
The Peremptory Norms of the International Community: A Rejoinder to Alexander Orakhelashvili

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Alexander Orakhelashvili has generously responded to my ‘The Peremptory Norms of the International Community’ with an understanding which requires a clarification on my part. On the one hand, consistently with my argument, he urges the departure from the “‘cut and paste” repetition’ of the sources of law. Such sources offer an ‘ordinary, or mainline, justification’ which is ‘insufficient or irrelevant’ to justify peremptory norms. On the other hand, he insists that ‘none of this is meant to challenge positivist foundations of international law’. Although he emphasizes public policy as an important factor in that foundation, he also highlights fundamental values and the will, choices and universality of an international community. Orakhelashvili adds that the international social ethos, which I privileged, was ‘a correct premise for *jus cogens*, but not a sufficient one’. What is also needed, he advises, is that the ethos be given ‘a legal expression’ or language. When the nature of such a legal language is addressed, one is advised that the language remains a ‘consensual positivism’. Public policy is emphasized as such an expression commonly accepted in domestic and international legal discourses, we are advised.

What is public policy remains left in the air, however. Perhaps public policy is an ‘ought’. In such a case, the ‘ought’ may be excluded from legal expression because of the naturalistic fallacy accepted so deeply by contemporary jurists. Perhaps public policy represents the *telos* of a rule posited in the sources itemized in the Statute of the International Court. And yet, this would direct the jurist to return circuitously to the very ‘cut and paste’ sources of law which may be void if in conflict with peremptory norms. The pivotal issue, then, is whether public policy is more than an empty concept, and to this Orakhelashvili replies that ‘public policy [is] derived from the overriding moral foundations of the society, even if it cannot be derived from the established sources of law’. But what does one signify by a moral foundation of society? One

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could hardly be satisfied that the moral foundation is expressed by the very sources of law rendered voidable by peremptory norms. Does the foundation rest in the rights and duties universally shared by virtue of their *a priori* character? If this were so, the peremptory norms would risk being distanced from the social-cultural practices of the members of the international community. Perhaps the moral foundation rests in the shared Good life, whether secularized or theocratic. But is not the Good life also an *a priori* concept which risks generalizing and abstracting from historically contingent social-cultural practices? Or is the moral foundation a matter of the social ethos (or character)? If the latter, what factors which make for such an ethos?

The possibility that a peremptory norm is somehow associated with a social ethos raises an important distinction between the identity of a discrete law and the binding character of an identifiable law. In attempting to 'locate' the identity of a peremptory norm in legal expression, legal analysis is misdirected because a peremptory norm begs a very different issue: namely, 'why is a peremptory norm binding?'. And that issue opens an entirely different set of factors of inquiry from the identity of a law. The usual response to the binding character of an identifiable law rests upon the express or implied consent by a state towards the international community as if the state, an historically contingent artifact of human construction, can actually consent to a discrete norm, and do so as if the state were a self-creative human author. Once again, though, such a response incorporates the very 'expression' which the peremptory norm is supposed to render void. The identity of a discrete, self-standing norm or rule does not explain why such a norm is binding. The binding character of a peremptory norm does not rest upon the number of times it is cited in legal rhetoric nor in a will of some make-believe international community 'out there' in some posited objectivity aggregated from the wills of the members. Peremptory norms are binding upon members of an international community (of which states are now only one form of membership) because without the norms an international community would not exist. Despite the reader's reactive need to categorize this idea as either positivistic or natural law according to the traditional Anglo-American Analytical Jurisprudence, it may be difficult to do so. The ethos is unwritten in the sense that it is not the object of self-conscious reflection about an objective legal expression and, yet, the ethos has a language, albeit a private immanent language with a relationship between the embodiment of meaning and meant objects of members of the ethos in which members find themselves.

Perhaps one might best exemplify an ethos by a contemporary family. Parents may well posit rules to an adolescent but the rules may not be considered socially binding by the adolescent by virtue of the absence of a family ethos (that is, by its dysfunctional social context). Let us return to Sophocles' *Antigone* for another example. When Antigone went out to sprinkle dust on the body of her deceased brother, she did not ask herself 'is there a law that requires me to do so?'. Nor did she ask 'what is the public policy expressed by King Creon's edict?'. Such questions require one to reflect and analyse the concepts taken as identifiable rules. Antigone felt immediate with the ethos of her traditional society. She shared collective memories with other members of her traditional community. She took her ethos for granted. She belonged in her ethos. An ethos – whether of a family, a religious group, a state, or an international community – manifests just such a pre-reflective

social bonding. If a territorial border delimits the boundary of an ethos, outsiders to the border will be excluded as foreigners. The boundary of an ethos, however, exists analytically and anthropologically prior in time and space before such a territorial border is accepted. A state does not begin as a member of an international community even if the state claims title to a territory: the state needs recognition as a member of the community by other members. Members of the international community, like a domestic community or a family, do not initially begin as self-sufficient socially isolated agents with rights and duties. Legal persons emerge as legal persons through social relationships. The unwritten and unspoken boundary of an ethos protects its members. Peremptory norms require *Vernunft* rather than *Verstand*. Because of a community's pre-analysable character, an identifiable rule, principle, public policy, or other concept may be considered void if it undermines the pre-reflective ethos. When I say 'undermines', I do not mean 'intellectually contradicts'. Nor do I suggest that the international community transcendently wills the peremptory norm. And yet, the ethos is not an invitation to posit arbitrary subjective values.

An ethos has a structure. Peremptory norms manifest such a structure. Collective memories and expectations by members of protection may presuppose norms which constitute the pillars of such a structure. The memories may well be remembrances of particular massive atrocities as much as of the ideal-directed objectives of General Assembly Resolutions. Because the ethos is nested in the immanent and historically contingent character of a community, it may not necessarily be universal. The structure of an ethos is taken for granted. Like Antigone, members feel 'at home' in such a structure. The structure possesses a language but the language of the structure of the ethos is unwritten. The structure emerges from memories and assumptions which constitute the ethos. An inquiry into such an unwritten language is not closed by the arbitrary posit of values. The inquiry entertained by peremptory norms transforms subjectivity into objectivity, an objectivity albeit very different in character from the structure of doctrines and rules about which jurists reflect and analyse. The risk is that the more general and abstract an intellectually constructed right or duty, the higher the risk of reification of such a right/duty from the immanent social-cultural structure of a particular ethos. Legal rhetoric may well hold out the particular conduct as contradictory with universal concepts such as human rights. But such rhetoric may well be misdirected if it precludes an examination of the unwritten language of the ethos. The challenge for jurists is to examine peremptory norms as existence conditions of an international ethos.

The structure of such a language protects the members of an ethos. Without *de facto* protection, it would be difficult for one to claim that the structure is a legal order. This is the point where peremptory norms enter legal analysis. Norms are peremptory because a community takes such norms for granted. If an entity's officials commit torture or cause the disappearance of inhabitants, arbitrarily detain or displace members *en masse*, commit genocide, or overlook slavery or systemic ethnic discrimination, the legal order of an ethos has dissolved whether or not legal rhetoric proscribes such acts or suggests otherwise. Peremptory norms constitute the existence conditions of a social ethos.

Jurists have too frequently excluded an inquiry about the ethos independent of legal language. Unless the jurist examines the structure of a social ethos, however, how is the boundary between an identifiable law and the alleged extra-legal ethos recognized? Indeed, how is a discrete peremptory norm identified without an inquiry into the ethos of the international community in which certain peremptory norms are presupposed as existence conditions of the community?