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The Exclusionary Boundary of the Early Modern International Community

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Abstract

In an effort to gain a deeper understanding of an important referent of contemporary international law, the international community as a whole, this article retrieves four senses of such a community as elaborated by early modern European jurists: the Christendom highlighted by Thomas Aquinas and William of Ockham, the community constituted from customary norms as featured by Vitoria, Jean Bodin, Suárez, and Grotius, Kant's "league of nations", and Hegel's "world history". The shared theme of each sense of an international community is that, despite the universality attributed to the community, some societies are excluded from recognition and membership. This exclusionary character of the international community raises the question whether a sense of an international community is emerging which overcomes the problems leading to such an exclusionary character.

Keywords

international community; *jus gentium*; customs; natural law; Aquinas; Grotius; Kant; Hegel

1. Introduction

A serious problem permeates contemporary international law. This problem arises from something which jurists not infrequently take for granted: namely, 'the international community as whole'. The 'international community as a whole' is taken as the ultimate referent of peremptory norms as recognized in the Vienna Treaty on treaties,[1] in judicial decisions of the International Court of

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1) Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UNTS 331, Article 53. *See also* Article 53 of the Vienna Convention on the Law of Treaties between States and International Organisations or between Organisations, March 21, 1986, U.N. Doc. A/CONF.129/15 (20 March 1986) (not yet in force as of 16 March 2009). The preamble of the Universal Declaration of Human Rights, 1948, for example, asserts that freedom, justice and peace are founded in the rights "of all members of the human family". Article 15 of the International Covenant of Civil and Political Rights, 1966 situates "the general principles of law" in a "community of nations". *See also* International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 54/109, para. 9, U.N. Doc. A/RES/54/109 (9 December 1999). *See also* Convention on the Safety of

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Justice,[2] in domestic judicial decision,[3] and in commentaries about international law.[4] The 'international community as a whole' is also taken for granted in human rights treaties and in the works of the International Law Commission and General

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United Nations and Associated Personnel, G.A. Res. 49/59, preamble para. 3, U.N. Doc. A/RES/49/59 (15 February 1995); International Convention for the Suppression of Terrorist Bombings, G.A. Res. 52/164, preamble para. 10, U.N. Doc. A/RES/52/164 (9 January 1998); Rome Statute of the International Criminal Court, Rome, 17 July 1998, 2187 UNTS 90 (RS), preamble para. 9, U.N. Doc. A/CONF.183/9. For other treaties, *see* International Convention against the taking of Hostages, preamble para. 4, 17 December 1979, 1316 UNTS 205; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, preamble para. 3, 14 December 1973, 1035 UNTS 167; African Charter on Human and Peoples' Rights, adopted 27 June 1981, entered into force 21 October 1987, O.A.U. Doc. CAB/LEG/67/3 Rev. 5, reprinted in 21 ILM 58 (1982), 7 HRLJ 403 (1986), Article 27.

[2] The *Barcelona* Court, discussed earlier, explained in 1961 that the obligations of a state towards the international community as a whole are ""the concern of all states' in contrast with duties owed by one state to another state by virtue of their legal relationship *inter se*". *Barcelona Traction, Light and Power Company, Limited (New Application 1962) (Belgium* v. *Spain)*, 1970 ICJ. Rep. 3, paras. 33–34, at 32; para. 91, at 47. *See also United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran)*, 1979 ICJ Reports 7, at 19 (Order of December 15), and Judgment, 1980 ICJ Reports 3, para. 92, at 43 (May 24). The Court has consistently held that peremptory norms exist by virtue of their relation to the international community as an end in itself. *See also Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, para. 157, at 199 (July 9). *See also* especially *East Timor (Portugal* v. *Australia)*, 1995 ICJ Reports 90, at 102, 172, 213–216 (dissenting opinion of Judge Weeramantry); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, Merits, 1986 I.C.J. 14, para. 190, at 100 (June 27). *Furundzija*, ILR 121 , paras. 151–157, at 260–262 (10 December 1998). The *Furundzija* judgment provides another list of international decisions in *Prosecutor* v. *Anto Furundzija*, Case No. IT-95-17/1-A, Appeals Chamber, (2002) ILR 213, para. 151, at 58, n.170 (21 July 2000); *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Provisional Measures*, 2000 ICJ Reports 182 (Order of December 8). Jessup held in 1966, dissenting, that "[s]tates may have a general interest – cognizable in the International Court – in the maintenance of an international regime adopted for the common benefit of the international society". *South West Africa, Second Phase (Ethiopia* v. *South Africa; Liberia* v. *South Africa)*, 1966 ICJ Reports 373 (July 18) (dissenting opinion of Judge Jessup).

[3] *R* v. *Bartle*, [1999] 2 All E.R. 97, [1999] 2 W.L.R 827 (H.L.); *Al-Adsani* v. *UK*, 34 ECHR (2001) App. No. 35763/97, 273; *Filartiga* v. *Pena-Irala*, 630 F.2d 876, 885-88 (2nd Circ. 1980) (Kaufman J.).

[4] Jessup asserted in 1948 that there is a broad "principle of community interest in the prevention of breaches of international law". *See* P. C. Jessup, *A Modern Law of Nastyions: an Introduction* (1948, repr. 1968 with a new Preface by author). *See also* Linderfalk, 'The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did you Ever Think About the Consequences?', 18 *EJIL* (2008) 853–871; Macdonald, 'International Community', in R. St. John Macdonald and D. M. Johnston (eds.), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (2005) 273, 296–299; Barboza, 'Legal Injury: The Tip of the Iceberg in the Law of State Responsibility', in M. Ragazzi (ed.), *International Responsibility Today: Essays in memory of Oscar Schachter* (2005) 7, at 20–21; M. Shaw, *International Law*, 5th edition (2003) 116–119; Mosler, 'International Legal Community', in R. Bernhardt (ed.), *Encyclopaedia of Public Int'l Law*, vol. 3 (1997) 1251, at 1252; Frowein, 'Obligations Erga Omnes', in R. Bernhardt (ed.), *Encyclopaedia of Public Int'l Law*, vol. 3 (1997) 757, at 757–759; Simma and Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles', 12 *Aus. Yb. Int'l L.* 82 (1992) at 103; de Hoogh, 'The Relationship between Jus Cogens, Obligations Erga Omnes and

Comments of the Committee of the International Covenant on Civil and Political Rights (ICCPR).[5] Despite the continued references to 'the international community as a whole' as the ultimate referent of international law, little insight is offered in contemporary international law commentaries as to what is the content and scope of this ultimate referent. Jurists have posited that the international community as a whole is equivalent with "the civilized world,"[6] "the conscience of mankind",[7] morality and public policy,[8] "basic human values",[9] and "more inclusive" (than a state).[10] Each associated referent leaves the signification of this

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International Crimes: Peremptory Norms in Perspective', 42 *Austrian J. Pub. Int'l L.* (1991), 183, at190, 193–196; Kelly, 'The Twilight of Customary International Law', 40 *Va J. Int'l. L.* (1999/2000) 449, at 465–469; Danilenko, 'International Jus Cogens: Issues of Law-Making', 42 *EJIL* (1991) 42–65; Mosler, 'The International Society as a Legal Community',140 *RdC* (rev. ed. 1980) (1974) 11, at 19; Brudner, 'The Domestic Enforcement of International Covenants on Human Rights: A Theoretical Framework', 35 *U. Tor. L. J.* (1985) 219, at 249–250; Verdross, 'Jus Dispositivum and Jus Cogens in International Law', 60 *Am. J. Int'l. L.* (1966) 55.

[5] Int'l L.Comm'n, 'Articles on State Responsibility', in Crawford, *International Law Commission's Articles on State Responsibility* (Cambridge University Press, Cambridge, 2002); Human Rights Committee, *General Comment 31*, para. 2, U.N. Doc. CCPR/C/21/REV.1/ADD.13 (26 May 2004).

[6] *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004). For other American cases, *see* Randall, 'Universal Jurisdiction under International Law', 66 *Tex. L. Rev.* (1988) 785, at 789–790. McNair takes the condition of civilized states for granted. *See* A. D. McNair, *The Law of Treaties* (1961) at 213–214: "In every civilized community there are some rules of law and some principles of morality which individuals are not permitted by law to ignore or to modify by their agreements." For examples from other jurisdictions, *see e.g. Catholic Commission for Justice and Peace in Zimbabwe* v. *Attorney-General of Zimbabwe and Others*, Judgment No. S.C. 73/93, 14 *Hum Rts L J* 323 (1993), (2001) A.H.R.L.R. 248 (Zimb. Sup. Ct 1993); *Filartiga* v. *Pena-Irala*, 630 F.2d 876, 885–888 (2nd Circ. 1980) (Kaufman J.); *Riley and others* v. *Attorney-General of Jamaica*, [1982] 3 All E.R. 469 (P.C.). J. Crawford, *Creation of States in International Law* (2006) at 16, 102.

[7] *Attorney General of Israel* v. *Adolf Eichmann*, District Court of Jerusalem, 36 I.L.R. 18, at 25, 26, 50 (Israel Dist. Ct. 1961). *See also* judgment of the Supreme Court sitting as Court of Criminal Appeals at 36 I.L.R. 277, at 299, 304 (Israel Sup. Ct. 1962). Crawford is satisfied with this criterion at one point in Crawford, 'Introduction', in *supra* note 5, at 38 (quoting *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 1951 I.C.J.15, 23 (May 28)). Dan Dubois cites a series of scholars who are satisfied with the conscience of the international community as the root of peremptory norms. *See* Dubois, 'The Authority of Peremptory Norms in International Law: State Consent or Natural Law', 78 *Nordic J. Int'l L.* (2009)133, at 154, n.72, 155, n.77.

[8] *See* J. Dunoff *et al.*, *International Law: Norms: Actors, Process*, 2nd edition (Aspen, New York, 2006) 59; R. K. M. Smith, *Texts & Materials on International Human Rights* (Routledge-Cavendish, London, 2007) at 15.

[9] Dubois, 'The Authority of Peremptory Norms in International Law: State Consent or Natural Law', 78 *Nordic J. Int'l L.* (2009) 133, at 161–162.

[10] *See e.g.* Int'l L.Comm'n, 'Articles on State Responsibility', in Crawford, *supra* note 5, Art. 48 and Comm., at 40, para. 10, at 278; Human Rights Committee, *General Comment 26*, para. 4, U.N. Doc. CCPR/C/21/REV.1/ADD.8/REV.1 (8 December 1997). However, Brownlie suggests that the State Responsibility Articles only contemplate non-derogation of peremptory norms when states have already agreed to such. *See* I. Brownlie, *Principles of Public International Law*, 6th edition (Oxford University Press, Oxford, 2003) at 489.

ultimate referent of legal analysis in the air. More often than not, like obscenity, the jurist assumes that we shall know it when we see it.

Contemporary jurists have too often assumed that the international community is of recent vintage. Maurizio Ragazzi, for example, has suggested that the international legal norms of *erga omnes* can be traced back to the early 20th century as if there had been no social or intellectual history about the international community before the last century.[11] Jochen abr. Frowein and others have highlighted a mid-19th century treatise of international law as the textual source of the international community as a whole.[12] Antony Anghie, drawing from 19th century treatises, has opposed the international community with traditional (indigenous) societies.[13] Other scholars have taken for granted that the international community suddenly took form with the early 17th century treatise of Hugo Grotius (1583–1645).[14] Such efforts are misdirected to the extent that they try to find one text or date when the international community took form. Adda Bozeman and F. H. Hinsley, for example, have explained how the modern international community emerged from the city-state relations of Renaissance Italy.[15] Joseph Strayer, as another example, has located a system of equal secular states six centuries before Grotius.[16] Indeed, the juxtaposition of the international community against traditional societies, held out as pre-legal, can be traced to Roman

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[11] *See* M. Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford University Press, Oxford,1997) at 44–45.

[12] *See* Frowein, 'Obligations Erga Omnes', in R. Bernhardt (ed.), *Encyclopaedia of Public Int'l Law*, vol. 2 (Elsevier, Amsterdam, 1997) 757–759, at 757. *See also e.g. Harry Roberts (U.S.A.)* v. *United Mexican States*, 4 R. Int'l Arb. Awards 77 (U.S./Mex. Gen. Claims Comm'n 1926); Weis, 'Diplomatic Protection of Nationals and International Protection of Human Rights', 4 *Hum. Rts. J.* (1971) 643–678, at 643.

[13] This is continued into the 20th century with the Statute of the Permanent International Court, 16 December 1920, and Article 38 of the Statute of the International Court of Justice, 26 June 1945, 1946 U.N.Y.B. 843, both of which recognize international law as "the general principles of law recognized by civilized nations". For the importance of "*civilised* nations" to the international family *see* Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law', 40 *Harv. Int'l. L. J.* (1999) 1, at 22–34.

[14] M. Koskenniemi, *From Apology to Utopia: the Structure of International Legal Argument, Reissue with a new Epilogue* (2005) 74–85; *The Gentle Civilizer of Nations: the Rise and Fall of International Law, 1870–1960* (Cambridge University Press, Cambridge, 2001) 4, 17, 406–411; Lauterpacht, 'The Grotian Tradition in international law', in E. Lauterpacht (ed.), *International Law: Collected Papers of Hersch Lauterpacht*, vol. 2 (Cambridge University Press, Cambridge, 1975) 307–365; 'Private Law Sources and Analogies of International Law', in vol. 2, 173–212, at189. However, *see* Koskenniemi, 'Empire and International Law: the Real Spanish Contribution', 61 *U Tor L J* (2011) 1.

[15] A. B. Bozeman, *Politics and Culture in International History* (Princeton University Press, Princeton, 1960); F. H. Hinsley, *Power and the Pursuit of Peace: the theory and practice in the history of the relations between states* (Cambridge University Press, Cambridge, 1963).

[16] J. R. Strayer, *On the Medieval Origins of the Modern State* (Princeton University Press, Princeton, 1970) 10.

legal thought,[17] Plato[18] and Homer.[19] In sum, deeply buried in the collective memory of legal consciousness, successive waves of legal thought have explained the nature of the international community.[20] Such a collective memory needs to be excavated in order to understand the international legal claims of today.

The late medieval (13th and 14th centuries) and early modern (the 16th and 17th centuries) European jurists attribute a crucial and consistent character to the international community. The identity of the community depends upon a boundary and this boundary differentiates outsiders from insiders as members of the community. This exclusionary character of the boundary of the various senses of an international community is pronounced despite the juristic claims of universality to the international community. The thrust of my inquiry does not presuppose nor inquire after an essence of the international community. Rather, those societies, groups and individuals who are excluded from the community offer insight as to the identity of the community. Such societies, groups and individuals are excluded by virtue of the form of reasoning by which the boundary is articulated.

The first sense of an international community, that enunciated most famously by Thomas Aquinas (1225–1274 CE) and William of Ockham (1285–1347), excluded non-Christian societies from the international community. Aquinas' form of reasoning was speculative in that the source of all laws was said to be nested in the metaphysical norms of an invisible Author. The second sense of an international community, elaborated by Francisco de Vitoria (1492–1546), Francisco Suárez (1548–1617) and Grotius, highlighted a community

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[17] *See* Lucretius, *De rerum natura* ,W. H. D. Rouse (trans.), bk 5 (Harvard University Press, Cambridge, MA, 1959) 1011–1013; Seneca, *Epistulae Morales*, R. M. Gummere (trans.), 3 vols. (Harvard University Press, Cambridge, 1953), vol. 2 letter 76.9; vol. 3, letter 124:13–14. For Cicero's view, *see* Conklin, 'The Myth of Primordialism in Cicero's Theory of *Jus Gentium*', 23 *Leiden J Int'l L* (2010) 479–506.

[18] Plato's works are seeped with the excluded "primitive" or pre-legal societies. *See e.g. Laws* 3.677e, 3.680b, *Statesman* 269b, *Critias* 109d.

[19] *See generally* Homer, *Odyssey*, W. Shewring (trans.), G. S. Kirk (intro.) (Oxford University Press, Oxford, 1998) 99–112. Homer describes the Cyclopes as "neither gatherings for council nor oracles of law, but they dwell in hollow caves ... and each one utters the laws to his children and his wives, and they reck not one of another". *Odyssey* 9. 112 *et seq.* quoted in Plato *Laws* 3.680b and in the Shewring translation at 101.

[20] For the notion of a collective memory, *see* Rossington, 'Introduction', in M. Rossington and A. Whitehead (eds.), *Theories of Memory: A Reader* (John Hopkins University Press, Baltimore, 2007) 134–138; P. Hutton, *History as an Art of Memory* (University Press of New England, 1993) xii–xxiii, 22–26, 77–80; Halbwachs, excerpt from his *Collective Memory* (1950), in M. Rossington and A. Whitehead (eds.), *Theories of Memory: A Reader* (John Hopkins University Press, Baltimore, 2007) 139–143; Nora, excerpt from *Between Memory and History: Les Lieux de Mémoire* (1989), in M. Rossington and A. Whitehead (eds.), *Theories of Memory: A Reader* (John Hopkins University Press, Baltimore, 2007)144–149; Jung, 'The Concept of the Collective Unconscious', in W. K. Gordon (ed.), *Literature in Critical Perspectives* (Appleton-Century-Crofts, New York, 1968) 504–508.

constituted from customary norms. Christian doctrine still figured in this second sense of an international community. But instead of the international community being posited by the laws of the invisible Author, state-centric societies were said to impliedly consent to the community. If a society were nomadic or if it lacked centralized institutions, it was excluded from the community. The third sense of an international community, elaborated by Immanuel Kant (1724–1804), was the product of the reasoning from a priori concepts. The universality of such a community was inevitably tainted by historically contingent norms, not least of which were norms which highlighted the freedom of the sovereign state. The international community was thereby an 'ought'. The 'is' was the consequence of an aggregate of the particular wills of states, each state being considered equal with the next. Again, societies lacking a state were excluded from the international community. The fourth sense of an international community, explained by Georg Frederich Hegel (1770–1831), lopped off the world of *a priori* concepts and, instead, identified various senses of the international community of socially contingent phenomena. Hegel called this sense of the international community "world history". The consequence of Hegel's form of reasoning, though, was to exclude societies which lacked self-consciousness (in Hegel's view) or, at least, a desire to be self-conscious (in Hegel's view). Traditional (or indigenous) societies were Hegel's example of such a lack of self-consciousness. Once again, the international community was exclusionary. The question, which these four senses of an international community beg today, is whether the ultimate referent of international legal analysis remains bounded and therefore exclusionary of some societies and peoples. Is there a sense of an emerging international community which functions as the referent of peremptory norms? Do boundaries, characteristic of the earlier images of an international community, remain embodied in contemporary international law analysis? Is there a sense of a boundless international community emerging?

2. The International Community of Christendom

The legal referent of an international community as a whole hardly begins with the 19th century or, for that matter with Grotius, as Hersch Lauterpacht and Koskenniemi have claimed.[21] During the late medieval and early modern period, the international community was considered synonymous with Christendom.[22] Otto Gierke described Christendom as "a single, universal Community, founded

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[21] Koskenniemi and Lauterpacht, *supra* note 14.

[22] *See generally* J. N. Figgis, *Political Thought from Gerson to Grotius: 1414–1625*, G. Mattingly (intro.) (Harper, New York, 1960 [Cambridge University Press, 1907]), at 198–217. *See also* H. Bull, *The Anarchical Society* (1977) 27–33; Bull, 'The Emergence of a Universal International

and governed by God himself".[23] Such a universal community had dominated the Middle Ages, Gierke advises.[24] J. N. Figgis highlights the universal character of the Christian international community in his classic *Political Thought from Gerson to Grotius*:

> There was one really universal order in Western Christendom and its name was the Church. ... The Holy Roman Empire, the most characteristic of all medieval institutions, did indeed attempt to realise the idea of an all powerful State, but that State was the Church. The medieval state had one basis of unity denied to the modern – religion. Baptism was a necessary element in true citizenship in the Middle Ages and excommunication was it antithesis.[25]

The crucial point for our purposes is that such a universal community, represented by Christendom, was paradoxically bounded with the effect that some societies were excluded from recognition and membership in the international community. The boundary defined who was a member of the international community and who was not. If a member of the international community signed a treaty with a non-member, the terms of the treaty did not bind the member. Laws were considered binding if they were enacted by members of the international community. The boundary, unlike today though, was not territorial. Rather, it was a product of metaphysical thinking or 'beyond' the physicality of nature.

2.1. Thomas Aquinas' International Community

One early sense of the international community represented Christian believers. Members of the community were believers in Jesus as the son of God. It was best elaborated by Thomas Aquinas (1225–1274 CE) and William of Ockham (1285–1347). The invisible Author of Christendom was believed to have willed natural laws and these, in turn, rendered contradictory human laws non-existent.

To be sure, the idea that a fundamental text could render human laws void arrived on the scene much later, particularly with Justice Marshall's judgements of the US Supreme Court. That said, Aquinas does suggest that human laws which contradicted natural laws were "unjust". Such a contradiction even rendered a human law non-existent as a law.[26] Quoting from Augustine, Aquinas

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Society', in H. Bull and A. Watson (eds.), *The Expansion of International Society* (Oxford University Press, New York, 1984) 118–141, at 117–120; Watson, 'European International Society and its Expansion', in H. Bull and A. Watson (eds.), *The Expansion of International Society* (Oxford University Press, New York, 1984) 13–32, at 13–17.

[23] O. Gierke, *Political Theories of the Middle Ages*, F. W. Maitland (intro.) (Beacon Hill, Boston, 1958 [Cambridge University Press, 1900]) at 10.

[24] *Ibid.*, at 18–19.

[25] Figgis, *supra* note 22, at 18–20.

[26] T. Aquinas, *Treatise on Law*, as translated from *Summa Theologica, First Part of the Second Part, Basic Writings of Saint Thomas Aquinas*, Anton C. Pegis (ed.) (Random House, New York, 1945),

states that "that which is not just seems to be no law at all".[27] As Aquinas continues from this passage, "every human law has just so much of the nature of law as it is derived from the law of nature". What is important to appreciate is that Aquinas concludes that customs are unrelated to natural laws. Only laws which are deduced from *a priori* principles are rightfully called laws.[28] Customs, being the product of a human community, are non-existent as laws if they contradict natural laws.[29] Interestingly, Strayer suggests that the modern sense of law begins with the rise of professional administrators who can differentiate between such customs from rationally deduced propositions. Only the latter are considered binding on human beings.[30]

The key to this differentiation between a legally binding law and a custom rests in Aquinas' four forms of laws: eternal laws, divine laws, natural laws and human laws. Eternal laws guide the super Author or Creator of nature. Like the human author of the later Renaissance,[31] the Christian Author is considered self-generating and self-determining. The Author is considered invisible in the sense of being inaccessible to the language of human agents. The Author lacks a physio-chemical body. The Author is mind or perhaps a better term is 'logos'. Nature exists as the product of the Author's mind. And so, both nature and human laws are generated *after* the invisible Author exists.[32] Since the Author pre-exists everything in the material world, the Author implants a design into the material world. This being so, the Author "foreknows" the eternal laws and all human objects that emulate from the Author's plans.[33] Human laws merely supplement the Author's thought-plan.

Since the Author is invisible in the sense of being inaccessible to human language and since the Author exists prior in time to all divine laws, natural laws and human laws, the eternal laws, which guide the Author, are also unknowable by humans. A divine law, Aquinas' second form of a law, functions as an intermediary between the eternal laws which guide the invisible Creator on the one hand and humanly posited laws on the other. As such, the ultimate identifiable source of all laws, including divine laws, is the will of the invisible Author. Even laws of

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vol. 2, Q 93, art. 3, reply obj. 2, pp. 765–766, and Q 95, art. 2, answ. and reply obj. 2, pp. 784–785.

27) *Ibid.*, Q95, art. 2, answ.

28) *Ibid.*, Q. 95, art. 3, answ., pp. 784–85.

29) *Ibid.*, Q 95, art. 2, reply obj. a. *See also* Vitoria, 'On Law', in A. Pagden and J. Lawrance (eds.), *Political Writings* (Cambridge University Press, Cambridge, 1991), art. 2, sect. 124, pp 173-4; art. 2, sect. 127, p. 157.

30) Strayer, *supra* note 16, 23–24.

31) Foucault, 'What is an Author?', in P. Rabinow (ed.), *The Foucault Reader* (1984) 101–120. This continues into contemporary legal thought. *See* Conklin, 'The Invisible Author of Legal Authority', in 7 *Law and Critique* (1996) 173–192.

32) Aquinas, *supra* note 26, Q 90; Q 91, art. 1; Q 93, art. 5.

33) Aquinas, *supra* note 26, Q 90, preface; Q 96, art. 5, reply obj. 3.

nature represent the Author's will. Since the first principles of natural law lie in the thought-plan of the Author, they are "indemonstrable". Like the divine laws, only the Author knows the first principles. As such, the Author is the "governor-in-chief". In brief, all humanly posited laws exist by virtue of their rational relation to the Author's will as manifested in nature.[34]

Like the divine laws, the law of nations mediates between the Author's super-will in a metaphysical world and human agents in a physical world. As such, the international community manifests the divine laws. So too, the international community represents the common good. This representation is instrumental in the constitution and analytic priority of the common good. Human agents are said to replicate the Author's thought-plan by reasoning about propositions of the *ius gentium*.[35] The most important end of the Author's thought-plan is what Aquinas calls "sociability", a term which Aristotle and Cicero especially highlighted and which Hegel later extended to the ethicality of laws.[36] Sociability may well require war and other morally offensive human acts. Sociability is the *telos* of international law.[37] The international law is described by Aquinas as the *jus gentium*, a sense of law which is first described in the extant materials of Cicero.[38] Like the divine and human laws, the *jus gentium* supplements the Author's thought-plan.

Now, two factors in Aquinas' theory of an international community work to exclude some societies, social groups and individuals from the community's membership and protection. For one thing, the international community is the product of speculative reasoning independent of the historical contingencies of particular societies.[39] The problem is that any sense of the international community may risk becoming estranged from the *ethoi* of societies.[40] Some human rulers, such as claimants to the Papacy, might well claim to be closer to the intent of the Author than any other human being. Along these lines, the French kings called themselves *Rex Christianissmus* ('The Most Christian King'). James I represented and indeed wrote a book claiming to be the Author's agent on earth. The consequence, needless to say, is that it is left to human rulers to define the international community in a manner which excludes some societies, groups and individuals from membership.

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34) Aquinas, *supra* note 26, art. 1, Q 94, art. 1a. *See also* Vitoria, 'On Law', *supra* note 29, art. 2, sect. 124, pp. 172–73; art. 3, sect. 127, pp. 185–86.

35) Aquinas, *supra* note 26, Q 94, art. 5a; Q 95, art. 4a. As with the sense of an international community, *jus gentium* also lacks a singular and definitive essence but varies with the social-cultural assumptions of time. For the earliest extant use of the term, *jus gentium*, *see* Conklin, *supra* note 17.

36) This term, "ethicality", is examined in W. E. Conklin, *Hegel's Laws: the legitimacy of a modern legal order* (Stanford University Press, Stanford, 2008) 162–187 [HL].

37) Aquinas, *supra* note 26, Q 90, art. 2a; Q 96, art. 1a.

38) Conklin, *supra* note 17.

39) This theme will continue into the secularized international community as refined in Kant's writings, we shall see in a moment.

40) The term 'ethos' is elaborated in Conklin, *HL supra* note 36, 162, 182–188, 214–215.

This raises the question: why is the Christian international community universal (that is, international) if it is exclusionary? This question addresses a second factor in the exclusionary character of the international community. The boundary of the international community demarcates who are believers and who are not.[41] A society would be recognized as a member of the international community if it were Christian. James Crawford describes such recognition of a legal entity at this time as the consequence of "a sort of juristic baptism, entailing the rights and duties of international law".[42] The problem, though, is that those societies deemed non-Christian might be or were in fact excluded from protection of the international community. As such, Aquinas' principles of *ius gentium* could be enforced against the non-members. For centuries earlier, the international community was constituted from speculative reasoning. Since the emergence of an international community was accompanied by the will or thought-plan of an invisible Author, the community had existed as a matter of faith. If Christianity were no longer the basis of the international community, would non-Christian societies be incorporated into the international community?

2.2. William of Ockham's Rationally Constructed International Community

William of Ockham subsequently refined Aquinas' sense of the international community as Christendom. Continuing Aquinas' speculative frame of reference, William emphasized that speculative reasoning from first principles leads to laws which govern the international community. Such self-conscious speculative reasoning, William realized, sharply contrasts with unwritten and unspoken customs. To be sure, customs help to identify the principles of the international community,[43] according to William. That said, the binding character of natural law draws from speculative reasoning, not customs. As such, the international community again gains a universal character by being located in a metaphysical world. Being purged of social contingency, the *jus gentium* is "immutable, invariable and indispensable".[44] It was commonly accepted until his day that the Pope represented the invisible Author's will. This being so, the Pope's canon laws rendered local laws void. William takes a different slant, one which secularizes the international community. Since the Author had created the whole of Nature according to a single thought-plan, according to William, principles could be

41) Crawford, *supra* note 5, 14–16. However, one can still find the criterion of "civilized nation" in relatively recent cases. *See e.g. Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden)*, 1958 I.C.J. 55, at 92 (November 28) (separate opinion of Judge Sir Hersch Lauterpacht).

42) Crawford, *supra* note 5, 16.

43) William of Ockham, 'A Dialogue', in A. S. McGrade and J. Kilcullen (eds.), *A Letter to the Friars Minor and Other Writings* (Cambridge University Press, Cambridge, 1995) 232, 246.

44) *Ibid.*, pt. 3, ch. 6, at 287.

rationally deduced from such a unifying thought-plan. One such deducted principle is that the members of the Christian community, not the Pope, represented the single thought-plan. Legal principles are universal by virtue of their derivation from the unity of the natural and social world so created. The community gains its authority as an independent source of law, in turn, from the *jus gentium* which "is the same among all nations".[45] It is important to appreciate William's twist here. Aquinas had elaborated how the international community was the product of the Author's will. William argues that the international community is created by the *jus gentium* itself, not by a rational deduction from the Christian Author's will. The boundary of the international community is now humanly constructed.

2.3. The Membership of the Council of Constance, 1414–1418

For Aquinas, the international community is part and parcel of an objectivity separate from the invisible Author's human laws. For William of Ockham, the international community is rationally constructed by human agents. William refers to the *jus gentium* of the late Roman Republic as representing this rational construction. The issue which William presents is whether the international community would remain stuck in a world of metaphysical abstractions estranged from historically contingent practices of particular societies.

Such a risk of the reification of the international community is challenged with the holding of the Council of Constance. Three claimants to the papacy had led to a schism in the organization of the Church. The Council was composed by more than Church agents, though. Included were the emperor, princes, dukes and nobles, about 18,000 church officials, ambassadors, and an enormous number of "sightseers".[46] Edward Gibbon describes how the Council of Constance symbolized the whole international community: "[T]he States-General of Europe, for the Republic of Europe, with the Emperor and Pope at its head, had never been represented with more dignity than in Constance."[47] The Council, as with Aquinas and William of Ockham, presupposed a boundary which excluded non-members from the international community. The boundary, again, was a product of reasoning about metaphysics (or 'beyond' the 'physical world'). By privileging the Christendom, the Council excluded some societies and included others.

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45) ILC, in Crawford, *supra* note 5, para. 4, ch. 2.

46) Adda B. Bozeman writes that there were a total of about 50,000 and 100,000 sightseers. *See* Bozeman, *supra* note 15, p. 499.

47) E. Gibbon, *The History of the Decline and Fall of the Roman Empire, 1427–28* (1776–88), vol. 2 as quoted in Bozeman, *supra* note 15, 500.

Adda Bozeman recounts how the various groups at the Council disputed which communities should be included and which excluded from the Council.[48] Italy, Germany, France, England and Spain were recognized as the members of the community. Nationhood, however, was not the ethnic nation which we take for granted today. Rather, for the Council, 'the nation' was synonymous with governmentality. By this, amongst other things, an administrative structure in a pyramidal form enacted and administered human laws. The crucial thing was that a king or king-like official represented the whole of the governmentality.[49] The Roman Church was now considered only one such governmental organization in Christendom.[50] Interestingly, in 1418, the Council devised a procedure to elect the Pope acceptable to the three claimants to the Papacy.[51] In addition, the Council enacted a decree, called *Frequens*, to the effect that the Council should regularly meet. The Council, though, did not subsequently meet.[52] Thereafter, the election turned to the Council of Cardinals for authority.

In sum, the international community was humanly constructed. Most importantly, a boundary defined Christendom by excluding societies and groups from membership. The legitimacy of the Crusades presupposed such a boundary between the members of Christendom on the one hand and unrecognized societies on the other. The boundary, it bears repeating, was believed to be deduced from rational principles derived from a metaphysical world.

3. The International Community as the Product of Customs

The emerging international community was now recognized as humanly constructed. Its boundary, though, was arbitrarily posited by believers, by the insiders, as if the insiders knew the beliefs of those who were outside the boundary. The key to this was the inaccessible thought-plan of the invisible Author. Aside from the Council of Constance, the locus of the international community began to shift to the social *ethoi* of an international community. This shift was represented by customary norms, the norms being the product of unwritten assumptions and expectations.

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48) Bozeman, *supra* note 15, 503–504.

49) Michel Foucault's sense of governmentality is appropriate here. *See* his 'Governmentality', in G. Burchell, C. Gordon and P. Miller (eds.), *The Foucault Effect: Studies in Governmentality with two lectures by Michel Foucault* (University of Chicago Press, Chicago, 1991) 87–104.

50) Figgis, *supra* note 22, at 57.

51) Bozeman, *supra* note 15, 500.

52) Figgis *supra* note 22, 53.

3.1. Vitoria's Deference to Customs

Customs are especially highlighted by Francisco de Vitoria in his effort to depart from the earlier speculative reasoning about the thought-plan of the invisible Author. One of Vitoria's essays in particular, "On the American Indians" (1539), highlights how customs are important in constituting the international community. The indigenous peoples of the Americas, though considered non-Christian, could even be protected by virtue of an international law constituted from customary norms.[53] By virtue of the role of customs, Vitoria argues, the *lex* of a governmentality might be void if the *lex* contradicted a customary norm.[54] This voidability character of written laws encourages Vitoria to consider that customs are synonymous with natural law.[55] Vitoria puts the point in this way:

> The law of nations (*jus gentium*) does not have the force merely of pacts or agreements between men, but has the validity of a positive enactment (*lex*). The whole world, which is in a sense a commonwealth, has the power to enact laws which are just and convenient to all men; and these make up the law of nations. From this it follows that those who break the law of nations, whether in peace or in war, are committing mortal crimes ... No kingdom may choose to ignore this law of nations, because it has the sanction of the whole world.[56]

The voidability of written laws elevates the international community above princes and kings. Customs are also independent of the self-consciously enacted statutes of European nations.

The remarkable shift from Aquinas' speculative reasoning to historically contingent customary norms extends to Vitoria's analysis of the heretofore unprotected indigenous inhabitants of the Americas. The indigenous inhabitants are now considered members of the international community. One international customary norm, for example, proscribed slavery. The indigenous inhabitants of the Americas were protected against slavery. Vitoria recognizes the Roman Church as possessing some temporal legitimacy over the world during an emergency.[57] By virtue of the universality of the Christian community, however, the indigenous peoples of the Americas are said to possess self-government just as did the Christian governmental entities in Europe at the time. This self-government rendered the customs of indigenous groups binding upon their inhabitants, independent of the authority of colonial states.[58] In this respect, according to Vitoria, the Spaniards offended the *jus gentium* by causing harm to the "barbarians".

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53) Vitoria, 'On the American Indians', *supra* note 29, sect. 127, art. 3, pp. 231–292.
54) Vitoria, 'On Law', *supra* note 29, para. 127, p. 186.
55) Vitoria, 'On the American Indians', *supra* note 29, 278.
56) Vitoria, 'On Civil Power', *supra* note 29, sect. 21, Q 3, art. 4, p. 40.
57) Vitoria, 'On the Power of the Church', Q 5, art. 7, sect. 11, pp. 91–92.
58) Vitoria, 'On the American Indians', *supra* note 29, Conclusion, p. 250–251.

Looting, killing and the occupation of land exemplified such harm. The *jus gentium* protected indigenous inhabitants even if they were conquered.[59]

The international community was not entirely inclusive of the whole of humankind on the globe, however. Traditional societies before contact, for example, were believed to be paganistic. They had to be Christianized by the priests. Traditional (tribal) societies, therefore, would be unprotected by the international community unless they were "civilized". They would be considered "civilized" if they were guided by Christian principles.[60] Being recognized as potential members of the international community, the pagans could be "compelled" to accept Christian principles and to accept Christian administrators.[61] Until such transpired, pagan communities could not be recognized as full members of the international community. Once again, the international community was exclusionary. This was so despite the shift from speculative reasoning to historically contingent customs.

3.2. An International Community of Territorially Bounded States

It is not a coincidence, then, that Jean Bodin (1529/30–1596) continually refers to the sovereign state, as a human construct, to replacing God. The state functions, he asserts, in "the image of God".[62] And so, Aquinas' metaphysical character of the international community has been displaced by the historically contingent customs of the community. In both cases, a boundary defines the identity of the international community. Although the boundary is, as with the first sense of an international community, of a metaphysical character, it now has territorial entities as its members.

Customs offered three factors in the identity of the international community. First, each state was free to enact and administer principles inside its territorial borders. Shared principles were described as *lex omnium gentium communis*.[63] Second, the international community, according to Bodin and Suárez (examined in a moment), represented principles shared in the domestic legal orders of the territorially bounded state members of the community. Third, the shared domestically posited principles bound states together into a soft sense of a community as it were. Suárez describes such binding principles as the international law "properly so called".[64] This international community, although the product of customs,

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[59] *Ibid.*, sect. 6, p. 282.

[60] Vitoria, 'On the Dietary Laws', *supra* note 29, p. 221.

[61] *Ibid.*, pp. 227, 228.

[62] J. Bodin, *On Sovereignty*, J. H. Franklin (ed. & trans.) (Cambridge University Press, Cambridge, 1992), 31 [385], 34 [389], 39 [398], 45 [406], 50 [483], 76 [519].

[63] Bodin writes about "the law common to all peoples, the grounds (*raiones*) of which are different from the laws of nature and of God." *Ibid*, p. 129, n. 22.

[64] Suárez, 'A Treatise on Laws and God the Lawgiver', in J. B. Scott (ed.), *Selections from Three Works by Francisco Suarez*, G. L. Williams, A. Brown and J.Waldron (trans.), H. Davis (revisions),

was somehow independent of the newly emerging territorially bounded states. As Suárez puts it,

> the human race, into howsoever different peoples and kingdoms it may be divided, always preserves a certain community, not only as a species, but also a moral and spiritual unity (as it were) enjoined by the natural precept of mutual love and mercy. A precept which applies to all, even to strangers of every nation.[65]

It was not that the international community is constituted from intellectually transcendent norms of territorially bounded states. Rather, the international community, according to Suárez, exists *independently* of the territorial state members. Historically contingent and shared customary norms bind states together. Such customary norms constitute the *jus gentium* "properly so called". They are the objects of human creation, not of the creative act of the invisible Creator-Author.

3.3. The Territorial Autonomy of the State during the Reformation

The Council of Constance had failed to constrain the Pope. The Council had also failed to institutionalize a federation of representatives throughout Christendom, a federation which would regularly meet. This failure went hand-in-hand with the Reformation which, for its part, privileged the self-determination of the individual natural person. Governmental administrations or a monarch now existed as the Head of self-determining governmentalities. By sharing a language or religion, customs seemed fixed and permanent in time. Customs worked to represent and to unify social groups. The Reformation manifested how such a group autonomy extended to the religious freedom of individual human beings.

The Reformation, which privileged the autonomous individual, reinforced a privileged European family of autonomous states. The European family of equal sovereign states had displaced universal Christendom. Each state was considered self-generating and self-determining. This was so because the universalism of Christendom had now been transferred to the bounded space of the state. No state could interfere with the internal matters of another state. Each state was considered equal with the next. A territorial border protected such a freedom of non-interference. Each state respected the other as an end-in-itself. Not all political and social groups on the globe, though, were organized in such a way. Aside from indigenous groups in North America, Africa and Asia, there were empires

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J. B. Scott (intro.) (Oceana, New York, 1964 [1944]), vol. 2, ch. 19, para. 6, at pp. 345–346. *See also* C. S. Edwards, *Hugo Grotius: The Miracle of Holland – A Study in Political and Legal Thought* (Nelson-Hall, Chicago, 1981) 92–94, 143.

[65] Suárez, *ibid.*, ch. 19, para. 9, at 348–349.

which undermined such a system of equal sovereign states.[66] The international community was Euro-centric. As Wheaton asserts in 1866,

> [i]s there a uniform law of nations? There certainly is not the same one for all the nations and states of the world. The public law, with slight exceptions, has always been, and still is, limited to the *civilized* and *Christian people of Europe* or to those *of European origin.*[67]

The international community was described as if a family with unwritten assumptions and ideals.

Although the autonomy of each sovereign state seemed to contradict the universalist character of Christendom, each sovereign state possessed universal authority to enact and administer laws within its territorial borders.[68] This newfound universality of a state is articulated in Luis Molina's *De Justitis et Jure* (1535–1600), Juan Mariana's *Historiae de rebus Hispaniae* (1592), and Francisco Suárez (1548–1617)'s *De Legibus* (1612). Christendom still permeates the legal principles of the international community. The legal principles of the international community, for example, are derived from God according to Suárez.[69] The norms of the international community, however, are now identified by customs rather than by Aquinas' speculative principles about the common good willed by the invisible Author. States are now guided by historically contingent customs of the international community. Domestically shared legal principles now constitute the identity of the laws of such a community.

The Reformation sets the background, then, for the emergence of a secularized international community. The individual natural person resembles the autonomous state ('autonomy' drawing from the Greek 'having one's own laws' or 'self-legislating'). The freedom of the state and of the individual person is a bounded or negative freedom. The Reformation emphasizes an individual natural person's freedom to choose one's own values about how one should live. This freedom of the individual, however, is not confined to the natural person. Rather, the Reformation jurists take for granted that both natural person and state are free. As such, a state may define its membership, including some and excluding

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66) For a variety of such systems, *see* Bozeman, *supra* note 15.

67) H. Wheaton, *Elements of International Law*, G. G. Wilson (ed.) (Clarendon, Oxford, 1936 [1866], Classics of International Law) 15, emphasis added.

68) Fitzpatrick has documented this in detail. This point is developed by Fitzpatrick in '"Gods would be needed ...": American Empire and the Rule of (International) Law', 16 *Leiden J. Int'l L.* (2003) 429–466, at 431–438; Fitzpatrick, '"What are the Gods to Us Now?": Secular Theology and the Modernity of Law', 8 *Theoretical Inquiries in Law* (2007) 161–190; 'Bare Sovereignty: *Homo Sacer* and the Insistence of Law', in A. Norris (ed.), *Politics, Metaphysics, and Death: Essays on Giorgio Agamben's Homo Sacer* (Duke University Press, 2005) 49–73, at 53–54; 'Latin Roots: Imperialism and the Making of Modern Law', in Fitzpatrick, *Law as Resistance, Modernism, Imperialism, Legalism* (Dartmouth, Aldershot, 2008) 275–291, at 279–284.

69) Suárez, *supra* note 64, 1–137.

others. More generally, a society is considered eligible to be a member of the international community if its members have been baptised into the Christian faith. And so, as with the autonomy of the natural person, a boundary protects the inner freedom of the state. With the state, the boundary is territorial. Inside its territorial border, the state has supreme authority over all objects. The state possesses a totality of domestic legislative authority.

What is critical in this regard is that, despite its universality inside a state's territorial borders, the international community is exclusionary. This universalism ironically takes form at the very moment that the state claims an independence from the universality of Christendom and of the Pope.[70] Since the domestic legal orders are exclusive of the universalism of Christendom, the international community is separate from the domestic legal orders. The territory of Europe is divided into territorial governmentalities. The Spanish maps of the 16th and 17th centuries, for example, indicate that the state of Spain occupied the centre with an increasing vagueness the further that one geographically travelled from the centre. In addition, maps functioned to separate a Christian principality from non-Christian territorial space.[71] Also by way of example, the Pope arbitrarily divided South America in 1496 into separate governmentalities by a vertical North-South line through the Continent. The state of Portugal was assigned ownership of the Eastern half and the Spanish state of the Western portion. Maps, more generally, demarcated how a bounded territorial space defined the jurisdiction of a state.[72] Indeed, states began to claim an ultimate inchoate title to territory which they possessed or controlled.[73] Like the international community of Christendom, the state was now considered complete within its territorial boundary. Only in the case of the state, a territorial boundary, rather than some metaphysical conception, defined the state's boundary. No external social entity might legitimately intervene across the territorially bounded freedom of the state. The theological character of the international community's universality was now extended to the state.[74]

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70) This point is developed by Fitzpatrick in 'What are the Gods to Us Now?', *supra* note 68.

71) *See e.g.* British Library, *Magnificent Maps: Power, Propaganda and Art* (British Library, London, 2010) 35.

72) *Ibid.*, 34, 40–41, 74–75, 85

73) *See generally* S. Sasson, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton University Press, Princeton, 2006) 31–73; J. Bartelson, *A Genealogy of Sovereignty* (Cambridge University Press, Cambridge, 1995) 40, 51, 206; J. Bartelson, *Visions of World Community* (Cambridge University Press, Cambridge, 2009) 113; Robbins, 'On giving ground: globalization, religion, and territorial detachment in a Papua New Guinea society', in M. Kahler and B. F. Walter (eds.), *Territoriality and Conflict in an Era of Globalization* (Cambridge University Press, Cambridge, 2006) 62–84.

74) C. Schmitt, *Political Theology*, with foreword by T. B. Strong, G. Schwab (ed. & trans.) (University of Chicago Press, Chicago, 1985 [1922]).

3.4. Grotius' International Community as Composed of Equal Sovereign States

Against the background of the speculative reasoning which Aquinas and William of Ockham attributed to the existence of the international community and against the background of the customs highlighted by Vitoria and Suárez , Hugo Grotius is less original than some commentators have attributed of him.[75] It is not surprising in this respect that Hersch Lauterpacht would express exasperation towards the many different readings attributed to Grotius.[76] Grotius writes a generation after Suárez. Grotius writes about an international community when states have been at war for decades and when state officials may have forgotten the shared principles which Suárez had accepted as constitutive of the international community. The international community exists of members which possess continuous possession, physical control and a property interest in a bounded territorial space.[77]

What Grotius does add, though, is a more rigorous analysis of how the international community exists independent of the territorially-bounded states. Although Vitoria had claimed that the scope of all laws of the international community enclosed all human beings, including indigenous peoples so long as they were Christians, Suárez had considered membership in the international community conditional upon their stage of being civilized.[78] In this context, Grotius recognized the importance of territoriality in any theory of the international community. What he appreciated in this regard is a state's claim to a property interest in physical space. It is not enough for a state to possess and control territory. The state must claim title to its territory which it possesses and controls. A freedom of domestic jurisdiction thereby goes hand-in-hand with a territorial border. This property claim, in turn, hinges in effect upon the territorial boundary of the state's control and property claim. Within such a territorial border, the state authoritatively exercises a universal jurisdiction. Such a jurisdiction constitutes legal space as well as a territorial space. In sum, even absent an invisible Author of the natural and metaphysical world, the international community still exists.[79] And that international community is constituted from unwritten customs which guide disputes about the property claims between states.

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75) *See* Lauterpacht and Koskenniemi, *supra* note 14.

76) Lauterpacht, 'Private Law Sources and Analogies of International Law', in E. Lauterpacht (ed.), *International Law: Collected Papers of Hersch Lauterpacht*, vol. 2 (Cambridge University Press, Cambridge, 1975)173–212, at 189.

77) Strayer, *supra* note 16, 5–6, 17.

78) Tierney, 'Vitoria and Suárez on ius gentium, natural law, and custom', in A. Perreau-Saussine and J. Bernard Murphy (eds.), *The Nature of Customary Law* (Cambridge University Press, Cambridge, 2007) 101–124, *cf.* section 2.1 above.

79) H. Grotius, *De Jure Belli ac Pacis Librtri Tres* [*The Law of War and Peace*], Francis Kelsey trans. 1964), Prolegomena, E. Dumbauld (intro.) (Classics of International Law Series; Oxford: Clarendon Press, 1925), sect. 6', 11'.

The scope of domestic jurisdiction exists by virtue of the territorial boundary. Indeed, the state claims the freedom to decide who is a member of the state and who is not. This bounded *domaine réservée* protects the freedom of the state to punish criminals, to posit laws, to expel non-members from its borders, to diplomatically protect its members, and to declare war against another state. Such state actions aim to protect the state as represented by its territorial control and title claim. The legal bond of allegiance extends to that national who is harmed by another state while on the latter's territory.[80] Grotius explains, for example, that the state possesses a diplomatic duty to protect its members by virtue of "the force of natural liberty" of the state.[81] In like vein, Vattel goes so far to assert in 1758 that if one state harms the nationals of another state, the state of nationality "must avenge the deed and, if possible, force the aggressor to give full satisfaction or punish him, since otherwise the citizen will not obtain the chief end of civil society, which is protection".[82] Vattel holds that the state has "an indiscriminate right to the property" of the natural person.[83] Indeed, if a foreign state excludes or expels "a single people", the state has committed a wrong.[84] Pufendorf too holds that the state protects its nationals by expelling or even executing inhabitants who lack an allegiance to the state.[85] The state's freedom within its territorial boundary continues with Jean Jacques Rousseau (1712–1778),[86] David Hume (1711–1776)[87] and Adam Smith (1723–1790).[88]

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[80] *Ibid.*, bk 2, ch. 2, sect. 23, p. 205. E. de Vattel, *The Law of Nations or the Principles of Natural Law*, G. Fenwick (trans.) (Klaus Reprint, New York,1916 [1758]) 136. Diplomatic protection was more like a privilege. Vattel describes it as a "limited right" rather than a right. Vattel, *Law of Nations* (Chitty-Ingraham ed., Philadelphia, 1855) sect. 17 as cited in Borchard, *The Diplomatic Protection of Citizens Abroad; or, The Law of International Claims* (Klaus Reprint, New York, 1970 [1915]) 356. The "limited right" was exercised by the executive rather than by the judiciary in common law countries. The allegiance, one needs to note, was a two-way relationship in that the natural person possessed the freedom to choose his own state of nationality. Grotius, *supra* note 79, sect. 15, p. 201; ch. 2, sect. 22, p. 204.

[81] Grotius, *supra* note 79, bk 2, ch. 2, sect. 23, p. 205.

[82] de Vattel, *supra* note 80, sect. 17, p. 14; sect. 71, p. 136. Diplomatic protection was more like a privilege.

[83] *Ibid.*, sect. 82.

[84] Grotius, *supra* note 79, ch. 2, sect. 22, p. 204.

[85] S. Pufendorf, *On the Duty of Man and Citizen according to Natural Law*, James Tully (ed.), M. Silverthorne (trans.) (Cambridge University Press, Cambridge,1991 [1673]), bk 2, 5.4(1); bk. 2, 18.15; bk. 2.11.3; bk 2.7.3.

[86] "The essence of the body politic consists in the union of obedience and liberty, and these words, *subject* and *sovereign*, are correlatives, the notion underlying them being expressed in the one word citizen" J.-J. Rousseau, 'The Social Contract', in *The Social Contract and Discourse on Inequality*, L. G. Crocker (ed. with intro.) (Signet, New York, 1967 [1762]) bk 3.13.

[87] "A man living under an absolute government, wou'd owe it no allegiance; since by its very nature, it depends not on consent." D. Hume, *A Treatise of Human Nature*, 2nd edition, with text revised and notes by P. H. Nidditch, (Oxford University Press, Oxford,1978 [1739–40]) 549.

[88] A. Smith, *Report dated 1766, Lectures on Jurisprudence*, R. L. Meek, D. D. Raphael and P. G. Stein (eds.) (Oxford University Press & Liberty Fund, Indianapolis,1978 [1766]) para. 18, p. 403.

Now, although this negative freedom of the state would seem to foreclose the possibility of an international community, this is not so. Indeed, the state was free by virtue of the historically and analytically prior international community. This priority of the international community exists because legal knowledge, in contrast with the non-territorial metaphysical boundary of Aquinas' Christendom, was assumed to take a territorial boundary for granted.[89] Aquinas, we must recall, elaborated how each natural person and each society has a *telos* to act in terms of the common good. Cicero had made much of this idea.[90] Grotius now explains that the presupposed territorial character to the international community and its members joins with this presupposed *telos*.[91] The *telos* of the international community is the sociability of human beings. In brief, nested in each human being, there is an innate propensity to socialize with others. This, needless to say, presents a contradiction. At the very moment when the members of the international community take on a universal and total jurisdiction within their respective territorial boundaries, the inhabitants inside the boundaries are believed to possess a capacity to socialize with others. This sense of a sociability of human beings underlies Grotius' inclusion of all social organizations into the international community. Even a family or corporation exemplifies such sociability as the *telos* of human beings.

The international community now implies or takes for granted that a territorial border surrounds each state and that legal knowledge is only recognizable inside that boundary. The boundary demarcates those whose sociability is protected from those whose sociability is not recognized. The international community likewise manifests the propensity of individual human beings and states to socialize. Domestically enacted laws by a state can be adjudged by the extent to which the content of the laws institutionalizes or protects the sociability of its inhabitants.[92] This evaluation of the content of a state's domestic laws extends to the identity and binding character of the international community. This being so, Grotius emphasizes that the state is a mere "convenience" in the fulfilling of the innate sociability of human beings. Put differently, the state, for Grotius, is an intermediate structure: the state mediates between the universal international community on the one hand and the individual human beings on the other.[93]

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89) This sense of territorial knowledge as opposed to experiential knowledge is developed in Conklin, 'The Ghosts of Cemetery Road: two forgotten indigenous women and the crisis of analytical jurisprudence', in 35 *Australian J. of Feminism and Law* (2011) 3–21; 'Territorial Knowledge, Derrida's Laws and the Call for Justice', in R. Buchanan, S. Motha and S. Pahja (eds.), *Reading Modern Law: Critical Methodologies and Sovereign Formations* (Routledge, London, 2011); Conklin, *HL supra* note 36, 323–328; 'A Phenomenological Theory of the Human Rights of the Alien', in 13 *Ethical Perspectives* (2006) 245–301.

90) Conklin, *supra* note 17.

91) Grotius, *supra* note 79, Prolegomena, sects. 6–9; bk 1, ch. 5, sect. 2(2), at p.165.

92) Grotius, *supra* note 79, bk 2, ch. 5, sect. 23, at p. 253.

93) *See especially* Edwards, *supra* note 64, at 101–102.

The individual desires to access the principles of the international community because of the natural person's natural duty to be sociable. Since the interrelations of states manifest the sociability of human beings, the international community is grounded in sociability. This sociability suggests the possibility of an international community that is greater than the will of each state.

Returning to Suárez, two senses of an international community have come to the fore upon the dissolution of Christendom in favour of an international community of states. The one is constituted from the shared domestic laws amongst self-generating and self-determining states. The other international community exists independent of the arbitrary wills of such monadic states. Suárez's description of the *jus gentium* as "properly so called" takes up this second sense of an international community. Grotius develops the latter by elaborating a fuller understanding of the international community "properly so called". It is difficult to appreciate Grotius' originality without retrieving Suarez's efforts.

Like his predecessor's efforts, however, Grotius' international community "properly so called" is exclusionary of outsiders. This is so by virtue of three factors. First, his adoption of a *telos* of all human beings (namely sociability) opens the door for him to hierarchize social entities to the extent that they have fulfilled the sociability principle as manifested in the content of their domestic laws. Second, Grotius takes for granted that state members are defined in terms of their territorial boundaries. Social entities, such as nomadic traditional societies in North America, lacked such a territorially bounded state and therefore were excluded from the international community. Third, Grotius falls back upon the historical contingency of unwritten customs as the source of the identity of the principles of the international community ""properly so called".[94] Here, again, departing from the speculative reasoning suggested by Aquinas, William of Ockham and the Council of Constance, Grotius opens the door to a socially contingent international community. Because he relies upon customary international norms as the *indicia* of the principles of the international community, a historical relativism is built into Grotius' theory. Officials' familiarity with persons and things inside a boundary of legal knowledge inculcates the recognition of shared domestically posited principles as if such persons are 'natural' or universal. A boundary, though, demarcates the international community from extra-law. The physical fact of territory is accepted as a 'given' prior to any sense of the identity of a law. What is known hangs upon the territorial boundary of the state members of the international community.

Once again, a moral and social hierarchy of societies and peoples ensues. The international community does not protect those societies and peoples which lack a territorially-bounded state. Nor does the international community protect

[94] Grotius, *supra* note 79, bk 1, ch. 1, sect. 14(2), p. 44.

nomadic groups which lack a physical *situs* on a state's territory. Nor does it protect migrants whose habitual residence is not the same as the place of birth (*soli*) or of one's blood-line (*sanguinis*) accepted as the basis of membership in a state (therefore in the international community). All this exclusion seems natural. With the above three features of the international community in mind, Grotius has no problem in excluding the traditional societies of the Americas as "uncivilized". Moral progress is built into the international community "properly so called". Levels of social and moral progress manifest the *telos* of sociability. "Uncivilized" peoples have not reached a recognizable stage of sociability. Sociability, of course, is represented by the secular state whose totality of domestic authority rests upon the ultimate title to the property claim of its bounded territory.

4. Kant's Formal Community

Now, the early modern European jurists take for granted a third sense of an international community. Like its predecessors, this community too is paradoxically exclusionary. Here, I particularly have in mind Immanuel Kant (1724–1804). Like his predecessors, Kant takes a territorial state for granted. And like his predecessors, he extends the inter-dependent relations of such states into the emerging diplomatic and secularized world. The members of this international community are self-generating and self-determining states. They are so much so that each is an end-in-itself. The natural person and the state share a pivotal idea: namely, a bounded space within which both natural person and state are free to choose their beliefs, actions, and laws. Such a space, described as a *domaine réservée* or jurisdiction, excluded other persons from trespassing, interfering, scrutinizing or evaluating a state's choices inside its territorial jurisdication.

The resulting international community, for Kant, was a confederation of equal autonomous persons which alone possessed the freedom to decide who were their members and who were not. At face value, peace characterizes such a confederation. Each legal person, as a state, recognizes the other as an end-in-itself. And yet, the other is defined by its territorial boundary. We have already observed with the first sense of the international community, that the community could lack a territoriality. Any social or political entity (such as a nomadic group) would now be excluded from membership in the international community. So too, the territorial boundary delimits and protects the bounded freedom of the state to exclude natural persons as members of the state. The best that the inter-state relations can establish is an aggregated will of each such state.

We are all familiar with Kant's theory of morality. Legal knowledge, as with moral knowledge, is divided between *noumenal* and *phenomenal* worlds. A fundamental gulf separates the two worlds. The *noumenal* is purged of all socially

contingent experiences, including one's biography, memory, expectations, prejudgements and conventions: the study of the person will be "mixed with no anthropology, no theology, no physics or hyperphysics, still less with occult qualities (which might be called hypophysical)".[95] Instead, the *noumenal* is composed of *a priori* concepts. As Kant puts it, "the space [of legal reasoning] is empty, namely, the space of transcendent concepts that is called the intelligible world".[96] Such reasoning, though, must not "flap its wings impotently" for, if it did so, the reasoning "would lose itself among mere phantoms of the brain".[97] As such, legal principles guiding human action risk being "lost in a theoretical world".[98] Even juridical possession of a physical object "is not an empirical concept (that would be dependent on temporal and spatial conditions)", Kant continues. Rather, a law is "abstracted from all spatial and temporal conditions".[99] A law is an intellectual construction and, given the gulf between the *noumenal* and the *phenomenal*, laws are concepts which are then *ex post* applied to social conditions. Like Aquinas' Invisible Author, dignity lacks any further referent for its identity. As such, all legal persons possess a dignity. Kant describes dignity as economically and politically immeasurable because of the person's empty social-cultural content.[100] Accordingly, we are moral if we treat each other as rational persons independent of any social contingency in which the person is immersed. Human rights are not infrequently tinged with this universal emptiness of personhood. Our wills are imperfect because we invariably incorporate our feelings and experiences into our reasoning about *a priori* concepts. This being so, the *a priori* respect towards others is an 'ought'. There is only one Being which would not have such 'oughts'. That is the perfectly pure rational will.[101] Such a will would be divine, Kant suggests, if it exists.

Now, Kant extends this line of thought to the international community.[102] The rational person of the international community, according to Kant, is the state.

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95) I. Kant, *Groundwork of the Metaphysics of Morals*, H. J. Paton (trans.) (Harper & Row, New York, 1964 [1785]) line 77.

96) *Ibid.*, line 428, pp. 35–36.

97) *Ibid.*

98) I.Kant, *Metaphysical Elements of Justice*, J. Ladd (trans.), (Hackett, Indianapolis, 1985 [1797] line 252, p. 49.

99) *Ibid.*, line 253, p. 50.

100) *Ibid.*, lines 77–79.

101) *Ibid.*, line 414, p. 24.

102) As with the second version of an international community outlined above, I initially believed that the idea of a self-generating and self-determining state analytically preceded an analysis of the presupposed autonomy of an atomistic state. Richard Tuck's work has convinced me otherwise. As such, it may be that a great deal of legal thought has been misdirected in that it has begun its analysis with the autonomous individual inside a state rather than with the state and its peoples *vis-à-vis* the international community. *See* R. Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford University Press, Oxford, 2001); *Natural Rights Theories: their origin and development* (Cambridge University Press, Cambridge, 1979).

The bounded freedom of the state cannot be quantified or compared with some other legal entity since the state is an end-end-itself. The state, for Kant, is a mere empty form.[103] The supreme head of the state is invisible in that it "is not an agent but the personified law itself."[104] The head is a mystical "abstract object of thought".[105] This mystical head, better known as the state in Kant's theory, is believed to guard and protect the juridical condition where the intelligible or *noumenal* world applies to and intellectually controls social phenomena.[106] The equality of empty forms, called states, permeates the international community. What Kant describes of the rational person inside a state also applies to the international community. The rationally constructed principles about the confederation of equal states must be applied and enclose the social-cultural phenomena inside the territorial border of each state and therefore inside the boundary of the international community. The international community, like the state and the moral being in Kant's ethics, is also located in the *noumenal* realm emptied of social-cultural phenomena.

It is tempting for a jurist to take for granted that such an international community, based as it is upon the equality and rights of states, ends our story. What more could one want in order to have peace? The problem is that this bounded freedom of a state, as described by Kant, continues and reinforces the earlier acceptance of the international community as an aggregate of the arbitrary wills of states.

To begin with, the identity of a state is embodied with the possession and property claim over territory.[107] A state must protect itself if another state threatens to trespass the territorial boundary and thereby intervene into the bounded freedom of a state.[108] Tuck likens the inter-relations of such territorially bounded states to Hobbes' state of nature.[109] Kant agrees with Hobbes that the state of nature is characterized by the condition where

> each wants to be the judge of what shall be his rights against others, but for which rights he has no security against others, and gives others no security: each has only his private strength. This is a state of war in which everyone must be perpetually armed against everyone else. ... for this state [of nature] is a continual infringement upon the rights of all others through man's arrogant insistence on being the judge of his own affairs and giving other men no security in their affairs save his own arbitrary will.[110]

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[103] Kant, *supra* note 98, line 33. *See* Conklin, *HL supra* note 36, 271–274.

[104] Kant, 'On the Common Saying: "This may be True in Theory, but it does not apply in Practice"', in *Kant's Political Writings*, H. Reiss and H. B. Nesbit (trans.) (Cambridge University Press, Cambridge,1970 [1784]) 77.

[105] Kant, *supra* note 98, p. 109.

[106] *Ibid.*, p. 80.

[107] *Ibid.*, sect. 15.

[108] *Ibid.*, sects. 54, 56.

[109] Tuck, *Rights of War and Peace*, *supra* note 102, 213.

[110] Kant, *Religion within the Limits of Reason Alone*, T. M. Greene and H. H. Hudson (eds. and trans.) (New York, 1960) 89, as quoted in Tuck, *Rights of War and Peace*, *supra* note 102, 208.

Kant explains that, in terms of ethics, natural persons must escape from this state of nature into an ethical commonwealth. But for inter-state relationships, states remain stuck in a condition of nature. The self-regarding state constitutes the basic unit of the international community as Kant understands it.[111] Each atomistic state joins with another into a political or military alliance. Each state is legally bound by a treaty because the state has expressly consented to the terms of the treaty. To the extent that there is a law of the international community the law is constituted from shared domestic legal rules and principles. Although such principles are rational in that they are *a priori* concepts of a *noumenal* realm of knowledge, they are also rational in that they are authored by a state which is located in the same *noumenal* world. But from the outside as it were the shared principles are arbitrary. They exist as happenstance beyond the authorship or rational control of an international community which might exist independent of the states. Kant rejects the idea of a super-state as the source of such an identifiable law. And with good reason, given its preoccupation with the aggregate of the arbitrary wills of states.

The consequence is a confederation constituted from the arbitrary wills of states. As an ideal situation, the confederation will link states together into "a permanent Congress of states".[112] Each state remains self-generating, self-determining and self-perpetuating in such a Congress. The will of each state will be equal with the will of another. Peace will be perpetual because each rational person (each state) will act according to the *a priori* imperatives to which the state has voluntarily consented as a member of the league. Peace will prevail, Kant reasons, if all states respect each other as self-generating and self-determining ends in an intelligible world of *a priori* concepts. Since this rational community will not be perfect, states, like ethical individuals, will need to perform 'oughts'. But respect for other members of the international community is only one such 'ought'. A state is only a member if it has voluntarily consented to join the international community. A state may choose to reserve conditions of acceptance of a treaty. So too, a state possesses the legal authority to withdraw from the international community.

The point that is important, a point which I raise in my next section, is that Kant's theory of the international community lifts the community above the social-cultural content of the shared and unshared legal principles of each state. After all, each state possesses an empty reserved domain whose territorial boundary protects choices, acts and decisions from exterior scrutiny, whether by other states or by institutional institutions. The states themselves are rationally constructed from *a priori* concepts in the *noumenal* realm of knowledge. At first

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[111] Kant, *supra* note 98, sect. 54; 'Perpetual Peace', in *Kant's Political Writings*, *supra* note 104, 93–130, at 101. *See generally*, Tuck, *Rights War and Peace*, *supra* note 102, 208–09, 213.

[112] Kant, *supra* note 98, sect. 61, p. 159.

blush, the international community is rational because it is constructed from the rational (*sc. a priori* concepts of a state's) will. The personal self-interest of the rulers of a state is immaterial to such a rational will. So too, the social-cultural assumptions and expectations in the content of the domestic reserved domain will be immaterial. In brief, legal knowledge will be territorial rather than experiential. And yet, this territorial knowledge will be arbitrarily posited from the standpoint of those principles which states do not share.[113]

The international community must exist for the state members, to be sure. But does the international community exist independent of the state members if the international community is composed as an aggregate of separate but equal states? For Kant, the international community does have a public character. But the international community is composed from the discrete and insular states which, without treaties, exist as if self-sufficient or monadic *vis-a-vis* the international community. The latter exists only in the sense that a state is dependent upon other states – much as a contractee exists because it is dependent upon another person. As Kant puts it,

> [b]ut this alliance must not involve a sovereign authority (as in a civil constitution), but only a confederation. Such an alliance can be renounced at any time and therefore must be renewed from time to time. This is a right that follows as a corollary *in subsidum* from another right, which is original, namely, the right to protect oneself against the danger of becoming involved in an actual war among the adherents of the confederation (*foedus Amphictyonum*).[114]

This confederation of aggregated rational wills easily shifts back into a pre-legal world (which he calls 'the state of nature'), "a nonjuridical condition (like lawless savages)", Kant admits.[115] If that happens, the voluntary confederation dissolves into what Kant understands as a savage world. And the laws of the league will no longer be binding.

The rationally-derived peace amongst inter-dependent states suggests a special sense of international law. International law is the product of an aggregate of the rational, yet arbitrary, wills of states. A treaty resembles a contract between two rational persons. A custom, in a sense, is not the object of a self-conscious authored act.[116] The state parties self-consciously consent to being bound to the terms of a treaty. The international community, then, is the product of consciously posited treaties, not of unwritten customs of which states and individuals are unconscious. The binding character of a treaty rests, in turn, on the fact that all parties to the treaty have consented to its terms.

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113) Conklin, *HL supra* note 36.

114) Kant, *supra* note 98, sect. 54, line 344, p. 152.

115) *Ibid.*, sect. 54, line 344, p. 152.

116) Hobbes makes this distinction in *A Dialogue between a Philosopher and a Student of the Common Laws of England*, J. Cropsey (ed. and intro.) (University of Chicago Press, Chicago,1971[1681] 58–59. Kant usually writes as if a treaty could only be bilateral rather than multilateral.

As with the speculative principles of Christendom and the customary basis of the international community of Vitoria, Suárez and Grotius, Kant's international community once again excludes some societies and inhabitants from the protection of the community. First, the member of the community must be a territorial state. A society which is not organized as a state cannot be a member of the international community. Empires and indigenous inhabitants which lack the administrative organizations of a state, for example, will be so excluded from the protection of the international community. Kant is clear about this. His anthropology reflects a hierarchy with stateless societies lying at the bottom.[117]

This takes us to a second exclusionary factor. The state must expressly consent to the international community to be a member of the international community. This consent excludes those states which refuse to ratify the treaties. A customary norm, the object of an implied consent, is also excluded as a legitimizing feature of the international community.

As a third factor making for the exclusionary character of the international community, the inhabitants of the state members must passively accept the state's laws as binding.[118] Since the state is rational in that it is situated in a *noumenal* world, emptied of social-cultural phenomena, the state is free to decide who are its members. The state is also free to expel non-members, to forcibly transfer members to various parts of its territory, and to diplomatically protect its members.

Fourth, since the international community is the consequence of the wills of states, the inter-relations of consenting states will be characterized by conditions which suggest the need for deliberation and consent: the rule of law, government by rational persons, and a rational freedom. If a social or political entity, such as a traditional society, lacks such deliberative institutions, it will not be recognized as a member of the international community. Tyrannical governments will also be so excluded, for example.[119] State-less inhabitants will also be excluded from protection of the league's laws.

Finally, Kant insists that one must not question why a state's laws, and therefore the international community's laws, are binding. This contrasts with the very idea of peremptory norms of an international community.[120] Kant is preoccupied with the identity of a law rather than the binding character of that law. The identity of a law is locatable in the institutional sources of the *domaine réservée* of a state. It can be located in the writing of an author whether the author be a

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117) *See* Harvey, 'Cosmopolitanism and the Banality of Geographical Evils', 12 *Public Culture* (2000) 529, 532–536.

118) *See especially* Kant, *supra* note 98, line 317, pp. 82–83.

119) *See generally* Tesón, 'The Kantian Theory of International Law', 92 *Colum. L. Rev.* 92 (1992) 53, at 84–86.

120) This idea is developed in Conklin, 'The Peremptory Norms of the International Community'. in *European J Int'l L* (forthcoming).

legislature, a court or the state itself. An international law can be identified in the written contract between two or more states.

Indeed, Kant is quite explicit that the jurist and the philosopher ought not to ask the question: 'why are states bound to some international community?' Kant even raises this concern in his "What is the Enlightenment?".[121] Members of the international community must possess a spirit or desire to recognize other members as equal and as autonomous ends-in-themselves. As he ends the *Foundation of Morality*, Kant recognizes that the analysis of imperatives in the metaphysical world is conditioned *as if* everyone desired such a morality.[122] Kant lacked a response to anyone who did not possess such a sense of morality. Similarly, one just could not question why laws are binding upon a state's members. Any such effort is considered treasonous.[123] And so, Kant holds that the legal order of the state should proscribe sedition, revolt and the execution of the head of the state. This is so even if the latter has "misused his authority".[124] As Kant explains in the *Metaphysics of Justice*, human laws may punish, execute or exile anyone who even "scrutinizes[s]" or is "overly curious" about the legitimizing origin of a state's laws.[125] As Kant puts it in the *Metaphysics of Morals*, the supreme authority (*summum imperium*) of human laws

> is so holy and inviolable that it is a crime even to doubt it or suspend it for an instant [that it] is represented as coming, not from human beings, but from some kind of highest perfect legislator. That is the meaning of the statement, 'All authority comes from God' which is not an historical explanation of the civil constitution, but an Idea that expresses the practical principle of reason that one ought to obey the legislative authority that now exists, regardless of its origin.[126]

If there were no untainted *a priori* concept at the foundation of a domestic legal order, there would be no finality in one's quest for the foundation of the legal order. Without a foundation, we would not know why a human law, as an *a priori* concept, is binding. Any examination of such an origin would raise "pointless questions that threaten the state with danger if they are asked with too much sophistication by a people who are already subject to civil law".[127] The state, as a person of the international community, represents the *summum imperium* (supreme political authority).[128] State officials and members of the international

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121) Kant, 'What is the Enlightenment?', in *Kant's Political Writings*, *supra* note 104, 54–60, at 59.
122) Kant, *supra* note 95, line 463, p. 62.
123) This is documented elaborated in detail in W. E. Conklin, *Invisible Origins of Legal Positivism* (Kluwer, Dordrecht, 2001) 47–54.
124) Kant, *supra* note 98, line 320.
125) *Ibid.*, line 318, pp. 123–124.
126) *Ibid.*, line 319, p. 124.
127) *Ibid.*, line 318–319, p. 124.
128) *Ibid.*, line 318, p. 229. *See also* 'General Remarks' in Kant, *ibid.*, line 319, p. 84.

community just have to *believe* on faith in the binding character of the laws of the international confederation.

Not surprisingly, given his predecessors, Kant relies upon territoriality for the boundary of a state member of the international community. Territoriality is a physical fact. It can be perceived, unlike *a priori* concepts. A territorial boundary is linear without all the complexities and nuances of concepts. More, Kant lives in a European culture where the state's identity rests upon the control and title claim to territory. The territorial boundary delimits the autonomy of the state. It also suggests when the state may punish some natural persons and not others because they are outside its territorial boundary.[129] Territoriality is prior to Kant's international community.

The Kantian view of an international community, then, risks being reified *vis-à-vis* the social *ethoi* of the state members of the community who find themselves both inside and outside the international community. The social-cultural assumptions and expectations are a remainder or left-over to Kant's international community. The social-cultural assumptions and expectations of state officials as well as inhabitants of the territorial state exist independent of the formal equality and empty laws of states and their international confederation. Arguments about concepts, though, count as knowledge. Rational coherency displaces the assumptions and expectations of diverse societies. Ironically, the secularization of the international community hinges upon *a faith* that there will be a consensus based upon arguments in a *noumenal* world of *a priori* concepts purged of social-cultural content. The consequence is the high risk that societies, groups and individuals will once again be excluded from the international community if they do not fit the form of a domestic legal order of empty written laws. And, the emptiness of the international community as an aggregate of empty states risks functioning as a camouflage for the arbitrary power relationships between states and inside the territorial borders of states. Peremptory norms are a misnomer in Kant's international community.

5. The International Community as the Social Content of an Empty Form

Kant's sense of an international community, as an empty form of an aggregate of the arbitrary wills of self-generating and self-determining states, leads us to a fourth early sense of the international community. In this case, the international community is identified in terms of its social-cultural content. The content is nested in the phenomenal world of historical contingencies, a world which Kant excluded from the identity and nature of the international community. The most

[129] *Ibid.*, line 253–254, pp. 50–52.

important feature of such contingencies is time as self-consciously experienced. And the crucial factor in the emergence of an international community is just such a self-consciousness. Such a self-consciousness reflects about the subject's boundary of knowledge. The one early modern jurist who addresses this possibility is Georg Frederich Hegel (1770–1831) whose theory of the international community is primarily elaborated in his final paragraphs of *Philosophy of Right* and in the introduction to his *Lectures on World History*.[130]

Although it is not easy to elaborate Hegel's theory of an international community in a little section of an article,[131] the key idea that is material for my purposes is that his theory too presupposes a boundary which excludes some societies, groups and individuals from the community. Unlike earlier versions of the international community, though, Hegel's community is not fixed in calendar time. Rather, there is a continuous stream of bounded international communities. Each emerges from the content of the self-consciousness of inhabitants. The community is continually changing. It is changing by virtue of the social-cultural assumptions and expectations which embody the content of the shape. We have a term for this embodiment of the international community. It is an ethos. Each ethos has a boundary which functions as legal objectivity. Hegel describes how the family, civil society, and a constitutional society – each with several distinct shapes – emerge into shapes of an international community or what he calls 'world history'. Each shape of self-consciousness recognizes a boundary which separates objectivity from the subject. My four images of an international community exemplify similar waves of such shapes of self-consciousness.

The consequence, then, is that there is not one legal objectivity 'out there' separate from subjects such as states (and now as natural persons and international organizations are at issue). Rather, there is a never-ending emergence of boundaries of an international community, which boundaries we take as the threshold of legal objectivity. There is no 'given' international community locked in calendar time. Instead of the referent of legal analysis being such a boundary, though, Hegel encourages us to recognize that we create the boundary in self-conscious reflection. Our social-cultural assumptions are crucial in such a creation. We thereby bring meaning *into* what we take as the boundary which we have created of our knowledge. And so, although with Kant, treaties are important *indicia* of the boundary of the international community, unwritten norms are also relevant in the analytic enterprise. Both are objects of human construction and human self-reflection.

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[130] Hegel, *Elements of the Philosophy of Right*, A. W. Wood (ed.) and H. B. Nisbet (trans.) (Cambridge University Press, Cambridge, 1991 [1821]). [PR]. Cited by para no. Remarks (R) by Hegel; *Lectures on the Philosophy of World History: Introduction*, N.B. Nisbet (trans.) and D. Forbes (intro.) (Cambridge University Press, Cambridge, 1975). [PH.] Cited by page number.

[131] It is even difficult to do so in full-fledged book. *See* Conklin, *HL supra* note 36.

The standard against which we can say that an international community exists, then, is the extent to which a social group, such as an ethnic nation (in Hegel's view), is self-conscious: that is, conscious of itself in relation to the boundary it has presupposed of its group. Despite Hegel's claim that the state is the only legal person of the international community (and despite the commonly held view that the organic state is Hegel's final shape of self-consciousness), Hegel emphasizes that the state is not an end-in-itself. By becoming increasingly self-conscious, the state, as a subject of international legal objectivity, might well dissolve into some other subject and object of self-consciousness. This higher level of self-consciousness, for Hegel, constitutes progress.

This continual movement of self-consciousness emerges from the pre-legal traditional (tribal) society. As with H. L. A. Hart, the self-consciousness of an international community must "leap" (Hegel) or "step" (Hart) from such a pre-legal society to a modern one.[132] Since the state is a creation of human action, the state, like the individual natural person, is a subject. The state, though, is a subject of the legal objectivity of the international community in contrast with the natural person who is the subject of the legal objectivity of the state. The state, though, is not fixed in experiential time. Nor is the international community. A state-centric international community, constituted from treaties and internationally shared customs, is only one shape of an international community. So too, an international community carved from a *noumenal* world of *a priori* concepts is another. The important point for our purposes, a point that commentators often fail to acknowledge, is that what commentators might understand as the only international community – one which exists from the recognition by one state that it is dependent upon another – is just one of several shapes of an international community which have emerged from Europe. A state is important because it is constructed by consciousness, not by nature. Further, the state itself, as a self-conscious author or creator, may well emerge into a different bounded international community. What is important for Hegel is the subject's reflection about what the subject has heretofore taken for granted.

Now, the crucial thing to note here is that, endemic to self-consciousness, according to Hegel, an individual or a group always exists exterior to the boundary of any shape of an international community. Unlike the boundary of Aquinas (which is nested in the metaphysical world) and unlike the boundary of Vitoria, Grotius, Kant and others (which is physically locatable on territory), the boundary of the international community in Hegel's view rests in the self-consciousness of a subject. There is always some exterior boundary of consciousness, then, which excludes peoples from the ever-moving thinking subject. The ultimate

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[132] The leap from an indigenous to a modern society is examined in Conklin, 'European Civilization, Indigenous Peoples and Hegel', in M. Irvine (ed.), *The Identity of European Civilization* (University of Waterloo Press, Waterloo, forthcoming).

form of the state is an organic constitution where each and all members of the state bond with each other and with the state. Such a social bonding legitimizes the state's laws. Put differently, the state's laws are binding by virtue of the social bonding of the members of the state. But even such a bounded and bonded state finds itself constrained by an objectivity beyond the state.

Hegel's theory of an international community suggests a second exclusionary feature. Communities unorganized in the form of a state will be excluded. Nomadic and traditional (or tribal) communities will be excluded. They lack a centrally organized state with a governmental structure claiming ownership of a bounded territory. In the 19th century (and even today), international law jurists described them as savage and barbaric.[133]

The European family of nations, as the international community, marks a "leap" from such "pre-legal" societies to a society which is the product of self-conscious thinking about concepts of legal objectivity.[134] The international community only exists, first, *after* a society has leapt into a world where state officials are self-reflective as manifested in a state's acts and laws; and, second, *after* such self-reflection recognises the society as a nation-state. Because statutes or codes are the product of self-conscious writing by institutional authors (legislatures and courts), such writing also manifests the leap from the pre-conscious habits and customs which are said to characterize a "primitive" immediacy manifested in a traditional society or a family.[135]

As with the family, civil society, a constitution and international law, the pre-legal societies, though excluded from the international community, do experience various levels of self-consciousness.[136] Indeed, Hegel offers a social hierarchy of African, North and South American, Asian and European societies with the indigenous peoples of the Americas, the Mongols and Arabs representing the lowest level of civilization.[137] Even the Greeks, Romans and Chinese of his day are said to lack the mark of civilization because they lacked a state-centric governmentality. Such a centralized author would bring rationality to the boundary of objectivity in knowledge.[138] Even the lowest civilized peoples, though, can become self-conscious and thereby progress into full-fledged members of the

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[133] Hegel, *PR supra* note 130, 249R, 257R, 310, 349, 349R, 351; A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, Cambridge, 2004).

[134] The requirement of this "leap" has been emphasized by H. L. A Hart and the Canadian Supreme Court as well as by Hegel. *See* H. L. A. Hart, *Concept of Law*, P. A. Bulloch and J. Raz (eds. with a postscript), 2nd edition (Clarendon, Oxford, 1994, [1961]). Interesting a former Chief Justice of the Canadian Supreme Court uses remarkably similar terms (the "formal legal step" required from custom to writing) in Re: Resolution to amend the Constitution, [1981] 1 SCR 753, at 857.

[135] Hegel, *Lectures on Natural Right and Political Science*, J. M. Stewart and P. C. Hodgson (trans.) (University of California Press, Berkeley, 1995)126.

[136] Hegel, *PH supra* note 130, pp. 122–123.

[137] *Ibid.* at 156, 164–171.

[138] *Ibid.*, at 79, 81, 137–139; Hegel, *PR supra* note 130, para. 351.

international community. To begin with, the ethnic nation manifests the social-cultural content of a state. In a family, one acts immediately or without reflection beforehand. The customs and collective memories of the family are accepted without more. Antigone's decision to enter the desert sands in order to bury the body of her deceased brother was such an act without reflection, according to Hegel. She just went out and did it. A family's members do the same unless, of course, they hire a lawyer.[139] This sense of immediacy between state (family member) and the family (the international community) extends to what Hegel calls "the European family of nations". When a state incorporates an ethnic nation, the state is given a body. The ethnic nation embodies the form of the state. Hegel describes the international community as such a system of embodied ethnic states which appear to be self-conscious (that is, secular in the sense of being independent of any theological universalism such as Christendom).[140] The domestic laws of a state are binding because, by virtue of the ethnic bonding, natural persons bond with the content of the state's written laws. The family of nations manifests a shared ethical life or *Sittlichkeit*.

To be sure, this family of nation-states is only one shape of the collective legal consciousness of thinking individuals. As with earlier moments of consciousness such as the traditional (or tribal) society, a society based upon property, or a society based upon contract, another embodiment of the international community will emerge through self-conscious reflection about one's relation with objectivity. As such, the boundary of the international community is not a physical object, such as a territorial border of a state, but an object of the consciousness about the relation of a subject to an object. The boundary is territorial-like. The jurist, in order to understand the legitimacy of the international community, will examine the social-cultural assumptions and expectations inside the territorial-like boundary in terms of their ethicality. The ethicality of the content of the community is nested in reciprocal recognition of natural persons in an organic constitutional order.[141]

The subject/object, though, passes through never-ending shapes of objectivity. Like the individual subject inside a state's borders, the organic state itself becomes the subject *vis-à-vis* the international legal objectivity. This slow development of legal consciousness is represented by the emergence of the early European state from a feudal system and of the colonial state from 'pre-civilized' indigenous groups.[142] The latter lacked a state-centric community. Although one might

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[139] Unless, of course, they retain a lawyer and thereby break the possibility of a social community.

[140] Conklin, *HL supra* note 36, pp. 202–204, 275–277.

[141] Hegel's sense of ethicality is elaborated in Conklin, *HL supra* note 36, 162–187. Such a community embodies the self-consciousness of jurists. *See* Hegel, *PR, supra* note 130, 249R, 257R, 310, 349, 349R, 351.

[142] Anghie, *supra* note 13, p. 17, note 56. Anghie suggests that "family" and "community" were used interchangeable amongst positivist theories such as that of John Austin.

associate a lack of civilization with an absence of high culture and education, as we might today, the key element for Hegel was the reflective thinking subject. This self-reflecting character of the subject was associated with civilization. In sum, Hegel takes us to a further exclusionary phenomenon. Nested in Hegel's theory of the international community there is, once again, an exclusion of societies which, according to Hegel, lack thinking members.

Thus, the international community of states with a bounded freedom and of rights of legal persons, all emptied of social-cultural content, is only one shape of an international community. Such an international community exists without a consideration of the social-cultural assumptions of the ethos of such a shape. The boundary of such an international community invariably excludes societies, peoples, groups and individuals from its membership and protection. The sustained quest of each individual to become self-conscious of the exclusive character of the European family of nations suggests the possibility that a very different shape of the international community is emerging in our legal consciousness. This emerging shape is represented by peremptory norms. That Hegel did not foresee an emergence of such an international community is not reason to suggest that it may not be emerging today.

6. The Exclusionary Boundary of an International Community

Now, there is an important presupposition which each sense of an international community shares. Each presupposes a boundary which excludes societies from the community. Without the boundary, there would be no freedom, it is believed. The boundary of Christendom differentiated Christendom from the non-Christian communities. When jurists begin to understand the boundary of the international community independent of the speculative reasoning of Christian priests, two important features characterize this emergent international community. First, although Vitoria and later Pufendorf entertain that international customary norms can render written domestic laws of a state void, even the appeal to customary norms, shared with Suárez and Grotius, are exclusionary. For one thing, the customary norms presuppose a territorial border around the legal space of the community. For another, the customary norms, being historically contingent, vary through time. What is peremptory in one epoch may lapse through time. In addition, the international community is constituted from the implicit consent of states.

The early modern jurists offer a second feature of the international community. What is critical here is their presupposed belief that the laws of the community are binding by virtue of their source in an author, the state being the author. Such an author is self-generating and self-determining. The jurist need not press beyond the relation of an international law to the author. Indeed, the state is so much a self-generating and self-determining author that it is sometimes

considered monadic. This assumption remains with many state officials today, including those of the dominant states in the international community. A boundary respects and protects a jurisdictional freedom of each author-state. Accordingly, the early state of Grotius in particular absorbs the universalism which Christendom had considered its own. The crux of this universality was the territorial border of the state. The boundary of the international community thereby conflated into the territorial boundary of each state. The knowledge about laws attributed to the international community had become territorial.

Kant, of course, leaves customs to a phenomenal realm. Instead, the domestic and international legal orders exist by virtue of *a priori* concepts: that is concepts which are prior to experience or phenomena. What one needs to appreciate, though, is that Kant too presupposes that there is something analytically and anthropologically before the *noumenal* knowledge about such *a priori* concepts. This is the territorial boundary as the limit of legal knowledge. As with his immediate predecessors, Kant takes for granted that a territorial boundary protects the negative freedom or jurisdiction of a state. The international community, in turn, protects such a freedom within which the state may recognize some natural persons as its members and others as non-members.

Since each state must claim a radical title to territory, the international community hinges upon the property interests of its state members. As Kant emphasizes,

> [t]his rational Idea of a peaceful, even if not a friendly, universal community of all nations on earth that can come into mutual active relations with one another is not a philanthropic (ethical) principle, but a juridical principle. From the fact that *nature* has enclosed all nations within a limited boundary (because of the spherical shape of the earth on which they live, as a *globus terraqueus*), it follows that the *possession of the land* on which an inhabitant of the earth can live can always be conceived only as the possession of a part of a determinate whole, such that every person can be conceived as originally having [had] a right to it. Accordingly, all nations originally hold a community of the land, although *it is not a juridical community* of possession (*communion*), and therefore of use, or community of ownership of the same.[143]

A state's mere possession of territory, of course, differs from a juridical claim of property. As Kant writes, "all nations originally hold a community of the land, although it is not a juridical community of possession (*communion*), and therefore of use, or community of ownership of the same".[144] The territorial boundary of such a juridical community is incorporated into the international community.[145]

As a consequence, the very identity of a law of the international community – whether of customary norms or of *a priori* concepts – rests upon a presupposed

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[143] Kant, *supra* note 95, sect.62, p. 160, emphasis added.
[144] Kant, *supra* note 98, sect. 62, line 352, p. 160.
[145] Kant, *supra* note 95, sect. 13, p. 62.

territorial boundary. A state's laws are identifiable precisely because legal knowledge only takes form as rules or principles recognized inside the bounded territorial space.[146] Legal knowledge is territorial even prior to *a priori* concepts. The problem is, however, that each state excludes peoples by virtue of its presupposed territorial border. The border divides outsiders from insiders. The most obvious excluded societies from membership are, in Kant's day, the indigenous peoples of North America, Africa and Asia.[147] Indeed, this very exclusion drove the dominant 18th, 19th and 20th century European states to colonize and 'uplift' excluded peoples into territorially bounded entities recognizable as states. Until so recognized, they were considered unknowable from the standpoint of the international community. Kant, arguably the founding father of universal human rights, is explicit about such an exclusionary character to the international community.[148] Social progress was believed to have a place on a territory when a society emerged from the stateless condition to a state-centric condition. Despite the fact that large numbers of inhabitants may have continuously inhabited a territory through time, they remained unrecognized as legal persons with rights and duties. Such territory was considered *terra nullius*.[149]

As an example, and only as an example, Marshall CJ of the US Supreme Court explained during the early 19th century that only state-centric political entities were members of the international community.[150] Indigenous societies were "dependent nations" – dependent upon states. A territory was "unsettled" if it lacked a centralized political structure which claims title to the territory.[151] The international community could only be considered existent if the jurist presupposed territorial knowledge. Such knowledge hinged upon the possession and title to exclusive property.[152] The Africans, in contrast, were considered at a lower level of civilization because they did not possess autonomous political groupings which resembled the state-centric European family of nations.[153] Thomas Lawrence (1895) shared this exclusionary character of the state-centric international community:

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146) Kant, *supra* note 98, sect. 61, line 349, p. 158, sect. 62, line 351–253, pp. 159–161.

147) *See also* Hobbes, *Leviathan*, C.B. Macpherson (ed. with intro.) (Penguin, London, 1968 [1651]), ch. 30, 378. *See also* Rousseau, *On the Origin and Foundation of the Inequality of Mankind* in *The Social Contract and Discourses*, G. D. H. Cole (trans. with intro.) (Everyman's Library, Dutton, N.Y., 1913 [1755) 119–229, at 161, 219.

148) Harvey, 'Cosmopolitanism and the Banality of Geographical Evils', 12 *Public Culture* (2000) 529–564, at 532–536.

149) *Campbell* v. *Hall*, 1 Cowp. 204, 212, 98 E.R. 1045 (1774) (Lord Mansfield).

150) *Johnson and Graham's Lease* v. *M'Intosh* (1832), 8 Wheaton 543, 21 US 240, *Worster* v. *State of Georgia*, (1832), 6 Peters 515, 31 US 530.

151) *Campbell of Hall*, 98 E.R. 1045 (1774, King's Bench).

152) *Worster* v. *State of Georgia*, 31 U.S. (6 Pet.) 5125 (1832); The Antelope, 23 U.S. (10 Wheaton) 5 (1825); *Johnson and Graham's Lease* v. *M'Intosh*, (1823), 21 U.S. 240, 8 Wheaton 543 (1823); *Cherokee Nation* v. *State of Georgia*, 30 U.S. 1, 17 (1831).

153) *The Antelope*, 23 U.S. (10 Wheaton) 5 (1825), p. 66 (as quoted by Anghie, *supra* note 13, 23).

> Occupation as a means of acquiring sovereignty and dominion applies only to such territories as are no part of the possessions of any civilised states. It is not necessary that they should be uninhabited. ... All territory not in the possession of states who are members of the family of nations and subjects of International Law must be considered as technically *res nullius* and therefore open to occupation. The rights of natives are moral, not legal.[154]

The very idea of a family of civilized states entertained a moral duty of the family of European nations to "extending civilized rule over backward tribes" and thereby raising them "to a higher plane of existence".[155] All nomadic peoples were excluded from the "family of nations". So too, John Westlake explains in 1866 that one had to distinguish between civilized and uncivilized peoples by virtue of whether a people inhabited a fixed territorial location with state-centric institutions.[156]

Now, this presupposed territorial knowledge about an international community continues into Hegel's understanding of the relation of a subject to the international community. Unlike the first sense of such a community which is derived from and located in metaphysics, unlike the second sense of a community which is derived from and identifiable in customary norms and unlike the third sense of a community which is derived from empty *a priori* concepts, Hegel's sense of an international community is nested in the self-consciousness of subjects. The objectivity of such self-consciousness is delimited by a boundary. The members (the states) of the international community are the product of thinking persons who share an ethos. International laws are the consequence of reflection about the relationships inside the boundaries of concepts. For this reason, the boundary of the international community (and of a state or an autonomous individual) is 'territorial-like' in our consciousness. The territorial-like boundary delimits what counts as knowledge. The bounded knowledge, protected by the boundary of a state's jurisdiction, is forever changing and, therefore, so does the territorial-like boundary of the international community.

The international communities of Hegel's theory, though, are doubly territorial. First, Hegel himself is a figure of his own times. As such, he recognizes the member subjects of the international community of his day as territorially bounded states. Such a territorial boundary of a member-state of the international community necessarily excludes societies, social groups and natural persons from membership in the international community.

Second, the jurist or other member of the international community constructs the boundary of the international community from its/her/his own

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154) T. Lawrence, *The Principles of International Law*, revised by P. H. Winfield, 7th edition (Macmillan, London, 1937) 148.

155) *Ibid.*,156.

156) J. Westlake, *Elements of International Law* , R. H. Dana (ed. with notes), 8th edition (Little Brown, Boston, 1866 [Classics of International Law, ed. by James Brown Scott]) 26, 49–50.

self-consciousness. The exteriority of the territorial-like boundary of legal consciousness or knowledge is unknowable and therefore unrecognizable. It is extra-legal, non-law or pre-legal. I frequently hear it described as 'philosophy' out there beyond the boundary. Although there may well be physical objects and human beings 'out there' beyond our knowledge of the boundary of the international community, the boundary forecloses us from recognizing them as legal persons. For Hegel, there is always going to be a territorial-like boundary in the sustained drive of member-subjects to become self-conscious. As such, for Hegel, any international community as a whole is just "another nation".[157] Hegel does not counsel nor describe what "another nation" might look like once the thinking subject becomes self-conscious of 'new' members of the international community. That "another nation" is possible, though, there is no doubt.

7. Conclusion

It is a mistake to believe that the very idea of an international community is a relatively recent idea. And it is also a mistake to fail to grasp that various features of earlier images of the international community may well find their way into contemporary treaties, judicial decisions and commentaries. This is so because, as Hegel emphasizes, the international community is not an empty form but an embodiment of assumptions and expectations of its members. The challenge for the international law jurist is to become self-conscious of such assumptions and expectations.

The early modern legal thought has presupposed four shapes of the international community. One such shape is nested, for example, in the association of the international community with Christendom. This shape of the international community is traceable to the canon law of the late medieval period, particularly in the work of Thomas Aquinas and William of Ockham. Here, the community was believed to be authored by an invisible author in the metaphysical world of knowledge. Such a view was displaced by Vitoria, Suárez and Grotius who appealed to humanly constructed norms which states shared in their domestic laws. Kant returns to the metaphysical world only in his case, the international community is humanly constructed. The consequence, for Kant, is that the international community is considered prior to social phenomena – that is, it is constituted from *a priori* concepts ('prior to experience'). Such a community, at Kant's insistence, is separated from the social-cultural *ethoi* of a phenomenal world. Despite its locus in a world of *a priori* concepts, Kant presupposes that the

[157] Hegel, *PR supra* note 130, 347R; Conklin, *HL supra* note 36, at 127–131, 294–297.

international community is an association of self-generating and self-determining author-states. As a consequence, the territorial boundaries (and therefore exclusionary character) of states are incorporated into the international association. The international community exists by virtue of an aggregate of the arbitrary wills of states which only enter into the confederation.

Hegel returns the jurist to the social-cultural phenomena which Kant had excluded from legal knowledge about the international community. By grounding the community in social-cultural phenomena of which subjects are become ever more self-conscious, Hegel recognizes that the international community will evolve through time to such a point that a "world history" or international legal order will exist for states (and indirectly for individual members of states) as well as exist independently of the state members. It just so happens that in Hegel's time the territorially bounded state had become the primary member-subject of the international community. How a peremptory norm could be considered binding independent of the territoriality of a state when historically contingent in the one context (as in the second shape of an international community) or abstracted from social-cultural contingencies in the other (as in Kant's) remains mystifying.

The possibility that there might be peremptory norms which trump the acts of state members arises in Hegel's theory of international law. Hegel attempts to address the possibility that the international community is more than a representation of the wills of its member-subjects: that is, it exists more than just *for* its members. The international community must also exist separate and independent of its members. In the latter case, the community is an *in itself*. It exists as an objectivity but the objectivity is constructed by the member-subjects in their self-consciousness. Because it is independent of the subject-members, Hegel poses the pressing issue often forgotten by contemporary jurists, 'why is an identifiable law of an international (or domestic) institution binding upon the community's members who strive to think about their relation with such an objective community?'

The issue which remains is whether it is possible that peremptory norms, often described as *jus cogens*, trump the domestic laws and actions of states and the actions of international officials.[158] To be sure, so long as the international community presupposes a territorial sense of knowledge there will always be outsiders to what is known and knowable by jurists. The predicament of state-less persons follows just such a prospect. The structure of the legal knowledge, whether of customary norms or empty *a priori* concepts, just cannot incorporate state-less

[158] *Jus cogens* refer to "peremptory principles or norms from which no derogation is permitted". J. Starke, *Introduction to International Law*, 7th edition (1972) 59; Human Rights Committee, *General Comment 31*, para. 2, U.N. Doc. CCPR/C/21/REV.1/ADD.13 (May 26, 2004); *Restatement (Third) of Foreign Relations of the United States* 2 § 702 cmt. o, at 161 (1987).

natural persons into the international community so long as membership and the community are manifestations of territorial boundaries. To this end, Jans Bartelson argues in his *Visions of World Community* that an international community is possible if it is boundless.[159] And it will be boundless, Bartelson claims, if jurists abandon the very notion of a territorial boundary.[160]

The problem is that we have already observed how one sense of an international community (Aquinas' and William of Ockham's sense of Christendom) which lacks a territorial boundary and yet which remains exclusionary. We have also observed that territoriality itself figures in several waves of a never-ending (it seems) stream of self-consciousness. Adda Bozeman identified other international communities where territoriality was not the dominant feature.[161] Even if one rejects Hegel's theory, one has to question whether a global world, as Bartelson imagines, will bring closure to the continual movement of shapes of international communities in human self-consciousness.

There is another complication to Bartelson's vision. Even if all natural persons, all states, all international organizations and all non-governmental organizations of the globe were legally recognized members of the international community, Hegel urges us to direct our attention to concepts presupposed in the *de facto* social-cultural practices inside such a community. There may be *pro forma* members of the community. They may have rights entrenched in texts. They may even be recognized as legal persons. And the international community may no longer protect one special legal person – the state or a natural person, for example – as possessing a *domaine réservée*. And yet, that special legal person may be treated by international or domestic institutions as if s/he/it does not exist in social actuality. S/he may be tortured or denied public education or live in extreme poverty or lack clothes. S/he may be enslaved or risk being killed if s/he walks onto the street. S/he may be forcibly removed to an alien environment albeit under the same legal name with which s/he has associated her/his country or family. These and other (likely) social circumstances today raise the prospect that even if all natural persons and states are formal members of the international community, they are not *de facto* members.

The latter possibility and the possibility that a non-territorial boundary may identify the international community still raises the prospect that peremptory norms exist despite the fact that members have not expressly or implicitly consented to the norms. This is so if jurists heed Hegel's effort, however limited, to examine the social-cultural ethos of an otherwise empty form of an international community. Such an effort begs that the jurist ask whether the legal order of such a community possesses certain assumptions and expectations without which

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159) Bartelson, *Visions of World Community*, *supra* note 73.
160) *Ibid.*, 177.
161) Bozeman, *supra* note 15.

the community just cannot exist. In this vein, can a jurist admit that an international (or domestic) legal order exists, for example, if international or state officials may commit torture, directly or through surrogates, as if social practices had returned jurists to medieval times? Does a legal order of the international community exist if international or state officials look askance to acts of genocide, internal mass displacement of peoples, enslavement, mass disappearances, prolonged arbitrary detention, systematic racial discrimination, or a consistent pattern of gross violations of internationally recognized human rights, these being suggested as important peremptory norms?[162] Simply citing *jus cogens* or *erga omnes* hardly establishes why any identifiable norms in such a legal order are binding. Jurists may well be able to identify international laws from treaties and international customary norms, from *opinio juris* and shared principles amongst member states. But if the above social and political practices exist somewhere on the globe, are such identifiable laws of an international (or domestic) community binding upon its members? Does the community exist as a legal order?

[162] These are offered as peremptory norms by Article 702 of the *Restatement (Third) of Foreign Relations Law of the United States* v. 2 § 702, at 161 (1987). Jean Allain has added the principle of non-refoulement in 'The Jus Cogens Nature of Non-refoulement', 13 *Int'l J. Refugee L.* (2001) 533, at 533–558.