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הקתדרה לזכויות האדם
על שם אני ופול ינוביץ'

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Community Interests Across International Law: Introduction

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Community Interests Across International Law: Introduction

Eyal Benvenisti and Georg Nolte

The Introduction describes the term "community interests" for the purpose of exploring the extent to which states owe duties toward those who are affected by their actions and omissions. It argues that the relevant "communities" which are envisaged by the book extend beyond the "international community of states" to cover individuals and groups, even when their interests were not taken into account at the negotiation table or in policymaking bodies. The community can also be humanity at large, as reflected in the concept of crimes against humanity. As far as "community interests" are concerned, the Introduction explores questions related to the identification of these interests, the prioritization among them and their achievement. The Introduction outlines a typology of duties states might have toward others.

I. Introduction

This book explores the extent to which contemporary international law expects states, when forming and implementing their policies, negotiating agreements, and in general conducting their relations with other states, to take into account the interests of others, namely third states or their citizens. The contributions to this book also inquire whether international law imposes on states in certain situations not only the duty to consider the interests of people outside their territory or control but also the duty to accommodate them – at least to a certain extent.

While early views about the nature of international law already recognized a global society that nurtures community-wide obligations,[1] the approach that crystallized during the 19th century, and which remains powerful today, suggests that international law is essentially based on more or less specific inter-state consent. The primacy of such consent as the source of international legal duties originates in a view of international law as being principally focused on states respecting each other's sovereignty, ensuring that *pacta sunt servanda* and respecting general practices that are accepted by them as law.

[1] *See* Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT'L L. 295, 301-02 (2013).

There is, however, no inherent contradiction between consent-based positivism and solidarity.[2] Indeed, the pre-WW II solidarist tradition in international law saw itself as being fully compatible with the reigning positivist approach to international law.[3] It is the later rethinking of the role of positivism in law generally, and in international law specifically, which was inspired by concepts of natural law or the notion of human solidarity that is grounded in global fraternity. Such a vision of international law also transcends a view of a world of sovereign states as narrowly self-interested entities and implies that states, in certain matters, promote and respect community interests, and, more importantly, they recognize obligations to the human community.[4] The Universal Declaration of Human Rights is an early example for the recognition in the global sphere of community interests beyond specific state interests whose protection and promotion is a collective duty. In more recent times, and particularly in the post-Cold-War era, political realities, technological changes and the sense of growing interdependence have generated efforts to articulate what human solidarity means for international law as a framework to secure a sustainable future for all. This effort is reflected in different representative areas of law. One characteristic feature is a shift of the interpretative emphasis from the original specific consent of the contracting parties to the protection of individuals or to collective interests more generally (e.g., in human rights law, international humanitarian law, refugee law, the interface between trade or investment law, and the protection of the environment), or where treaties and other rules and principles of international law recognize and seek to promote community interests (e.g., "the common heritage of mankind," or the concept of *jus cogens*).

There is, of course, no sharp distinction between a consent-based and a community interest-oriented international law. Treaties, as consent-based instruments, often articulate and specify

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[2] *See* Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 RECUEIL DES COURS 217 (1994) (defining community interests 'as **a consensus** according to which respect for certain fundamental values is not to be left to the free disposition of States individually or *inter se* but is recognized and sanctioned by international law as a matter of concern to all States.' (our emphasis)).

[3] STEPHEN C. NEFF, JUSTICE AMONG NATIONS, 285-97, 373-78 (2014); Stephen C. Neff, *A Short History of International Law, in* INTERNATIONAL LAW 3 (Malcolm Evans ed., 3rd ed. 2010).

[4] GEORG JELLINEK, DIE LEHRE VON DEN STAATENVERBINDUNGEN [THEORY OF INTERNATIONAL FEDERATIONS] 92-96 (1882) (on Jellinek's approach see Jochen von Bernstorf, *Georg Jellinek and the Origins of Liberal Constitutionalism in International Law*, 4 GOETTINGEN J. INT'L L. 659, 672-73 (2012)); Armin von Bogdansky, *Common Principles for a Plurality of Orders: A Study on Public Authority in the European Legal Area*, 12 INT'L J. CONST. L. 980, 984 (2014) (also in § 232 Prinzipien von Staat, supranationalen und internationalen Organisationen, *in* XI HANDBUCH DES STAATSRECHTS 275 (Dritte Auflage, Josef Isensee, Paul Kirchhof eds., 2013)).

community interests. And non-consent-based approaches to international law have never denied that consent and treaties have an important role to play in the realization of community interests. The question is rather the determination of the relative role of specific consent on the one hand, and the recognition and reception of broader community interests in international law on the other.

This book does not attempt to explore the very idea of community interests in international law or to offer a theoretical grounding for either of the competing visions of community interest and resulting obligations. Instead, the book explores various manifestations of what has been described as community interests in most areas regulated by international law. Accordingly, this book takes stock of the state of contemporary international law and observes the extent to which the law has in fact evolved from a legal system based on more or less specific consent and aimed at promoting particular interests of states to one that is more generally oriented towards collectively protecting common interests and values (or, instead, reverted to a more self-interest-oriented regime). By systematically covering different areas of law, we are asking in each area whether states are required to take into account the interests and rights of third states (or of the persons under their jurisdiction or control) even if they are not parties to the relevant treaty. We do not, of course, expect clear answers in favor of a simple progress narrative, but we are interested in the degree to which elements of one or the other paradigm coexist and interact in different fields of international law.

Accordingly, we have identified certain broadly representative areas for analysis and have assembled a diverse group of authors whom we have asked to provide an assessment of whether current law reflects recognition of community interests. To the extent that such recognition can be observed, the authors also analyze the modalities through which the law has come to offer such a reflection (through drafting of treaties? judicial interpretation? scholarly work? other?).

There is clearly a tension between the consent-based vision of "community interests and obligations" in positive international law, and the community-interest vision that argues for "other-regarding duties" of states that precede and transcend state consent. The tension between these two approaches is echoed throughout this book as the various authors subscribe more to one or to the other approach. We believe that a dialogue between these two approaches provides room for critical elaboration and assessment of both. The dialogue enriches both views: it offers those who subscribe to the "other regarding" view rich illustrations of other regarding duties on

different areas of positive international law. At the same time, those who subscribe to the "beyond self-interest" view have the opportunity to assess the potential implications of the more demanding "community interest" approach in the progressive development of international law.

II. What are "Community Interests"?

Exploring the question whether international law requires states to take into account and promote community interests requires a clarification of the term "community interests."

We use the term "community" for the purpose of exploring the extent to which states owe duties toward those who are affected by their actions and omissions, and therefore in a broad sense. The relevant "community" may thus extend beyond the "international community of states" and may also cover individuals and groups whose interests, for various reasons, were not fully considered at the negotiation table or in policymaking bodies.[5] The relevant community could therefore be a group of farmers in developing countries who are adversely affected by new food safety standards that are set by an EU committee without hearing them, or inhabitants of islands in the Pacific Ocean, soon to be submerged due to rising sea levels. More generally and abstractly, the community can be humanity at large, as reflected in the concept of crimes against humanity.

As we turn to the definition of the term "community interests," we encounter two challenges. The first relates to the need to define what such interests are; the second is about how to achieve them, namely how to prioritize when there is a conflict between interests, and also how to secure those interests.

The first question is easy to address at a high level of abstraction. Take, for example, the 2016 Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law. Few would query their definition of the goals of international law:

> The principles of international law are the cornerstone for just and equitable international relations featuring win-win cooperation, creating a community of

[5] *See* Dino Kritsiotis, *Imagining the International Community*, 13 EUR. J. INT'L L. 961 (2002).

> shared future for mankind, and establishing common space of equal and indivisible security and economic cooperation.[6]

Similarly, who could dispute the Millennium Development Goals as being an appropriate set of community interests? The UN Millennium Declaration asserts their goal as

> addressing extreme poverty in its many dimensions - income poverty, hunger, disease, lack of adequate shelter, and exclusion-while promoting gender equality, education, and environmental sustainability, [and] also basic human rights – the rights of each person on the planet to health, education, shelter, and security.[7]

In the same vein, the Preamble to the 2030 Agenda for Sustainable Development begins by describing it as

> a plan of action for people, planet and prosperity … to strengthen universal peace in larger freedom. We recognise that eradicating poverty in all its forms and dimensions, including extreme poverty, is the greatest global challenge and an indispensable requirement for sustainable development. All countries and all stakeholders, acting in collaborative partnership, will implement this plan.[8]

To have any practical meaning, such lofty descriptions of community interests must be further elaborated and specified. This is what the UN Millennium Declaration does with its eight sets of detailed "targets" and "indicators" for directing and assessing performance. More detailed articulations of community interests can be found, for example, in the various treaties on international and regional human rights or on environmental protection.

As we increase the granularity of our gaze, we necessarily encounter the need to address tradeoffs between conflicting interests. We also confront disputes on how to how to promote

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[6] The Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law, Russ.-China, June 25, 2016, http://www.mid.ru/en/foreign_policy/position_word_order/-/asset_publisher/6S4RuXfeYlKr/content/id/2331698.

[7] About MDGs, *What Are They?*, MILLENIUM PROJECT, http://www.unmillenniumproject.org/goals/ (last visited June 21, 2017).

[8] G.A. Res. 70/1, Transforming our world: the 2030 Agenda for Sustainable Development (Oct. 21, 2015).

particular common interests. Disagreements can be grounded in a normative dispute between competing values and in uncertainties regarding proposed actions (how to achieve greater security? how to address climate change?). Arguably, the existence of open and inclusive venues for deliberating such questions is also a community interest. Due to the fact that in many instances, promoting community interests would require collective action of states, ways to facilitate collective action, such as solid regional and global institutions, is also a community interest. A stable set of expectations regarding the law is another.

Beyond disagreements about tradeoffs, there are and will continue to be deep political and ideological cleavages about the very notion of community obligations. The above mentioned Chinese-Russian Declaration on the Promotion of International Law echoes the Chinese old-new doctrine on "Five Principles of Peaceful Coexistence" which when first enunciated in 1954 reflected the Cold War era sensitivities of under-developed third world countries seeking insulation from foreign intervention.[9] These principles emphasised sovereignty and non-interference rather than commitment to cooperation in addressing collective challenges. 2016 also saw the rise of national sentiments in key western democracies such as the United Kingdom and the United States as voters turned their backs to international institutions. Whether these assertions resurrecting older visions of sovereignty reflect a historical turning point or a bump on the road to more inclusive, community-oriented global institutions that take the interests of all states and individuals into account is too early to tell. What is clear is that global challenges will continue to demand the attention of national communities and resolving them will continue to require a cooperative approach.

III. A Typology of Duties that States Might Have with Respect to Community Interests

The traditional duty of states is not to harm the rights and thereby certain interests of other states. Since very early on, and long before the concept of state responsibility emerged, states have been required to enact laws that repress crimes committed on their territory against the peace of neighboring states.[10] The more general duty to prevent harm is by now duly established. Our task

[9] Agreement on Trade and Intercourse with Tibet Region, India-China, Apr. 29, 1954, 299 U.N.T.S. 57.

[10] Professor J. Horning, *Study of the Problem of International Law* (Inclosure 1 to Letter No. 109 of Apr. 26, 1874), *reprinted in* U.S. DEP'T OF STATE, EXECUTIVE DOCUMENTS PRINTED BY ORDER OF THE HOUSE OF REPRESENTATIVES 1875-'76, at 1062 (1875-76) (observing in 1875 that "The repression by each state of offences committed on its

in this book is to explore the extent to which states owe duties beyond that basic limited duty to prevent harm: whether there is also a duty to actively protect others against impending or occurring harms (such as natural disasters), or a duty to improve the availability or allocation of existing resources and values.

Such positive duties are of two distinct types. According to the first, states could have a duty "to consider" the rights and welfare of others, namely to include those interests as relevant factors in their decision-making processes. The second type of duty would require some actual, even minimal, sacrifice of the state's interests or resources to accommodate the respective community's interest. The duty to take into account the interests of neighboring communities when designing new development plans near a state's border is an example of the duty to consider the interests of others. The duty to respond to an act of genocide or possibly to a natural disaster occurring across one's borders, or the duty to protect a world cultural heritage site, or the duty of a coastal state to allow access to neighboring landlocked states, will often require some, however minimal, sacrifice.

A further distinction between different positive duties is the one between substantive and procedural duties. A substantive duty typically calls for a certain action: the sending of aid, of crews, or allowing access to tankers or pipes to reach a landlocked state. Procedural duties may provide voice to affected persons without necessarily imposing significant costs on those who hear them out. Therefore, a procedural approach to identifying community interests and duties will ask whether the relevant rules (e.g., in trade law, investment law, etc.) compensate for the lack of representation of relevant persons in the decision-making process.

International environmental law is one example of the interdependent character of the substantive and procedural aspects of community interests and duties. International environmental law covers diverse efforts of regulation of the "common concern of humankind" – a substantive approach to identifying community interests and duties. At the same time, international environmental law and institutions are replete with rules that call for public participation in decision-making as a way to ensure a process through which community interests and duties will crystallize and be enforced. While the substantive perspective identifies community interests and duties by legal definitions and norm prescription, the procedural

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territory against international law, is now a matter of general legislation." These include "outrage against a foreign nation or its sovereign, or a foreign government"), http://digicoll.library.wisc.edu/cgi-bin/FRUS/FRUS-idx?type=goto&id=FRUS.FRUS187576v02&isize=M&submit=Go+to+page&page=1062.

perspective is more agnostic about the rules themselves. It rather puts faith in an open, transparent and inclusive collective decision-making process as necessary and sufficient for identifying the appropriate policies.

The various contributions to the project not only assess the extent to which contemporary international law protects and promotes community interests, and thus establishes community obligations, but also inform us about the capacity of international law to accommodate community interests in a system that contains strong structural elements for the protection of self-interest.

IV. Introducing the Contributions to this Book

The first part of this book, which frames the discussion, begins with Rüdiger Wolfrum's introductory chapter on "*Identifying Community Interests in the International Law: Common Spaces and Beyond*." This chapter explores the general question of how to establish that the regulation of a certain matter constitutes a matter of community-wide concern, which is the necessary step for the recognition of community obligation. The author's hypothesis is that such a qualification must firstly be well founded factually and secondly accepted as such in a legal or political legitimizing process (such as in a treaty or General Assembly resolution). This approach leads him to suggest that the governance of spaces beyond national jurisdiction constitutes a community interest and hence has to be guided by the interests of the international community. Exploring this question with respect to key common spaces, the author notes the difficulty of most of the dispute settlement systems, which, being bilateral, are not fully adequate to address questions related to the management of global commons as well as for the protection of the environment. As a way out of this difficulty, the author suggests greater reliance on advisory opinions where available, as ITLOS has done twice so far.

In "*Community Interests in International Law: Whose Interests are They and How Should We Best Identify Them?*" Samantha Besson explores the nature and scope of community interests in international law and assesses how they should best be identified. She rejects the prevalent assumption that states act selfishly and hence pursue interests that are at odds with community interests. The Chapter argues that states often pursue both individual interests and collective and even global ones. Moreover, she reminds the readers that invoking collective interests must be done with caution, and must always be justified: the priority of community interests over other

values and interests, including states' interests, in the legitimation of international law cannot simply be taken for granted. Therefore, the aim of the chapter is firstly to discuss the nature and scope of community interests in international law and, secondly, to assess how they should best be identified while acknowledging the important role of state consent in this process.

Samantha Besson's second contribution, "*Community Interests in the Identification of International Law – With a Special Emphasis on Treaty Interpretation and Customary Law*," identifies the ways in which community interests are channeled into the identification and interpretation of international law and, secondly, and at the same time, it assesses these developments normatively. The chapter's argument is that the existing rules on treaty interpretation and the identification of customary international law facilitate the safeguarding of community interests. To improve this function, these secondary rules of identification and interpretation should be put into practice more transparently.

Eyal Benvenisti examines the extent to which international courts and tribunals can take community interests into consideration and develop community obligations. "*Community Interests in International Adjudication*" explores the significance of this distinction between the ad hoc dispute-settlement tribunals that serve only the parties to the dispute and standing courts with jurisdiction to adjudicate multiple cases. The chapter argues that it is this recursive function which transforms international courts into global lawmakers that weave together a system of norms with secondary rules of recognition. International tribunals serve a crucial role of coordinating the behavior of state and non-state actors by creating focal points that define the parties' legal obligations. In an otherwise anarchic global system, they are in a unique position to stabilize expectations. Moreover, and more relevant to this exploration, the chapter argues that because of this function international courts are uniquely situated to take community interests into account, and that they often, if not always, do so. This implies that if properly insulated from pressures and prejudices, international adjudicators are institutionally inclined to promote community obligations.

Jan Klabbers' contribution examines the role of international organizations in promoting community interests. "*What Role for International Organizations in the Promotion of Community Interests? Reflections on the Ideology of Functionalism*" suggests that there are several ways in which international organizations contribute to formulating, maintaining and enhancing the community interest, but also that little of this is straightforward. Organizations can

contribute to the community interest merely by existing and serving as a platform for the formulation of that interest. They can do so through coercion of member states or even others, although this is rare and not easy to justify. They can do so, more regularly, by developing ideas and consensus concerning the community interest and adopting documents to this effect or aspiring to this effect, and they do so, hidden from view but of great practical significance, by relying on the ideology of functionalism. Since the notion of community interest does not exist in isolation from particular projects, it always and by definition assumes someone pouring meaning into it. Although this might seem a bad thing, it is not necessarily so. The term ideology is best seen as a methodological device for laying bare aspects of reality that otherwise would remain hidden from view, without implying a further normative evaluation of those aspects. The point, then, is not to disavow international organizations or functionalism *tout court*, but rather to recognize international organizations for what they are: always someone's political project, dressed up in terms of the community interest and operated by the ideology of functionalist thought.

Georg Nolte looks at community interests from the perspective of the International Law Commission. As the topics of the Commission are diverse, the outcome of its work is often seen as providing a sense of direction regarding general aspects of international law. In his analysis, Nolte looks at both secondary and primary rules of international law, as they have been articulated by the Commission, and their relevance for the recognition and implementation of community interests. The picture which emerges, however, fits the narrative of "from self-interest to community interest" only to a certain extent. Whereas the Commission has indeed recognized, or developed, certain primary rules which more fully articulate community interests, it has been reluctant to reformulate secondary rules of international law, with the exception of *jus cogens*. The Commission has more recently rather insisted that the traditional State-consent-oriented secondary rules concerning the formation of customary international law and regarding the interpretation of treaties continue to be valid in the face of other actors and forms of action which push towards the recognition of more and thicker community interests.

The second part of the book discusses community obligations in the context of natural resources. It begins with Surabhi Ranganathan's treatment of the concept "the common heritage of mankind" in the law of the sea. "*The Law of the Sea and Natural Resources*" outlines the specific content of the common heritage of mankind principle as it has developed in relation to

deep seabed mining. The first section focuses on the legal and institutional framework associated with the principle, while the following section describes its evolution in the context of political and economic developments. The common heritage of mankind principle, it will be seen, does not conform to a broad narrative of progress. Its high-water mark was reached in the 1980s, and the story of its subsequent application has been one of recession. The final section of the chapter speaks to this point, and evaluates whether and to what degree the current framework conforms to the idea of the principle. The chapter thus supplies the tools for a fine-grained analysis of the degree to which international law realizes this particular community obligation in principle and practice.

Ki-Gab Park addresses the state of the law on natural disasters. "*Law on Natural Disasters: From Cooperation to Solidarity?*" argues that natural disasters are common concerns in the international community. At the same time, the current international cooperation mechanism, based on the principle of equal sovereignty, mainly reflects inter-state relations, one of whose main features is the requirement of prior consent by the state affected by a natural disaster whenever external humanitarian relief assistance is to be provided. Unfortunately, this is not always an efficient tool for the protection of victims. The globalization of problems and the proliferation of humanitarian crises make the veritable solidarity of the international community increasingly necessary. If we wish to strengthen the international legal order as a vehicle for justice and order, another high value, namely international solidarity or community obligations, should create direct and immediate obligations for all members of the international community. The main object of this chapter is to discuss the future-oriented direction of the law on natural disasters. This means, first, to ascertain the *lex lata*, especially customary rules. However, *lex lata* alone cannot comprise the law on natural disasters. The chapter therefore offers some suggestions on possible ways for the international community to provide more effective relief for victims of natural disasters.

Jutta Brunnée surveys the ways in which the procedural aspects of contemporary international environmental law contribute to the safeguarding of community interests. "*International Environmental Law and Community Interests: Procedural Aspects*" shows that strong procedural elements are indispensable to international environmental law's capacity to serve community interests. The experience in the transboundary context suggests that procedural obligations have great potential to strengthen the preventive aspects of the harm prevention rule,

as well as flesh out – or support, depending on one's reading of the ICJ case law – its due diligence standard. Procedural obligations can also serve useful purposes when states, or judges, are reluctant to entertain substantive arguments, or find it difficult to establish that environmental harm has been, or is being, caused by another state. Violations of procedural obligations are more easily established and, by holding states to their procedural duties, they can sometimes be prompted to correct harmful conduct, or at least to take more effective preventive measures going forward. Unfortunately, in relation to community concerns, the operation of procedural rules is constrained by the dearth of international practice and the continued struggle with the substance of community obligations and the legal effects of *erga omnes* norms. Treaty-based approaches have proven better suited to community concerns, overcoming some of the constraints of general international law. Overall, community concern regimes have proven to be both resilient and adaptable, perhaps in part because they place such strong emphasis on procedural elements and employ an increasingly diverse range of formal lawmaking and informal standard-setting approaches.

Lorenzo Casini explores the legal regime that currently addresses cultural heritage sites. "*The Law of Cultural Heritage Sites*" analyses the complex relationships between local, national and universal community interests in cultural heritage sites, and how law can address such relationships, by focusing on the regime that is based on the 1972 UNESCO World Heritage Convention (WHC). The WHC is a site of complex interactions between state and global authorities, where states choose to bring in international regulators, but then find themselves having ceded significant regulatory authority to the latter who invoke community interests. Once a site is added to the WHC list, the interests at stake transcend national borders and an international arena has been established: this will allow foreign actors – or even domestic actors who do not share local or national communities – to monitor and to act against states' policies that may affect the preservation of cultural heritage.

The third part of the book focusing on community interests and global markets begins with Christian Tietje and Andrej Lang's discussion of "*Community Interests in World Trade Law*." The authors argue that WTO law protects the community interest of promoting an essentially rule-based and fair world market. The core concern of WTO law is to protect trade-conducive structures that enable and further global economic activity for the purpose of generating overall welfare. The foundational principles of WTO law, the most-favored nation and the national

treatment clauses, aim at protecting the equality of competitive conditions between WTO members. Derogations from WTO law are strictly limited whenever these principles are affected. The WTO enforcement regime entitles virtually every WTO member to bring a complaint before the Dispute Settlement Body if a WTO nondiscrimination obligation is breached in order to enforce the basic trade conditions that enable the formation of a world market. Although bilateral elements have long been dominant and still prominently exist in the WTO legal order, communal elements are slowly overlapping and superseding bilateral elements as part of the legal and institutional transformation of the world trade system, in particular the establishment of the Appellate Body, brought about by the founding of the WTO.

In "*International Investment Law and Community Interests*," Stephan W Schill and Vladislav Djanic begin by pointing out that in contemporary discourse, international investment law (IIL) and investor-state dispute settlement (ISDS) are often perceived as threats to community interests in one-sidedly protecting foreign investors and undermining public policies that are to the benefit of the local population and the international community. This is nowhere more manifest than in the fierce debates about the inclusion of an investment chapter in the Transatlantic Trade and Investment Partnership currently being negotiated between the European Union and the United States. The present chapter forwards a different perspective. First, it argues that investment law properly construed can be conceptualized as protecting community interests, because it is part of the legal infrastructure that is necessary for the functioning of the global economy under a rule of law framework. Aimed at supporting economic growth, this helps further economic and noneconomic community interests, including sustainable development. Second, the chapter argues that IIL and ISDS do not turn a blind eye to the conflicts that can arise between economic and noneconomic community interests, such as environmental protection, labor standards, public health or human rights. Instead, investment law and dispute settlement have numerous mechanisms at their disposal for alleviating tensions with noneconomic community interests.

In "*Community Interests and The Right to Health in Trade and Investment Law*," Andrew Mitchell and Tania Voon examine the interaction between international trade law and international investment law on the one hand and the right to health as a human right on the other. They argue that international economic law has the potential to make a profound (negative or positive) impact on the realization of the right to health. Yet the relationship between international economic law (comprising, inter alia, international trade law and international

investment law), on the one hand, and international human rights law and the right to health, on the other hand, is rarely acknowledged explicitly in the primary sources of trade and investment law. The chapter considers the United Nations treatment of this relationship as well as the right to health and human rights in WTO agreements, preferential trade agreements, bilateral investment treaties, and international disputes associated with these treaties. Using tobacco control as a case study, the chapter concludes that international economic law has the capacity to balance health interests, such that the objectives of health, trade and investment can be aligned.

"*"Community Interests" and the Creation of a Global Market for Agricultural Land*" by Jochen von Bernstorff explores the relationship between the protection of rather diverse so-called "community interests" in international law and the global land-grab phenomenon. International institutions over the last twenty years have created a global market for agricultural land. Over the last decade, a dramatic increase of foreign investment in agricultural land could be observed in this market. Critical voices have termed this trend the "global land grab." Bilateral investment treaties protect 75% of these large-scale land acquisitions, many of which came with associated social problems, such as displaced local populations, violations of economic and social rights, and negative consequences for food security in Third World countries receiving these large-scale investments. In responding to these challenges, three areas of international law come to mind: economic, social and cultural rights, including most notably the human right to food, followed by international trade law and international investment law.

The chapter on "*Community Interest Obligations in International Energy Law*" by Danai Azaria describes international energy law as an amalgam of different obligations concerning energy activities – the exploration and exploitation of energy resources, their trade and transportation, and investment in the energy sector – as well as the effects of these activities on the environment and on human rights. It is thus not surprising that it accommodates bilateral obligations (either based on bilateral norms, such as bilateral treaties, or found in multilateral norms, such as treaties or custom, but translating into bundles of bilateralizable relationships between states) as well as obligations that protect community interests either of all states (*erga omnes*) or of groups of states (*erga omnes partes*). Furthermore, the role of community interest obligations in international energy law is not only relevant vis-à-vis the nature of obligations that fall within the field's scope. Given the importance that states place on economic activities in the

energy sector, international obligations, which reflect community interests, may be and often are enforced by energy-related measures.

Tsilly Dagan's chapter on "*Community Obligations in International Taxation*" describes the multilateral efforts regarding four key concerns of the international community: prevention of double taxation, fighting "harmful tax competition," sharing of information, and the "gaps and frictions" between the tax systems of various countries noted by the recent BEPS report. It then asks what, in fact, constitutes the community's interest in the international tax area, arguing that where tax policy is concerned, there is no clear "textbook answer" regarding the best way to tax internationally. The paper criticizes two proxies which are often implicitly endorsed in order to evaluate international tax policy: cooperation among states, and the prevention of transaction costs and market failures. It argues that cooperation, contrary to conventional wisdom, is neither a goal in itself, nor is it a good enough proxy for the collective good. Cooperation should be supported only when it genuinely promotes the interest of the community as a whole, which is not necessarily the case in the four initiatives examined. As for transaction costs and market failures, although their elimination indisputably seems to be a community interest that should be pursued, correcting only some of them may raise a second-best problem.

The fourth part of the book addresses the interface between community Interests and state authority. Writing on "*International Migration and Refugee Law and Community Obligations*," Tally Kritzman-Amir addresses one of the most pressing challenges for global regulation. With globalization, it became increasingly hard to limit movement of people, which came with the movement of capital and goods. As control was virtually lost and borders became porous, states sought the cooperation of others in an attempt to regain control. At first this cooperation took the form of bilateral arrangements, but eventually multilateral ones were also applied. This chapter takes a closer look at some of the main components of international refugee law and some of the recent European practices in order to see how they resonate the notion of community obligation and convey a commitment to the common protection of human rights, in a way that deviates from a purely consent-based conception of the norms. it addresses four main points: 1) a broad interpretation of the definition of refugee in the convention relating to the status of refugees as an expression of a notion of community obligation; 2) non-refoulement as an expression of a notion of community obligation; 3) the duty to refrain from rejecting asylum-seekers at the border as an

expression of a notion of community obligation; and 4) responsibility sharing as an expression of a community obligation.

The chapter on "Hum*an Rights Extraterritoriality: The Right to Privacy and National Security Surveillance*" by Francesca Bignami and Giorgio Resta explores the extent to which the state practice of digital privacy law lives up to the promise of the universal right to privacy. The chapter examines the law of what are generally recognized to be two of the most important jurisdictions for digital privacy: the United States and the European Union. It focuses on a policy area that has been the subject of intense public interest and debate in recent times: national security surveillance by spy agencies. The safeguards afforded for privacy under the law of national security surveillance in the United States and the European Union appear to be motivated as much, if not more, by national self-interest as by a universal right to privacy. This is particularly true of the United States. There the law has traditionally distinguished between insiders (citizens and permanent residents) and outsiders (all others) and has protected the privacy rights of the insiders far more assiduously than those of the outsiders. It has also distinguished between surveillance on the national territory and surveillance abroad and has largely regulated only the former. What is striking, however, is that many of the efforts that have been made to modernize surveillance law rely on the category of person and seek to improve privacy for insiders rather than relinquish that category in favor of an international human right that applies regardless of the identity of the party. In the European Union, there is no power to act internally ("competence") in the national security domain. However, the European Union has certain powers to regulate privacy externally, in foreign spy agencies. Unsurprisingly, given the bilateral nature of these agreements, they reflect the traditional, self-interested logic of international law designed to further the interests of the parties to the agreement rather than the broader international community.

In "Socioeconomic Rights, Extraterritorially," Ralph Wilde offers a critical evaluation of the 2011 Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, using the Principles and its associated Commentary as a case study in assessing the potential contributions of international human rights in the struggle against global poverty and economic inequality. This case study is used because on the fundamental bases for obligation—conceptions of 'power' and 'cooperation' that will be reviewed herein—the Principles and the Commentary reflect how many international legal experts, not only those

associated with the Principles, view the general contours of the law in this area. The chapter argues that the view of the law set out in the case study has a very limited potential to transform global economic relations for the better.

August Reinisch examines in his chapter titled "*Human Rights Extraterritoriality: Controlling Companies Abroad*" the extraterritorial enforcement of human rights guarantees against private economic actors that infringe such rights of individuals. It argues that in this context the underlying community interest is the protection of human rights as the fundamental value recognized and sanctioned by international law as a matter of concern to all states. States have recognized that they also have to ensure that human rights are not infringed by third (private) parties. In an increasingly interdependent and transnational world, this has led to the need to address human rights violations by private parties abroad through a range of state measures. This often entails different degrees of extraterritoriality, which lies at the core of this contribution. The chapter seeks to analyze how states have resorted to extraterritorial measures when trying to control companies that may infringe the human rights entitlements of individuals or groups. At the same time, it seeks to move beyond the descriptive to a normative debate about the lawfulness and legitimacy of such attempts. The chapter finally develops an argument for a rethinking of the traditional jurisdictional principles, which are based on the formal allocation of spheres of jurisdiction between states emanating from the concept of sovereign equality, towards a community obligation-driven, substantive justification for the exercise of (extraterritorial) jurisdiction. The exercise of extraterritorial jurisdiction often leads to friction because it is likely, almost by necessity, to infringe upon the territorial jurisdiction of another state. Where a state exercises extraterritorial jurisdiction over companies operating abroad, such jurisdiction appears justified as the enforcement of community values.

The final part of the book examines the question of community interests in the context of the use of force. In *Implementing Common Interests of Humankind through the Use of Force*, Enzo Cannizzaro discusses the philosophical foundations of the current regulation of the use of force. The chapter argues that, in correspondence with the emergence of a sphere of substantive rules protecting common interests of humankind, international law is also gradually developing a system of protection against egregious breaches of these interests. This conclusion is reached through an analysis of the law and practice governing the action of the UN Security Council as well as the law of state responsibility concerning individual and collective reactions to egregious

breaches of common interests. This system is based on positive obligations imposed upon individual states as well as UN organs, and it appears to be still rudimentary and inefficient. However, the chapter suggests that the mere existence of this system, these shortcomings notwithstanding, has the effect of promoting the further development of the law in search for more appropriate mechanisms of protection.

Janina Dill addresses the topic of "*The Rights and Obligations of Parties to International Armed Conflicts: From Bilateralism but not Towards Community Interest?*" This chapter explores to what extent contemporary International Humanitarian Law (IHL) now expects parties to an armed conflict to take into account community interest when conducting hostilities. Specifically, the task of this contribution to the volume is to assess in what measure IHL has evolved from a 'bilateral, consent-based legal system to one that has adopted multilateral features in the sense of collectively protecting common goods'? For the purpose of this assessment, she assumes that international law promotes the international community's interest if, all things considered, it furthers rather than undermines the common good(s) at stake in any given area of international relations. IHL then moves towards community interest when it starts protecting or increasingly protects the common goods at stake in war. The chapter offers an explanation for IHL's role as both a trailblazer of procedural and formal legal progress and a slacker in the substantive move towards making the individual the primary beneficiary of international law. If community interest is defined as the protection of common goods at stake in war, then the international community has an untainted interest in the procedural and formal developments that are part and parcel of a move away from bilateralism. Increased third-party standing and a lowered threshold of applicability of IHL strengthen the rule of law, an important common good. Formal and procedural developments achieve this improved protection of a shared value without a tradeoff against losses in another equally significant common good.

Heike Krieger surveys "*The Rights and Obligations of Third Parties in Armed Conflicts*." She begins by noting that the prohibition of the use of force is the quintessential *ius cogens* rule of an *erga omnes* character. The same holds true for Common Article 1 of the Geneva Conventions. Both norms create third-party rights and obligations. However, structural deficits in the international legal order often hinder their effective enforcement. Moreover, recent state practice challenges certain obligations stemming in particular from the prohibition on the use of force. This chapter analyses and compares the normative framework of both rules and examines

recent contestations in state practice. It concludes by exploring the question as to what extent both rules reflect community interests or are still grounded on a reciprocal bilateral basis related to states' self-interest.

In our brief conclusion, we draw the different threads together and respond to the question we posed here, namely: what is the capacity of international law to accommodate community interests in a system that contains strong structural elements for the protection of self-interest.