# On the Concept of "International Community as a Whole" in International Law

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SUMMARY: 1. Introduction. — 2. Customary foundation of *jus gentium* in the thought of Francisco Suárez. — 3. Hans Kelsen's *Grundnorm:* States must behave as they customarily behave. — 4. International law and international society in the thought of Santi Romano. — 5. States acting on behalf of the "international community" in the thought of Rolando Quadri. — 6. Some remarks on the construction of the international community of States as a whole.

## 1. *Introduction*

1. The term "international community" has become widespread in States' and international organisations' practice as well as in doctrine and in public opinion too. It refers either to the current "fundamental values" of the global community (which in turn usually correspond to a sense of human solidarity amongst transnational private individuals and civil societies) or to the actions sometimes taken by certain States "on behalf" of all others States, with or without UN support.(1)

In particular, "international community as a whole" is an expression which can be found in a number of legal provisions and judicial decisions. Article 53 of the 1969 Vienna Convention on the Law of Treaties refers to the "international community of States as a whole" in order to define *jus cogens*. In the well-known *Barcelona Traction* decision of 1970, the International Court of Justice advocated (albeit as an *obiter dictum*) the existence of State obligations towards the "international community as a whole". It did not, however, qualify whether said community is comprised of States alone or of other entities too (e.g. individuals, NGOs, etc.). Article 5 of the International Criminal Court's Statute adopted in

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1998 refers to the "international community as a whole" for the purposes of identifying crimes that fall within the Court's jurisdiction. Several provisions of the ILC's Draft Articles on State responsibility adopted in 2001 refer to the "international community as a whole" in relation to the violations of norms either belonging to *jus cogens* or providing for obligations towards all other States, thus clearly linking to Article 19 of the previous Draft adopted by the ILC in 1996 which dealt with "international crimes". Other treaty provisions use different expressions presumably conveying a similar notion, such as the "common interest of humankind" found in the Madrid Protocol of 1991 on the Protection of the Antarctic Environment; and the "common heritage of mankind" in Article 136 of the Montego Bay Convention on the Law of the Sea.

But is there any legal meaning to be attached to the notion of "international community"? If so, what is it? The purpose of this paper is to provide a tentative answer to these questions.

It is not within the scope of this study to examine such distinctions as those between "international system", "international society", "international community", "international order", "world order" and similia. As is well-known, in *The Anarchical Society* H. Bull distinguished between "international system" (as "formed when two or more States have sufficient contact... to make the behaviour of each a necessary element in the calculations of the other") and "international society" (defined as a State system where common interests and values are pursued through common institutions), and furthermore "international order" (defined as an international society where elementary, primary and universal goals are also pursued, such as the safeguard of the States system itself and of each State's sovereignty as well as peace) and "world order" (viewed as an order "in the great society of all mankind", i.e. an order between all individuals on earth and not limited to relations between States).[(2)] It is somehow an articulation of the classical distinction between *Gesellschaft* and *Gemeinschaft* first introduced in the 19th century by the German sociologist F. Tönnies, the former concept referring to a factual interconnection and the latter to a sense of common values.[(3)] Useful as they may be, however, in both a political and legal analysis aimed at identifying different degrees of interaction between States and other international actors,

these distinctions are hardly applicable when investigating the ultimate legal significance of worldwide interaction between States. For this reason, the term "international community" shall be used simply to indicate the *States as a whole,* without implying that entities other than States cannot be part of such a community. Furthermore, while the expression "international community as a whole" is more frequently found in legal provisions and judicial decisions dealing with *jus cogens* and obligations *erga omnes*, this paper shall nevertheless attempt to demonstrate that these concepts are not vital to the notion of an international community, though they may assist in identifying certain features of the present international community.

The paper shall proceed by first examining the works of some eminent scholars who have offered an account on the concept of an international community since the very beginning of modern international law (F. Suárez, H. Kelsen, S. Romano and R. Quadri). It shall then attempt to compare and contrast their reasoning in order to establish a common concept of an international community which could reflect current international law. Needless to say, the above selection of authors does not imply that other scholars have not equally elaborated on the concept of an international community. Such a preference is based solely on the intent to discuss those points which are more closely related to the conclusions of this paper on the concept of an international community.

## 2. *Customary foundation of jus gentium in the thought of Francisco Suárez.*

While Hugo Grotius' *De jure belli ac pacis* of 1625 considered *jus gentium* as universal customary law centred on his concept of natural law and in the usages of most peoples,[4] it is in Francisco Suárez's masterpiece *Tractatus de legibus ac Deo legislatore,* published in 1612, that a comprehensive theory on the customary foundation of *jus gentium* can be found.[5] Suárez's theory on *jus gentium* is presented in chapters 17-20 of the second volume of his *Tractatus*. His conclusions are worth discussing in further detail.

Suárez treats *jus gentium* as some sort of "bridge" after having examined *jus naturae* and before discussing *jus civile* or "positive" law (*jus positivum*) (II, 17, § 1). He was certain that *jus gentium* existed as an autonomous branch of law,

at least in so far as it was frequently mentioned — as a law somehow in-between *jus naturae* and *jus civile* — both in Roman law sources (*Corpus iuris civilis*) and in Canon law (*Decretum Gratiani*); as well as in Scholastic theology, in particular St. Thomas' (II, 17, §1). The question lay, in his view, in what was to be meant by *jus gentium* proper and how such a law could be comprehensively distinguished from both *jus naturae* and *jus civile*.

Suárez rejected all known criteria of his time, based on Roman law in order to distinguish *jus gentium* from *jus naturae*. Firstly, *jus gentium* was traditionally distinguished from *jus naturae* by relying on passages contained in the *Corpus iuris civilis*. where it is defined as a body of law inherently linked to the human race and thus common only to human beings in their mutual relations. *Jus naturae,* on the other hand, was regarded as the law common to all animals, including human beings. Suárez argued that there were norms which applied solely to human beings (i.e. not to animals) which most certainly belonged to the sphere of natural law; such as those concerning worshipping the Lord and bearing respect for one's parents (II, 17, §16). Secondly, it had at the time been argued that *jus naturae* also included "self-evident principles" or "necessary and immediate conclusions" derived from supreme moral principles, whereas *jus gentium* only referred to conclusions reached via a series of "laborious" reasoning. Suárez objected that several norms which were commonly viewed as pertaining to the sphere of *jus gentium* did not, however, present such inherent necessity (e.g. private property and slavery) and, more importantly, that *jus gentium* could neither refer to nor result from moral principles as it could otherwise be confused with *jus naturae* (II, 17, §8). Thirdly, it was further contended that *jus gentium*, as a body of law deriving from human will, necessarily supposed a human society; whereas *jus naturae* remained valid in absolute terms, irrespective of an effective society. However, according to Suárez, there several natural law norms also existed and these presupposed a society, such as the prohibition of theft and a slave's obligation to obey his master (II, 17, §9). Fourthly, some scholars of the time maintained that *jus gentium*, unlike *jus naturae,* did not include obligations and prohibitions but merely powers or *facultates*. Suárez, however, opposed the existence of acts permitted under *jus naturae* (such as the

*facultas* to get married) and argued against the general belief that it was impossible to distinguish prohibitions from powers both in *jus naturae* and in *jus gentium.*[(6)] Lastly, a distinction was made between *jus gentium primarium* and *jus gentium secundarium,* in which the latter, unlike the former and *jus naturae,* was regarded as human positive law. Suárez objected that *jus gentium* could not be considered "divine" as such in so far as it was not "natural" law; thereby inferring that it must be "human and positive" and hence capable of being identified following reasoned conclusions and human assessment rather than from natural self-evidence (II, 19, §4).

From the foregoing discussion, Suárez concluded that both common and — certainly more substantial — different elements existed between *jus gentium* and *jus naturae*. As regards the common elements: (i) both were shared by all human beings; (ii) both applied exclusively to human beings; and (iii) both included obligations/prohibitions as well as powers and *facultates* (II, 19, §1). The differences were that: (i) *jus naturae* could be identified through deduction of natural principles whereas *jus gentium* was identified in a different way in order to maintain its conceptual autonomy; (ii) *jus gentium* could not, unlike *jus naturae,* be immutable as immutability is a direct consequence of necessity; and (iii) *jus gentium* was not always observed by all peoples whereas *jus naturae* could be occasionally and somewhere (*alicubi*) disregarded "by mistake" (II, 19, §2).

With regard to the distinction between *jus gentium* and *jus civile*, Suárez maintained that *jus civile* is the law of each political community, whereas *jus gentium* is common to all peoples. Albeit "common" was not to be understood as a body of law created via an agreement between all human beings as such an agreement was extremely unlikely given the variety of human inclinations. Consequently, the distinction between *jus gentium* and *jus civile* lay more generically upon the fact that *jus gentium* consisted of customs (i.e. unwritten norms), complied with by nearly all peoples rather than by just one or two societies. Customary "civil" law certainly also existed; however, this was only binding for (and could only be changed by) those individual peoples who had established it over time (II, 20, §7). Custom, established by nearly all peoples, was defined by

Suárez as *jus gentium* "proper" and bound all peoples equally (II, 19, §5). Suárez emphasised the importance of the term "nearly" (*fere*) in order to convey that *jus gentium* is not an inherently or naturally necessary form of law, nor is it a kind of law common to all peoples in absolute terms (II, 19, §6).

To sum up, in Suárez's view *jus gentium* is different from both *jus naturae* (in that it rests upon custom rather than upon nature) and *jus civile* (in that it is established by all or nearly all peoples rather than by only one society and binds all of them) (II, 19, §5). On this basis, Suárez pointed out that there existed norms of *jus gentium*, such as those on war or slavery, which did not belong to natural law and consequently could be different from what they actually were. Indeed, these came into existence through human tradition and custom (*iura gentium, quae magis traditione et consuetudine quam constitutione aliqua introducta sunt*).

Thus defined, *jus gentium* proper ("*propriissime*") is "the law which all peoples and the various *gentes* must comply with in their mutual relations" (*jus quod omnes populi et variae gentes inter se servare debent*) (II, 19, §8). *Jus gentium* not proper, on the other hand, is "the law which every single city or kingdom must observe within its confines" (*ius quod singulae civitates vel regna intra se observant*) and which "includes some precepts, forms and lifestyles which do not *per se* refer to all human beings, nor aim directly at suitable association and communication between all peoples in their mutual relations, but rather at establishing itself within the confines of all republics under a suitable regime. They are characterised in such a way that nearly all peoples agree with the use of these forms and laws, thus showing a resemblance which is at times general and other times specific" (II, 19, §9, and II, 20, §7). Hence, Suárez delineates very clearly a difference which had remained ambiguous in the past, that between *jus gentium* as a body of law *inter gentes* and *jus gentium* as a body of law which most peoples observe *intra se*. He provided a number of examples of *jus gentium* rules proper: (i) the rules on diplomatic envoys and immunities, whose violation was in his view a "*violatio iuris gentium*"; (ii) commercial practice; (iii) the laws of war, relying on the power of a State ("*respublica vel monarchia suprema*") to punish or obtain reparation from another State for having suffered

an injustice; (iv) slavery; (v) peace treaties and truces (II, 19, § 7-8).

In a well-known passage, Suárez explained the essence and purpose of *jus gentium* proper within scholastic tradition but also referred to the newly emergent States system. In his view, the human race, while maintaining a certain unity, was divided into various peoples and kingdoms (*populos, regna, civitates, respublicae*) which were not wholly self-sufficient and in need of a certain form of aid, or exchange with others to provide for their own welfare and advantage as well as, occasionally, for moral necessity or indigence. As a consequence, they also needed a system of rules governing their association and communication and since natural law did not govern everything, peoples created special supplementary customary rules. These were certainly few, closely related to natural law and known as *jus gentium* (II, 19, § 9). *Jus gentium* was thus established through practice and historical tradition and more precisely through a process of succession, of diffusion and of mutual imitation amongst different peoples, without any need for a special assembly or for a simultaneous agreement between them all. According to Suárez, *jus gentium* was so close to natural law and so helpful for every nation and their societies that it spread almost naturally along with mankind. It was not written simply because it was not dictated by any legislator. Instead it emerged by custom (II, 20, § 1).

Clearly, Suárez's discussion of *jus gentium* is general and theoretical. Suárez is not interested for example in extensively dealing with treaties. He simply defines *jus gentium* as a *customary* legal system applicable *inter gentes*. Its exclusive aim is in theory to distinguish *jus gentium* from both *jus civile* and (more importantly) *jus naturae*. However, *jus gentium* was considered a *supplementary* system of rules which applied to *inter-gentes* relations in addition to natural law. Furthermore, his reasoning is wholly compatible with the traditional Aristotelian and Scholastic view on law and society in general. His apparent acknowledgement that an "inter-State" system is emerging and needs special rules —— particularly when he states that *jus gentium* was not created by a universal assembly or a superior legislator —— does not prevent him from applying the traditional legal theory of his era to the world without considering that it was radically different from the past.

However, Suárez's definition of *jus gentium* proper as a law governing mutual relations between different peoples (*inter gentes*) and opposed to a body of law which most peoples observe *intra se* is extremely significant. In Suárez's view *jus gentium* rests essentially upon custom rather than upon reason. Indeed, rather than in reason it is precisely in the common exercise of nearly all peoples that it can be identified in practice. Alongside the concept of customary *jus gentium,* the notions that custom requires some form of consent from nearly all (i.e. not necessarily all) peoples and that such general "consent" can hardly be expected to be a formal agreement between all human beings or adopted by a universal assembly, will be subsequently developed into the theory of custom as the primary source of international law.

### 3. *Hans Kelsen's* Grundnorm*: States must behave as they customarily behave.*

Hans Kelsen is one of the strongest modern advocates of the customary foundation and universality of international law. A brief summary of his basic ideas may prove helpful.[(7)]

Kelsen defined his legal theory as "pure" (*reine Rechtslehre*) in the Kantian sense: "independent of the experience". In particular, independent of morals, of justice, of politics and ultimately of nature. This theory was assumed to be anti-ideological and anti-naturalistic; Kelsen strongly denied the so-called "naturalistic fallacy" i.e. the tendency to draw rules from facts. To the contrary, he believed that the validity and legal basis of a rule can only be drawn from another legal rule. For Kelsen a fact never justifies the validity of a rule. It is rather another rule which classifies that fact as legally relevant in order for the first rule to be valid in legal terms. For example, in international law the mere fact that a State has come into existence is not capable of justifying its legal personality; rather, another legal rule is necessary for the factual existence of a State and thus confers legal personality on said State. Kelsen's line of reasoning is typically epistemological: the legal character of a rule can only be conceived on the condition that one assumes that another legal rule so provides.

Kelsen's theory is thus "pure" first and foremost because the legal validity of rules do not result from facts or from experience and much less so from a purely

successful action such as war but rather from another legal rule. This process from one rule to another, as distinct from the naturalistic process from a fact to a rule, is commonly referred to as "normativism". Within a normativist theoretical framework, only rules exist and facts do not *per se* fall within the legal sphere. The whole body of existing legal rules is viewed as a legal system and according to Kelsen a State is merely a legal system (i.e. a group of legal rules). In short, it is always rules that "create" facts by making them legally relevant and never facts as such that create rules.

This denial of naturalistic fallacy is reflected in Kelsen's clear-cut distinction between validity (*Geltung*) and efficacy (*Wirkung*). A rule is valid when it is so defined by another rule, whereas it is effective if it is generally obeyed by those to whom it applies. The concept of validity refers to that which "ought" (*Sollen*), whereas the concept of efficacy refers to that which "is" (*Sein*). A rule is thus still valid provided such validity is prescribed by another rule, even though it may no longer be obeyed and is ineffective. Otherwise, Kelsen argues, rules would be "more or less" legally valid and obeyed depending on the degree they are in actual fact obeyed at any given moment. In such a situation, it would be hardly possible to establish whether a rule exists or not and if the people to whom it applies are expected to abide by it. On the other hand, Kelsen acknowledged that this distinction only holds true when *single individual* rules prove to be ineffective. If the *entire* legal system is no longer obeyed and proves ineffective all legal rules become invalid even though they continue to be regarded as valid by another rule. In this sense, the principle of effectiveness is a general (and indeed supreme) condition for the validity of any rule within the system.

Besides its being pure and normativist, Kelsen's theory is also neo-positivist. Indeed, it is positivist to the extent that rules are considered as having legal character if "posited" and if backed by sanctions. This was also the 19th century positivist school's view. More specifically, for Kelsen a rule is a hypothetical proposition concerning the applicability of a sanction: if the hypothesis of transgression of the rule comes true, then the legal possibility of sanctions arises (if A, then B). Kelsen's theory nevertheless departs from the 19th century positivist school in that it assumes that rules are epistemologically "posited" (or

presupposed as valid) by another rule rather than *physically* by a political sovereign modelled after the State. The fact that a political sovereign "posits" a rule cannot result in the legal character of this rule unless another valid rule confers on the political sovereign the power to create valid rules. The act aimed at physically "positing" a rule is one thing. The evaluation by another rule of such act as an act empowering the sovereign to create legally valid rules is quite another. In this sense Kelsen's neo-positivism is a *critical* form of positivism.

The above demonstrates why Kelsen's theory is "gradualistic". His "theory of gradual construction" (*Stufenbautheorie*) of the legal system is based on the notion that the validity of a rule can only depend on another rule. It follows therefore that the rule on which another rule depends (i.e. the rule which this last one necessarily presupposes when asserted to be valid) can be conventionally considered as "superior"; the other rule can consequently be considered as "inferior". Each rule is valid if another superior rule so prescribes. Since a *regressus ad infinitum* is logically unacceptable, it must be assumed that this chain of rules ends somewhere. Thus a "basic" rule (*Grundnorm*) is found. This rule is indeed a legal rule in that it explains the legal character of the entire legal system. However, it is not positive as its validity does not result from another rule. Furthermore, the legal character of the basic rule cannot be demonstrated in legal terms. It must be assumed as an epistemological hypothesis (*grundlegende Hypothese*) which is necessary if one is willing to account for the legal character of any rules within that legal system. In a way, drawing again on Kant, Kelsen's basic rule is a condition for rules to be conceived of as legal rules (i.e. a condition *sine qua non* or a transcendental condition). If the basic rule were denied, rules would constantly and inconsistently be conceived of as legal without any logical basis.

How can this basic rule be identified? Positivist scholars of the 19th century had emphasised that by definition nothing is superior to the State. Therefore if a basic rule were to be identified, it would be the basic or constitutional principle in which each State's legal system is rooted. Kelsen harshly criticised this absolute concept of State sovereignty since its earliest writings. For him States cannot be conceived of as *superiorem non recognoscentes* in a world where they

co-exist as equals or, to be more precise, equally *superiorem non recognoscentes*. In Kelsen's view, there must logically be a "higher" law which governs their relations as relations between equals. This law is necessarily different from those prevailing within each of them and can only be international law.[8] In short, sovereignty in absolute terms cannot be conceived of in a world of co-existence, whatever States may unilaterally uphold. On the other hand, sovereignty in relative terms is not sovereignty at all. States are but partial legal systems within a universal and all-pervading legal system represented by international law. International law is thus not only really law but the ultimate and supreme justification of law as such. Within this framework, the "basic rule" becomes an international principle which universally unites all legal phenomena on earth.

At first and perhaps under Triepel's influence, Kelsen believed the international basic norm to be *pacta sunt servanda*. Subsequently however, Kelsen upheld that the international basic norm was *consuetudo est servanda*. He therefore argued that the supreme universal principle is effectiveness: States must behave as they generally behave. It has been suggested that this conclusion is inconsistent with Kelsen's intent to construct a "pure" theory of law given that law ("ought", i.e. what States *must* do) ends up depending on facts ("is", i.e. what States *in fact* do). However, Kelsen's view was that every single rule is legally valid and binding if the whole system within which it bases its validity is effective. In other words, every single rule is valid because and to the extent that States and individuals ultimately follow a pattern of behaviour that is generally followed by the majority of them. This assumption, according to Kelsen, on the one hand accounts for law as such and on the other hand cannot be demonstrated in itself. It can only be assumed and in his view it is indeed constantly assumed in order to explain the legal character of every rule, regardless of what their rank is within each legal system and no matter how partial those legal systems are. It is worth noting that in Kelsen's thinking the demonstration of the universality of international law is nothing other than the demonstration of its justification as really law (and *vice versa*). International law is really law because it is both really and necessarily universal. To Kelsen a notion of international law as non-universal law is a contradiction in terms. Either

international law is universal or it is not international law but rather a partial legal system, whether wider in scope than State law or not. Above such a non-universal law a universal law must once again be presupposed.

### 4. *International law and international society in the thought of Santi Romano.*

A strong criticism against both 19th century positivism and Kelsen's 20th century neo-positivism was made by the sociological theory of law based on the concept of "institution" which was first developed in France by M. Hauriou and L. Duguit and in Italy by S. Romano.(9) Romano's view is particularly helpful to our discussion and deserves consideration.

In his theory, two key concepts are relevant to international law. Firstly, the "theory of institution" (clearly developed against Kelsen's normativism) according to which it is social reality that creates and accounts for law and not the other way round. Indeed, "what comes out from the pure sphere of individuals is not law (*ubi ius ibi societas*) and no society in the authentic sense of the word is conceivable without law (*ubi societas ibi ius*)".(10) In other words, only in society can law be found (not in the inner sphere of the individual) and wherever a social group is discernable law is operative therein. The term "institution" is used to refer to "every social entity or body" which enjoys an objective and concrete external/visible individuality. In this sense, to Romano an institution is "the first, original and essential manifestation of law".(11)

Secondly, the theory of legal pluralism (clearly developed against the ninetienth century's positivism) according to which if law exists wherever a social group exists then legal rules cannot be only those created by the State but also those created by other social groups such as the society of States. Romano argued that "international law is conceived by the very existence of a community of States. A community which necessarily implies a legal system that constitutes and governs it".(12) Romano thus provides a justification for the legal character of international law, as well as that of canonical law and even of the rules followed within associations acting against the law.(13)

### 5. *States acting on behalf of the "international community" in the thought of Rolando Quadri.*

An attempt to combine the sociological concerns of Romano's theory with the imperativist stance of the positive and neo-positive law schools was made by another distinguished Italian scholar, Rolando Quadri.[(14)]

In his view, States are bi-dimensional: they both act as individual entities in a horizontal dimension and equal footing (*uti singuli*) and as a whole in a vertical dimension where each individual State is under pressure by the collective will of all the others. In the horizontal dimension (what Quadri calls the "traditional view"), States are only viewed as *superiorem non recognoscentes* and international law appears simply inconceivable as no law can be conceived without an authority capable of enforcing it from above through sanctions. The international community (i.e. States acting *uti universi*) is indeed such an authority, albeit with no formal organs similar to the supreme authorities within State systems. The League of Nations and the United Nations are not in Quadri's view organs of the international community. Having no formal organs, to Quadri the international community acts through the States themselves and particularly through those most powerful. These are the only ones capable of exerting power in order to enforce international law in the event of transgression. International rules are thus ultimately created through "principles", using Quadri's own terminology, which are superior to both customary and treaty law and enforced by what Quadri calls "intervention" (a general category including reprisals and war) by the most powerful States even as third parties in a dispute.

Such a "realist" approach is clearly aimed at making sense of international law (thanks to the value attached to sanctions) without ignoring the dominant role played in international relations by the most powerful States. Within this approach, international law is regarded as actual law because its violations are punished and such punishment can be realistically administered only by those States strong enough to enforce it.

### 6. *Some remarks on the construction of the international community of States as a whole.*

What can be ascertained from the above scholars and theories? The most favourable definition of the international community remains that provided by Suárez. International law is ultimately made by the generality of States as opposed to single individual States, even when it empowers a few individual States to make rules solely binding on them such as treaties. Indeed, *pacta sunt servanda* is a customary rule: it is the *generality* of States that want every single treaty made between two or more individual States to be legally binding and such power is not possessed by the parties to the treaty alone. A treaty between two States without a surrounding group of other States is not law at all and depends on their day-to-day free will and relative contractual force. States' interdependence force them to abide by common rules, i.e. customary international law. Such an interdependence clearly emerged at the beginning of the modern age in Europe when States found themselves deprived of a superior effective authority capable of safeguarding their survival and in need to make arrangements with others. Such necessity for interaction calls for legal rules equally applicable to all. In other words, as Suárez indeed upheld, international law is necessarily rooted in universal custom rather than in reason alone. On the other hand, Suárez's notion of universality was in practice referred to the Christian European world. Such a notion can no longer be maintained today.

Kelsen also stressed that there must be a common universal law based on the principle *consuetudo est servanda* between States whose sovereignty cannot be absolute. What cannot be acknowledged is Kelsen's idea that international law is really law because it is backed by sanctions, though decentralised. In his view, with no superior authority or objective procedure to be followed decentralised sanctions can only be taken. However, decentralised sanctions are only available to powerful States and States are merely empowered (not bound) to enforce them. These of course only take place when the most powerful States think it fit to do so and in accordance with their own interests. Hence Kelsen's theoretical outcome is paradoxical: sanctions are believed to provide a basis for international law as actual law but end up destroying international law insofar as they simply

reflect power politics. In other words, decentralised sanctions are expressive of pure force and cannot serve as evidence of the reality of international law, although they might (and generally do) reinforce compliance with existing law. States comply with international law for a variety of reasons and sanctions are only rarely of significance. International law derives from the consent and will of the international community of States as a whole as distinct from the consent and will of single individual States. It is sufficient for States to be aware (which generally they are) of rules as distinct from moral or social standards in order for a scholar to conceptualise international law as actual law. Regardless of possible sanctions therefore, States' mutual expectations corresponding to perceived international rules are generally met and international law does function as a real body of (universal) legal rules.

However, in opposition to Kelsen's "pure" approach to law, Romano's notion that international law is rooted in society rather than in logic appears tenable. States exist and survive side by side and this very fact is the ultimate basis for international law. As already pointed out, one could draw theoretical distinctions between States' "system", "society", "community", "order", etc. and these terms may be fruitfully used to give a different name to different degrees of collective interaction. However, what ultimately matters is interaction *per se*. When interaction begins, law invariably comes into play. No interaction is possible without rules even during conflict. Interaction calls for predictability of each others' behaviour and rules serve this exact purpose in order to ensure predictability and avoid chaos. On the other hand, Romano's notion that law is equal to society cannot be accepted. Law derives from social interaction which in turn gives rise to non-legal rules as well. Furthermore, the distinction between the "is" of society and the "ought" of law must be retained if law is to be given some significance. It cannot be maintained that whatever occurs in social life corresponds to a legal rule. Such an approach in practice ends up absorbing law into social power and ultimately denying law as such. Criteria must be discerned in order to distinguish legal rules from all other standards of behaviour to be followed in any given society. These criteria are usually considered within the theory of law sources and derived from the generality of the members of that society. In

international law, it is States as a whole that regard certain facts (such as practice resulting in customary rules, treaty rules, etc.) as sources of international law. Other international standards are not international legal rules, although they may be equally and even more consistently met by States. International law is not simply a photograph of international social power, it is what the *generality* of States regard as such and is thus binding upon *each of* them.

Quadri's notion that international law cannot be interpreted unless one sets aside the "horizontal" theory that States are simply entities existing side by side at the same level is also acceptable. If international law is to be thought of as actual law, one must assume that States as a whole are a distinct concept from a mere arithmetical sum of individual States and "impose" international law to each individual State regardless of the latter's relative power. In a world where no State is capable of making itself obeyed by the whole human race it is States *uti universi* which limit States *uti singuli,* including the most powerful ones. International law is possible because there is a constant interaction between States. Such interaction is an inescapable necessity for both the most and less powerful States. Although the most powerful ones by definition are far more influential than weaker States in the creation and enforcement of international law, they nevertheless require interaction with (each and all of) both weak and other strong States and are quite plainly incapable of systematically resisting the pressure to create and comply with common legal rules. However, it does not follow (as Quadri's approach did) that States *uti universi* impose international law through the "most powerful States" of the day, nor do they guarantee imposition and enforcement of those international rules which are considered more important and *erga omnes*. As stated above, international law does not ultimately rely on sanctions nor does it depend on sanctions enforced by third party States. States *uti universi* implies all States which ultimately make international law and maintain an interactive environment where each State is placed under pressure to comply with set rules most of the time. International law definitely requires effectiveness and compliance where compliance is not necessarily to be intended as enforcement. Furthermore, the international community is the *whole* of its members. It comprises all entities which have sufficiently stable and

dependent relations and cannot survive (at least not in their perception) without the remaining others. In this sense, the community cannot be "represented" by only a few States. The UN Security Council itself does not necessarily represent the international community. A handful of powerful States claiming to act in the name of the entire international community are simply not equivalent to the whole international community. Theirs is but the traditional hegemonic argument aimed at the struggle for power within the community rather than at enforcement of existing law. The international community is what States *as a whole,* powerful and weak alike, perceive themselves as and international law is the law binding on *each* of them.

To sum up, international law is ultimately based on custom. Custom in turn is based on the consent and will of the community of States as a whole. Today, this community includes all States on earth on equal ground regardless of their different cultures or civilisations. Claims made by individual States, particularly those more powerful and influential, are more likely to bring about a change in existing law but not to coincide with it. It is States in their entirety that ultimately make and unmake international law, not this or that State in single instances and in accordance with their contingent interests. This community is defined by the interrelations between States and by their general awareness of forming a whole. All individual States are more or less dependent on the whole of States without this implying a majority vote. Custom works differently than voting. It always operates prior to formal proceedings and sustains these afterwards. In order to construct international law as a body of universal rules binding on every single State, sanctions are not necessarily required. The community of States and international law as a universal body of law exists even if sanctions by third party States are not permitted within the system. It follows therefore that the currently fashionable question of whether third-party sanctions are allowed in international law is an empirical question to be solved by examining State practice rather than by way of logical implication. It is worth emphasizing that such an empirical approach is identical to that normally taken in identifying "ordinary" rules, although possible obligations *erga omnes* may be classified as norms reflecting particularly important values of the international

community as a whole. In other words, the idea of an "international community as a whole" does not necessarily need to be supported by concepts such as obligations *erga omnes* and *jus cogens*, though such concepts may reflect some of its current and contingent features.

## Notes

(1) Cfr. UN Security Council debates of 12 September 2001 on the attacks against the United States (UN Doc. S/PV.4370); as well as K. Annan, *Meaning of International Community,* in *Address to DPI/NGO Conference* of 15 September 1999 (*Press Release* SG/SM/7133, PI/1176). In legal doctrine see A. L. Paulus, *Die internationale Gemeinschaft im Völkerrecht,* München, 2001. For the argument that great powers always try to present their interests as global interests, see the classical work of E. H. Carr, *The Twenty Years' Crisis 1919-1939,* London, 1946, p. 86.

(2) H. Bull, *The Anarchical Society. A Study of Order in World Politics,* Houndmills-New York, 3rd edition, 2002, Ch. 1.

(3) F. Tönnies, *Gemeinschaft und Gesellschaft: Grundbegriffe der reinen Soziologie,* 1887.

(4) Y. Onuma, *Eurocentrism in the History of International Law,* in Id. (Ed.), *A Normative Approach to War. Peace, War, and Justice in Hugo Grotius,* Oxford, 1993, p. 371.

(5) F. Suárez, *Tractatus de legibus ac Deo legislatore,* Coimbra, 1612; Spanish translation: *De legibus,* vol. II, 13-20, De *jure gentium*, Madrid, 1973. In legal doctrine see C. Barcia Trelles, *Francisco Suarez (1548-1617) (les théologiens espagnoles du XVIe siècle et l'école moderne du Droit international,* in *RCADI,* 1933-I, vol. 43, pp. 663-791; Id., *Internacionalistas españoles del siglo XVI: Francisco Suárez (1546-1617),* Valladolid, 1934; J. B. Scott, *The Catholic Conception of International Law,* 1934, p. 127 ff.; L. Pereña Vicente, *Teoria de la guerra en Francisco Suárez,* vols. 2, Madrid, 1954; James L. Brierly, *Suárez's Vision of A World Community,* in Id., *The Basis of Obligation in International Law and Other Papers,* ed. by H. Lauterpacht and C. H. M. Waldock, Oxford, 1958, pp. 358-365; Id., *The Realization Today of Suárez World Community, ibidem,* pp. 366-375; J. Soder, *Francisco Suárez und das Völkerrecht. Grundgedanken zu Staat, Recht und internationalen Beziehungen,* Frankfurt am Mein, 1973.

(6) This latter contention is demonstrated by Suárez by recalling a number of legal norms: (i) the grant of a privilege to a person, implying the prohibition imposed on others from disturbing its exercise; (ii) the power to occupy a piece of land or to build and fortify a previously occupied piece of land, implying the prohibition imposed on others from hindering it; (iii) the power to wage war, implying the prohibition of aggression (for war was "just", in Suárez' view, only as a reaction to aggression) as well as, at times, the obligation to defend oneself by resorting to arms; (iv) the reduction to slavery, implying the obligation imposed on the slave to subject himself to it or the prohibition to resist to it, as well as the *postliminium,* i.e. the grant of freedom to a slave, implying the obligation imposed on the master to grant it; (v) the power to enter into peace treaties and truces, implying the obligation to abide by them and the prohibition to attack the enemy during the truce; (vi) the power to send envoys to other sovereigns, implying the obligation to confer immunities on them (II, 17, §5).

(7) H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer reinen Rechtslehre,* Tübingen, 1920; Id., *General Theory of Law and State,* Cambridge (Mass.), 1945; Id., *Peace Through Law,* Chapel Hill, 1944 (2nd ed. New York, 1973); Id., *Principles of International Law,* New York, 1952; Id., *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik,* Wien, 1934; Id., *The Law of the United Nations,* London, 1950. For a collection of studies on Kelsen's theory of international law see 9 *European Journal of International Law* (1998).

(8) Kelsen certainly acknowledged in scientific terms that this superior law could be either State law or international law and that it was a question of "preference" between one of these two options. He preferred the latter as a greater guarantee for peace.

(9) S. Romano, *L'ordinamento giuridico,* Firenze, 1962.
(10) S. Romano, *L'ordinamento* cit., pp. 25-26, § 10.
(11) S. Romano, *L'ordinamento* cit., pp. 35 e 43, §§ 12 e 13.
(12) S. Romano, *L'ordinamento* cit., p. 60, § 17.
(13) S. Romano, *L'ordinamento* cit., pp. 114-125, §§ 28-30; Id., *Corso di diritto internazionale,* Padova, 1939, pp. 6-7.
(14) R. Quadri, *Le fondement du caractère obligatoire du droit international public, in Recueil des Cours* (1952-I), pp. 583-631; Id., *Diritto internazionale pubblico,* Napoli, 1968, pp. 25-33, 119-129 e 275-278.

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