanda’s reservation to the Genocide Convention was null and void, as finding otherwise would ‘prevent the...Court from fulfilling its noble mission of

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<sup>206</sup> *Nicaragua (Merits)*, 100-101. The Court may have mentioned *jus cogens* twice, but only through quoting directly from the United States’ Counter-Memorial. The same approach was taken in *Oil Platforms*, 82, this time using the United States’ Rejoinder. In *Armed Activities in the Congo (Congo v Uganda)*, 227, the Court blandly reaffirmed *Nicaragua (Merits)* in averring that military intervention breaches the prohibition against the use of force. Cf Tasioulas, ‘In Defence of Relative Normativity’, 112, who argues that an interpretation of the customary law on the use of force and on the prohibition of intervention which relies upon their peremptory status involves an endorsement *sub silentio* of the ‘interpretative programme of adjudication in deriving and defining customary norms’.

<sup>207</sup> *Nuclear Weapons*, 258.

<sup>208</sup> *ibid* 257.

<sup>209</sup> *ibid* 258.

<sup>210</sup> *Armed Activities in the Congo* (2006), 32; see also C Tomuschat, ‘Article 36’, in Statute Commentary, 606, who defends the correctness of the judgment.

safeguarding peremptory norms.<sup>211</sup> In a reprise of *East Timor*, the Court again rejected any shift in the applicable rules governing its bases of jurisdiction that could be wrought by a claim that a *jus cogens* norm or *erga omnes* obligation had been violated. Adhering strictly to its position that the nature of a primary norm could not serve to modify the bases of its jurisdiction, it found that such peremptory norms could not constitute an exception to the principle that its jurisdiction ‘always depends on the consent of the parties.’<sup>212</sup> The Court also took pains to emphasise that its limited international function, unmodified by the *jus cogens* nature of the claims before it, would not exclude the wrongfulness of Rwanda’s conduct, explaining that even though it was precluded by its Statute from taking any position on the merits, any internationally wrongful conduct would still remain attributable to the States committing them.<sup>213</sup>

Interestingly, the relevance of the *Armed Activities* judgment on this issue extends beyond the summary dismissal of the nature and legal effect of peremptory norms on its jurisdiction, and demonstrates the tension within the contemporary Court as to how to accommodate the classical view of its judicial function with *jus cogens* norms and *erga omnes* obligations. It is a tension that remains unresolved: Judge Simma, for example, suggested that there was ‘progressive development’ away from the *East Timor* precedent.<sup>214</sup> That tension had manifested itself in an earlier phase of the case: despite rejecting the DR Congo’s request for provisional measures, the Court nevertheless felt a need to stress ‘the necessity for the Parties to...use their influence to prevent the repeated grave violations of human rights and international humanitarian law which

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<sup>211</sup> *ibid* 31-32.

<sup>212</sup> *ibid* 52.

<sup>213</sup> *ibid* 52-53. But *cf* Separate Opinion of Judge *ad hoc* Dugard, 86, 89-91, maintaining that consent remains the cornerstone of the Court’s jurisdiction, explained that ‘the judicial function is essentially an exercise in choice’ between principles (‘propositions that describe rights’) and policies (‘propositions that describe goals’) which allow to arrive at coherent conclusions which uphold the integrity of the international legal order. He considered that *jus cogens* norms, ‘a blend of principle and policy’ which enjoy hierarchical superiority over other norms, necessarily played a ‘dominant role in the process of judicial choice’.

<sup>214</sup> *Armed Activities in the Congo (Congo v Uganda)*, Separate Opinion of Judge Simma, 347.



have been observed even recently.<sup>215</sup> As Judge Buergenthal then pointed out, in many respects this is *ultra vires*: ‘the Court’s function is to pronounce itself on matters within its jurisdiction and not to voice personal sentiments or to make comments, general or specific, which, despite their admittedly “feel-good” qualities, have no legitimate place in this Order.’<sup>216</sup> Accordingly, it was clear that whatever express recognition it may have been prepared to give the concept, the Court was unprepared to view it as legally opposable to the principle of consent that governed its jurisdiction. In its own words, ‘[t]he fact that a dispute relates to compliance with a norm having such a character [of *jus cogens*] ... cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute. Under the Court’s Statute that jurisdiction is always based on the consent of the parties.’<sup>217</sup>

b. *Jurisdictional Immunities of the State*, 2012

The most recent judgment that directly relates to the legal effect of *jus cogens* is that in the *Jurisdictional Immunities of the State* case opposing Germany and Italy. A central part of the parties’ arguments concerned the effect of a violation of a primary norm of *jus cogens* on the rules on State immunity, thus obliging the Court to take a position on this question. The position it eventually took was not unforeseeable: a decade earlier, in the *Arrest Warrant* case, the Court had already concluded the customary nature of the personal immunity of Mr Yerodia was unaffected by the fact that he was accused of committing crimes against humanity (and thus violating *jus cogens* norms), although the Court did suggest there that the procedural bar of immunity would not exonerate Mr Yerodia from any eventual international criminal responsibility.<sup>218</sup>

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<sup>215</sup> *Armed Activities in the Congo* (2002), 250.

<sup>216</sup> *ibid*, Declaration of Judge Buergenthal, 258.

<sup>217</sup> *ibid*, Judgment, 32, para 64.

<sup>218</sup> *Arrest Warrant*, 24, paras 58-60. In the Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, 63, 84, para 71, the three judges suggested that the Court’s judgment confused procedural rule of State immunity, ‘an exception to a normative rule’, with a primary norm, although in analysing the customary law of State immunity, their methodology was generally in line with that of the Court. Judge *ad hoc* Van den Wyngaert’s Dissenting Opinion, 137, 145-151, engaged directly with the Court’s customary law analysis to conclude that it had been flawed, but she

Returning to *Jurisdictional Immunities of the State*, Germany had sought a declaration that Italy had violated international law by failing to respect its jurisdictional immunity by allowing civil claims to be brought in the Italian courts.<sup>219</sup> The cases complained of by Germany, and especially the Italian Corte di Cassazione's judgment in *Ferrini*,<sup>220</sup> in which Germany's immunity was held not to apply in the light of the *jus cogens* nature of the international crimes in issue. Germany had argued that a sharp distinction between primary rules pertaining to the class of *jus cogens* norms and the secondary rules governing the legal consequences of their breach remained necessary, with the latter rules remaining intact even in cases where *jus cogens* norms were violated.<sup>221</sup> For its part, Italy defended the practice of its courts, contending that the violation of *jus cogens* norms was a legitimate reason under international law for denying immunity to German. Italy's justification was precisely the hierarchical supremacy of rules of *jus cogens*, which, in certain borderline cases of irreconcilable conflict, could come to modify the interpretation of secondary rules concerning the consequences of a violation.<sup>222</sup> Greece's intervention was similar in the main, concluding that the

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did not go so far as to assert that the *jus cogens* norms in question could modify the interpretation of the law on State immunity.

<sup>219</sup> *Jurisdictional Immunities of the State*, para 15 (citing from the Application of Germany).

<sup>220</sup> *Ferrini v Federal Republic of Germany*, Decision No. 5044/2004, 128 ILR 658, cited in *Jurisdictional Immunities of the State*, para 27. At paras 28-36, the Court recalled a long series of cases which applied the conclusion in *Ferrini*, namely, that a State was not entitled to rely on its immunity in cases where international crimes were alleged.

<sup>221</sup> *Jurisdictional Immunities of the State*, Memorial of Germany, 51-5, paras 83-8; Reply of Germany, paras 56-68, CR 2011/17, 48-55; CR 2011/20, 48-50. On the nature of *jus cogens* norms, Germany had argued that the breach of a *jus cogens* rule (a primary norm) could not amount to a departure from the rules of the Statute (secondary rules), pursuant to which the jurisdiction of the Court is based on consent (using *Armed Activities (Congo v Rwanda)* as precedent). Germany also invoked the *Arrest Warrant* precedent as the basis for claiming that the immunity of a high-ranking official does not yield even if the commission of an international crime is claimed, and dedicated special attention to the argument that *jus cogens* norms did not impose a general hierarchy of norms (CR 2011/17, 51-3).

<sup>222</sup> *Jurisdictional Immunities of the State*, para 92. For further detail, see Counter-Memorial of Italy, 64-70, paras 4.67-4.77; Rejoinder of Italy, 31-39, paras 4.9-4.23; CR 2011/18, 22-3, 47-9, 54-61; CR 2011/21, 41. Citing several domestic judicial decisions, Italy argued that the violation of peremptory norms of international law could not be a sovereign act, and that States responsible for violations of *jus cogens* norms would no longer be entitled to sovereign immunity. Italy relied on the ILC Commentary on Article 41 of its Articles on State Responsibility, which rejected a rigid primary/secondary dichotomy so far as *jus cogens* norms were concerned: 'it is necessary for the articles to reflect that there are certain consequences flowing from the basic concepts of peremptory norms of international law and obligations to the international community as a whole within the field of State responsibility', (2001) Ybk Intl L Commission, Vol II, Part 2, 111, cited in Rejoinder of Italy, 33, paras 4.11.

nature and consequence of *jus cogens* norms required that jurisdictional immunity of a State had to yield in cases where such norms were in issue.<sup>223</sup>

The Court upheld Germany's immunity, using reasoning consistent with its formalistic understanding of rules of *jus cogens*.<sup>224</sup> First, the Court surveyed the claims in respect of immunity for *acta jure imperi* and concluded that, under 'customary international law as it presently stands', the gravity of the violations did not deprive a State from invoking immunity from the jurisdiction of another State's courts.<sup>225</sup> At this point, the Court turned squarely to the relation between *jus cogens* and the law of State immunity. Its reasoning can be distilled into the following propositions. First, according to the Court, there is no possibility of conflict between rules of *jus cogens* and those of State immunity, due to the 'procedural character' of the latter.<sup>226</sup> Consequently, rules of *jus cogens* would 'have no bearing' on whether the denial of immunity in domestic courts was an internationally wrongful act.<sup>227</sup> Secondly, the Court denied that the rules on the exercise of jurisdiction would necessarily derogate from the substantive character of a breach of a rule of *jus cogens*, even if so do to would have the effect of rendering unavailable a means of enforcement of such a rule. In so doing, the Court pointed to its own case law already described earlier, *Arrest Warrant*<sup>228</sup> and later *Armed Activities in the Congo (Congo v Rwanda)*,<sup>229</sup> and then only secondarily to

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<sup>223</sup> *Jurisdictional Immunities of the State*, *ibid*, Written Statement of the Hellenic Republic, 17-8, paras 50-6; CR 2011/19, 35-8, paras 91-106. Greece had devoted considerable effort to explaining how the judgments of its domestic courts, and especially the *Massacre at Distomo* case, were evidence of the emergence of a new rule of customary law restricting State immunity in cases of violations of *jus cogens* norms.

<sup>224</sup> Judge Bennouna, in his Separate Opinion, para 29, calls the Court's reasoning 'mechanical'.

<sup>225</sup> *Jurisdictional Immunities of the State*, para 91.

<sup>226</sup> *ibid*, para 93.

<sup>227</sup> *ibid*. According to the Court, two logical corollaries flow from this conclusion: first, that the application of immunity for events occurring decades prior does not infringe the principle that law should not be applied retrospectively to determine matters of legality and responsibility; and secondly, that to recognise the immunity of a State does not amount to recognising as lawful the conduct of that State in situations where rules of *jus cogens* have been breached.

<sup>228</sup> *Arrest Warrant*, paras 58, 78.

<sup>229</sup> *Armed Activities in the Congo (2006)*, paras 64, 125.

the practice of national courts,<sup>230</sup> this time not expressly as State practice but possibly as subsidiary sources of international law.<sup>231</sup> The latter point is crucial, as the Court's reasoning did not rest on the present state of international law, but was based on its view on the *form* of rules of *jus cogens*. The Court suggested that any principle that might have underpinned the existence of a rule (here, the principle of human dignity upheld by the Italian courts)<sup>232</sup> would not be made legally operative to the point where it could displace the extant *rule* of State immunity. Accordingly, it is difficult to accept that its judgment is merely on the law as it stands today, as is suggested by Judge Koroma;<sup>233</sup> instead, the judgment seems consciously prescriptive, expressing a considered view on the broader nature of the international legal order.

Further, the Court's resolution of the possible conflict between a rule of *jus cogens* and those on State immunity was unusually decisive, resolving not only the case before it but taking a position of principle. A number of alternatives had beckoned, as even the individual opinions demonstrate. First, the Court could have regarded as determinative Germany's willingness to assume international responsibility for the breaches of rules of *jus cogens*<sup>234</sup> and its consequent payment of reparations to Italy and Italian nationals,<sup>235</sup> and concluded that it was the assumption

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<sup>230</sup> *Jurisdictional Immunities of the State*, paras 95-6.

<sup>231</sup> Cf the Court's treatment of the judgments of national courts in paras 84-85, where it expressly likens them to State practice, in relation to Italy's argument that the gravity of violations could serve to limit the rules on State immunity.

<sup>232</sup> The principle of human dignity was expressly linked to *jus cogens* in the Corte di Cassazione's *Criminal Proceedings against Milde* (13 January 2009), Italian Case No 1072), also available at *International Law in Domestic Courts*, Judgment 1224 (IT 2009). The original Italian version is at [http://www.cicr.org/ihl-nat.nsf/46707c419d6bdfa24125673e00508145/938e2cb397e8da36c1257561003a1c4d/\\$FILE/Italy%20v.%20Milde%202008.pdf](http://www.cicr.org/ihl-nat.nsf/46707c419d6bdfa24125673e00508145/938e2cb397e8da36c1257561003a1c4d/$FILE/Italy%20v.%20Milde%202008.pdf) (last accessed 21 November 2012).

<sup>233</sup> As suggested Judge Koroma in his Separate Opinion, at para 7.

<sup>234</sup> See *Jurisdictional Immunities of the State*, para 52, where the judgment recalls how Germany acknowledged the unlawfulness of the acts in issue, and accepted responsibility for them.

<sup>235</sup> The Court made express reference to the reparations paid by Germany: see especially paras 98-99. It however took pains to establish that, whatever shortcomings there were in Germany's payment of reparations, there could be no link between a State's payment of reparations and the validity of a claim of immunity: see paras 101-102.

of responsibility by Germany that justified its immunity in Italian courts.<sup>236</sup> This would have left the door open for the denial of immunity in exceptional circumstances, for example when a State, presumed responsible for breaches of rules of *jus cogens*, rejected any engagement whatsoever of its responsibility.<sup>237</sup> Secondly, the Court could have declared as determinative the Italian waiver in the 1961 Agreements between Germany and Italy, in which the latter declared all outstanding claims on behalf of itself and its citizens to be ‘settled’.<sup>238</sup> In so doing, the Court would have avoided taking any position whatsoever, which would have been intellectually unsatisfactory, but would have prevented the Court from taking a position on an area of international law that is in relative flux.<sup>239</sup> Finally, the Court could have traced the genealogy of the rules on State immunity to the *par in par imperium non habet* principle,<sup>240</sup> itself certainly a fundamental norm of international law, and thus resolved the conflict between these two principles through a balancing test, taking into consideration the proportionality and legitimacy of purpose of granting immunity in that

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<sup>236</sup> See Separate Opinion of Judge Bennouna, para 13, where this precise point is argued. It is true, however, that endorsing such an argument could have left it open to the charge levelled by Judge Yusuf in his Separate Opinion, paras 30-34, 38-40, to the effect that Germany’s failure to provide reparations for certain categories of victims would in fact have deprived it of its immunity.

<sup>237</sup> *ibid*, para 15. This is not the same argument as Judge Cançado Trindade offers in his Dissenting Opinion, esp para 224, that the right of access to justice is not merely a logical corollary to the breach of a rule of *jus cogens*, but is in fact a rule of *jus cogens* itself.

<sup>238</sup> The Agreements are cited in the *Jurisdictional Immunities of the State* judgment, *ibid*, paras 24-25. The Court in fact alluded to this in para 102, suggesting the iniquity in a situation where the nationals of an injured State, having benefited from a comprehensive settlement but that has chosen to use the settlement to rebuild its infrastructure or economy, would then be entitled to claim against the State that had transferred money to the injured State. Certainly, the Court would have certainly faced criticism for concluding that a State would have the right to waive its claims, and those of its nationals, in situations involving international crimes. Nonetheless, the present author would suggest that a judgment based on Italy’s waiver could have been patterned similar reasoning to that given by the Court—the ‘procedural character’ of a waiver—yet would have permitted the Court a mechanism through which a normative statement on the rules on State immunity would not have been necessary.

<sup>239</sup> A point not lost on Judge Yusuf: see his Dissenting Opinion, especially para 24: ‘[w]ould it not have been more appropriate to recognize, in the light of conflicting judicial decisions and other practices of States, that customary international law in this area remains fragmentary and unsettled?’ See also the Separate Opinion of Judge Bennouna, para 34, suggesting the existence of a trend linking the ‘immune system’ of a State and its admission of its own breaches of international law, and that the Court should have anticipated the impact of this trend on the formation of international law.

<sup>240</sup> As did the International Law Commission in its Commentaries on the United Nations Convention on Jurisdictional Immunities of States: see (1980-II) Ybk Int L Commission, vol 2, 156, para 55 (commentary to Draft Art. 6); (1991-II) Ybk Int L Commission, vol 2, 22-23, para 5 (commentary to Art. 5). The Court’s reasoning in para 57 came close: it concluded that the rule of State immunity occupied an ‘important place’ in international law, deriving from the principle of sovereign equality, ‘one of the fundamental principles of the international legal order.’

particular case.<sup>241</sup> Such a balancing test could have allowed for the balance to lie elsewhere in the future, at least in a case with a different factual scenario. Yet in the final analysis, the Court chose none of these paths, instead taking a decisive position that may have a ‘chilling’<sup>242</sup> effect on the development of this particular aspect of the law on State immunity.<sup>243</sup>

## F. CONCLUSION

Every legal order must ultimately find a coherent justification for its distinctiveness *qua* legal order. Although this may not take the shape of some constitutional system or something readily intelligible for a domestic lawyer, international law is defined by the basic principles that constitute the foundations of the legal order: sovereign equality; consent to obligations; and the horizontality of authority. Whether domestic or international, a legal system also provides for the existence of institutions entrusted with the interpretation and application of that legal order, to safeguard its formal coherence and also the fundamental propositions on which it rests. Whatever role judicial institutions such as the Court take in the development of international law, therefore, their systemic function, by definition as organs applying international law, is to clarify, condense, and assist in understanding the structure of the international legal system. As such, the overarching principles that sustain these international legal structures require some identification,

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<sup>241</sup> Judge Bennouna, in his Separate Opinion, para 12, suggested that the rules on State immunity existed ‘to enable the courts to take account of the sovereign equality of States in the exercise of their respective jurisdictions’, citing the resolution of the Institut de Droit International concerning the ‘Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes’ ((2009) 73 *Annuaire de l’Institut de droit international* (Naples)). Similarly, see the Dissenting Opinion of Judge Yusuf, paras 23-6, pointing out the relative indeterminacy of the scope of operation of the rules on State immunity with the colourful phrase: ‘State immunity is, as a matter of fact, as full of holes as Swiss cheese.’ His conclusion, whilst the opposite of Bennouna’s, would have employed a similar balancing/proportionality test. The ‘balancing test’ has some relevance in this area, having also been relied upon in the Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal in *Arrest Warrant*, para 75.

<sup>242</sup> As describes Philippa Webb, ‘The International Court of Justice’s Judgment in Germany v. Italy: A Chilling Effect?’ in <http://ilawyerblog.com/the-international-court-of-justices-judgment-in-germany-v-italy-a-chilling-effect/> (posted 17 March 2012). The ‘frozen’ metaphor was also invoked by Judge Bennouna in his Separate Opinion, para 19, and Judge Cançado Trindade in his Dissenting Opinion, para 226.

<sup>243</sup> Judge Cançado Trindade, in his Dissenting Opinion, para 297, calls the Court’s judgment a ‘groundless deconstruction’ of *jus cogens*, depriving that concept of its effects and legal consequences.

although the process of identification need not require enquiry into the merits behind these overarching principles.

Due to its unique place as the principal judicial organ under the United Nations Charter, and its self-proclaimed status as ‘the only court of a universal character with general jurisdiction’,<sup>244</sup> it is the Court, and only the Court, that can form the judicial ‘pivot’ within that framework. Yet, as Abi-Saab warns, this is only so provided that the Court ‘accepts to play the part and integrates it as an essential part of its judicial policy’.<sup>245</sup> It also would require that the Court accept for itself the status as an organ of the international legal order, and not merely a creature of its Statute that settles disputes and issues advisory opinions.

As the analysis in this study should demonstrate, the Court does not arrogate for itself any central role in sketching the contours of the notion of ‘international community’, a concept that might indicate ‘a conceptual shift that could result in the basic transformation’ of international law.<sup>246</sup> If one follows the development of the idea through the case law of the Court, one finds continual reliance on the centrality of States in defining the ‘international community of States’ purely in relation to its participants: a ‘matter of faith’,<sup>247</sup> or a rhetorical construct bereft of substantive content. Any more expansive conception would be baseless: as Fitzmaurice cautioned in *Namibia*, it seems that the Court adheres to the view that ‘the so-called organized world community is not a separate juridical entity with a personality over and above, and distinct from, the particular international organizations in which the idea of it may from time to time find actual

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<sup>244</sup> The exact terminology found consistently within its own press releases: see e.g. ICJ Press Release 2012/23 (19<sup>th</sup> November 2012), announcing the judgment on the merits in *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Merits, Judgment of 29<sup>th</sup> November 2012.

<sup>245</sup> G Abi-Saab, ‘Fragmentation or Unification: Some Concluding Remarks’, (1999) 31 New York Journal of International Law and Politics 919, 929.

<sup>246</sup> A von Bogdandy, ‘Constitutionalism in International Law: Comment on a Proposal from Germany’ (2006) 47 Harvard International Law Journal 223, 234.

<sup>247</sup> H Thirlway, ‘Injured and Non-Injured States Before the International Court of Justice’, in M Ragazzi (ed), *International Responsibility Today: Essays in Honour of Oscar Schachter* (Martinus Nijhoff, The Hague, 2005) 311, 311.

expression.<sup>248</sup> So confined, the State system remains the foundation for ‘the basic contemporary circumstance of the international community’<sup>249</sup> and a departure from this, even for the principal judicial organ of the United Nations, is difficult to justify. There is nothing to suggest that the Court is anything but most reticent to engage in any project to translate a conception of the common good or of a universal conscience into law.<sup>250</sup>

Moreover, the manner in which the Court employs the concept of ‘international community’ also underscores its great ambivalence in respect of *jus cogens* norms and obligations *erga omnes*. Although there is no longer a challenge to their existence, the Court primarily invokes these concepts in a legally inconsequential manner, an ‘empty box’ of sorts.<sup>251</sup> As such, the Court has resisted arrogating for itself a centralised interpretative role in articulating these controversial concepts.<sup>252</sup> This might be the explanation as to why the ICJ avoids *erga omnes* and *jus cogens*: by avoiding ‘fetishisation’ of these terms, it refuses to participate in their reification.<sup>253</sup> Arguably well aware of the impact of its legitimating effect on the rules of international law,<sup>254</sup> the Court’s silence speaks volumes.

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<sup>248</sup> *Namibia*, Dissenting Opinion of Judge Fitzmaurice, 241.

<sup>249</sup> Franck, *Power of Legitimacy*, 233.

<sup>250</sup> De Visscher, *Théories et réalités*, 119.

<sup>251</sup> A reference to Abi-Saab’s comment that ‘even as an empty box, *jus cogens* is necessary, because if you do not have the box, you cannot put anything in it.’ G Abi-Saab, ‘Discussion’ in A Cassese and JHH Weiler (eds), *Change and Stability in International Law-Making* (Gruyter, Berlin, 1988) 96.

<sup>252</sup> Lauterpacht *Recueil des Cours*, 188 *et seq.*, strongly emphasises the role of ‘tribunaux internationaux impartiaux’ in envisaging this ‘international community’. But *cf* Guillaume, ‘*Jus cogens* et souveraineté’, 132, who expresses scepticism that the Court can impart any conceptual clarity to the concept.

<sup>253</sup> S Marks, ‘Big Brother is Bleeping Us—With the Message that Ideology Doesn’t Matter’ (2001) 12 *European Journal of International Law* 109, 112: ‘the process by which human products come to appear as if they were material things, and then to dominate those who produced them. Thanks to strategies of reification, men and women may cease to recognize the social world as the outcome of human endeavour, and begin to see it as fixed and unchangeable, an object of contemplation rather than a domain of action’.

<sup>254</sup> H Kelsen, *Pure Theory of Law* (2<sup>nd</sup> edn University of California Press, Berkeley, 1970) 236-238, esp 238: ‘[o]nly the lack of insight into the normative function of the judicial function, only the prejudice that the law consists merely of general norms, only the ignoring of the existence of individual legal norms obscured the fact that the judicial decision is a continuation of the law-creating process, and has led to the error to see it in a merely declaratory function.’ *See also* E Jouannet, ‘Existe-t-il de grands arrêts de la Cour internationale de Justice?’ in C Apostolidis, *Les arrêts de la Cour internationale de Justice* (Éditions universitaires de Dijon, Dijon, 2005) 169, 181 *et seq.*, who claims that what is important



In the final analysis, any disinclination on the part of the Court in articulating the concept of international community remains linked to wider problems of doing so in scholarship and State practice. The fact that a consensus is lacking is conceded even by ardent supporters of the concept,<sup>255</sup> which remains at best a juridical fiction channelling the traditional processes of international law-formation,<sup>256</sup> the content of which depends on the deeply personal values and commitments of the individual invoking it.<sup>257</sup> Any objective substantive meaning is difficult to identify and, to date, continually elicits controversy;<sup>258</sup> it may even create the conditions for the legitimization of a form of intellectual imperialism.<sup>259</sup>

As such, as a contested idea with purely abstract or ‘mythical’ connotations,<sup>260</sup> the very notion of international community requires basic theorising about the nature of international law; and of all people, it was Prosper Weil who recalled that ‘le mythe, après tout, est porteur d’espérance et facteur de progrès. C’est au-delà, avec la conception d’une communauté internationale “historique”, déjà réalisée dans les faits, que l’on s’enfonce dans le brouillard’.<sup>261</sup> In this respect,

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about those judgments commonly elevated as ‘grands arrêts’ (her analogy to the ‘*arrêt de principe*’ in civil law countries) is that they refer to ‘principes jurisprudentiels nouveaux et non pas la solution inscrite dans son dispositif’.

<sup>255</sup> See eg A Cassese, ‘Soliloquy’, in *The Human Dimension of International Law* (Oxford University Press, Oxford, 2008) lix, lxxvii: ‘lacking is a community sentiment’, the feeling in each member state that it is a part of the whole and must pursue common goals; a shared conviction that each member not only must comply with existing legal and moral standards, but is also bound to call upon and even demand that other members do likewise in the interest of the whole community’.

<sup>256</sup> P-M Dupuy, *Recueil des Cours*, 258-260. Oeter, ‘The International Legal Order’, 599 argues that the legal fiction of ‘international community’ is an important normative tool for judges, allowing them to fulfil the mission of creating unity and ‘doing at the same time justice to the special rationality of the sub-system entrusted to them’—but only if international judges are aware of such a mission.

<sup>257</sup> See Jouannet, ‘La communauté internationale’, 16.

<sup>258</sup> D Kennedy, ‘The Disciplines of International Law and Policy’ (1999) 12 *Leiden Journal of International Law* 83, 84, defines the term as a ‘subterfuge’.

<sup>259</sup> See Koskenniemi, Comment on Paulus, ‘The Influence of the United States’, esp 95-100, who cautions against conflating the usurped, hegemonic invocation of such a term from that defined from a ‘horizon of universality’; Klein, ‘Problèmes soulevés’, 261, explains how the term ‘international community’ was employed during the NATO intervention in Kosovo so to give it a veneer of legality.

<sup>260</sup> De Visscher, *Théories et réalités*, 110, suggests that ‘international community’ is ultimately a concept between fact and law, with such difficulties of precision that it has more than anything else, brought forward ill-thought conclusions and ‘nebulous’ speculation.

<sup>261</sup> Weil, *Recueil des Cours*, 311.

the aim of this study is to deconstruct the myth of the Court as a force for the progressive development in international law, and in so doing, to reinforce the need for further scholarly treatment of questions relating to the nature of international law. The Court's judgments may be of utility in this endeavour, but only subject to the caveat that the Court remains a mirror against which international lawyers may assess the present state of international law; it is not an engine for its future development.