
The Legal Dimension of the International Community: How Community Interests Are Protected in International Law

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Abstract

This article uses the emergence of the protection of community interests in international law as a theoretical framework to explain a number of legal notions and regimes, such as jus cogens, obligations erga omnes, international responsibility towards the international community as a whole, and individual criminal responsibility. With reference to various international conventions, the work of the International Law Commission, and the case law of different international tribunals, it describes how changes in social intercourse at the global level have entailed structural transformations of the international legal order, as well as tensions caused by the concurrent legal protection of community and individual interests. The article further explains how the proposed theoretical framework may be used to address several concrete issues which have arisen in the contemporary legal debate, such as the question of exceptions to the immunity of state officials from foreign criminal jurisdiction, countermeasures by states other than the injured state in international responsibility, the legal regime of jus cogens, etc.

1 Introduction

The 'international community' is omnipresent in the contemporary discourse of international relations: appeals are repeatedly made to it, outrage is expressed in its name, action (sometimes of a military character) is undertaken to protect its interests.

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The popularity of the expression certainly finds its source in the reassuring sense of togetherness that it inspires, but also in the legitimacy it vests upon whoever claims to be acting on its behalf. The ‘international community’ remains, however, an evasive concept and, as such, it is always subject to the risk of being abused. It thus comes as no surprise that, while the majority of international lawyers seem to have embraced the notion, which provides for an attractive solution to many of the problems and tensions of the contemporary law of nations, authoritative appeals for caution are recurrently made and the very legal value of the concept is sometimes put in doubt.

The present article supports the thesis that there is a social and legal reality behind the expression. It will describe the current legal phenomenon by which the interests of the international community as a whole have emerged in, and are today protected by, international law. While for centuries the international legal order had contained a relatively stable set of rules mainly aimed at ensuring the respect of state sovereignty, in the past decades there has been a shift in the focus of certain social relations between states. This has brought with it transformations in international law which take into account the protection of public goods and the fulfilment of community interests. The article will try to demonstrate how this phenomenon has already provoked changes in the international legal order, which today protects both individual and community interests, but will also argue that a careful balance needs to be found between the interests involved. Independently of the issue whether this trend is a desirable development,¹ the question to be addressed is therefore how the international legal order protects community interests, but also how this protection should be reconciled with the enduring relevance of state sovereignty.

This question, as a matter of fact, stands at the centre of numerous current debates in international law. It was, and continues to be, for instance, among the main contentious points in recent cases before the International Court of Justice, such as the *Arrest Warrant* case (whether the community interest in the punishment of crimes under international law justifies an exception to the immunity of a minister for foreign affairs),² the case between the Democratic Republic of the Congo and Rwanda (whether the peremptory character of the norm prohibiting genocide could in itself provide a basis for the Court’s jurisdiction to entertain the dispute),³ the *Wall* advisory proceedings (whether the breach by Israel of obligations *erga omnes*, such as those arising from the right of self-determination, human rights, and international humanitarian law,

¹ In other words, whether the emergence of community interests and some resulting limitations on state sovereignty are a positive evolution of the international legal system. The theory described hereinafter aims at proposing an objective description of a phenomenon which has transformed certain inter-state relations and the law that regulates them, independently of any assessment on the opportuneness (political or ethical) of this evolution.

² *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment [2002] ICJ Rep. 3.

³ *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction of the Court and Admissibility of the Application, Judgment of 3 Feb. 2006, notably at paras 56–70.

would entail special legal consequences),⁴ or the *Jurisdictional Immunities of the State* case brought by Germany against Italy (whether a state continues to enjoy sovereign immunity in civil cases concerning serious violations of human rights or humanitarian law brought before foreign courts).⁵ The same question is at the core of current efforts at codification by the International Law Commission in various fields, such as the protection of persons in the event of disasters (whether there exists a right to humanitarian assistance which would imply obligations incumbent upon both the state having suffered a disaster on its territory and third states),⁶ the obligation to extradite or prosecute (whether such an obligation exists, under customary international law, with regard to certain crimes),⁷ or the immunity of state officials from foreign criminal jurisdiction (in similar terms to the *Arrest Warrant* case).⁸ More generally, it has manifested itself at the heart of several major fields of contemporary international law (such as state responsibility, the law of treaties, environmental law, or international criminal law) and lies beneath successful new concepts invoked in the contemporary debate (such as the ‘responsibility to protect’ or the international ‘rule of law’).

In the following, I will first analyse the phenomenon of the emergence of community interests in international law. I will thereafter defend the argument that the protection of community interests has already been effected in positive international law, by describing in the perspective proposed here various international legal notions and regimes, such as *jus cogens*, obligations *erga omnes*, Article 103 of the Charter, certain aspects of state responsibility, and individual criminal responsibility. Finally, I will describe some cases which reveal the concurrent protection by international law of community and individual interests, and propose certain criteria to resolve the apparent paradoxes arising from this situation.

⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004 [2004] ICJ Rep. 136.

⁵ See *Jurisdictional Immunities of the State (Germany v. Italy)*, Application instituting proceedings, 23 Dec. 2008, available at: www.icj-cij.org/docket/files/143/14923.pdf.

⁶ See Report of the International Law Commission on the Work of its Sixtieth Session (2008), UN Doc A/63/10, Ch IX (‘Protection of Persons in the Event of Disasters’), notably at paras 241–250. For the debates in the Sixth Committee on this issue at the 63rd session of the GA see the summary records of the 20th to 25th plenary meetings, held from 30 Oct. to 5 Nov. 2008, UN Doc. A/C.6/63/SR.20–25.

⁷ See Report of the International Law Commission on the Work of its Fifty-eighth Session (2007), UN Doc. A/62/10, at paras 354–355, and the debates in the Sixth Committee: summary records of the 22nd to 26th plenary meetings, held from 1 to 6 Nov. 2007 (62nd session of the GA) and summary records of the 20th to 25th plenary meetings, held from 30 Oct. to 5 Nov. 2008 UN Doc A/C.6/63/SR.20–25 (63rd session). The same issue is raised in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, in which Belgium argues that Senegal is obliged, under the 1984 Convention against Torture and under customary international law, to bring criminal proceedings against Hissène Habré, the former President of Chad, or, failing prosecution, to extradite him to Belgium (see the Application instituting proceedings, 16 Feb. 2009, available at: www.icj-cij.org/docket/files/144/15054.pdf).

⁸ See Report, *supra* note 6, at 294–298. For the debates in the Sixth Committee on this issue at the 63rd session of the General Assembly see the summary records of the 20th to 25th plenary meetings, *supra* note 6.

2 The Emergence of Community Interests in International Law

The first step in the analysis, i.e. the description of the emergence of community interests in international law, requires a departure from a pure legal perspective in order to examine the social environment in which community interests have arisen – i.e., how states in their mutual relations have been driven to ensure the protection of certain community interests beyond their individual sphere – and the effects which this phenomenon has had in international law.

A The Shift towards the Protection of Community Interests

Following the Peace of Westphalia, the society of states was founded on a strict repartition of jurisdictions on a territorial basis. Relations between states were relatively limited and did not involve established instances of cooperation. International law was mainly aimed at resolving possible conflicts in the exercise of territorial jurisdictions, and most international norms were centred on the preservation of each state's personal interests on its own territory, i.e., of its sovereign rights. In the first part of the 20th century, Max Huber, acting as sole arbitrator in the *Island of Palmas* case, could still affirm that:

The development of the national organisation of States during the last few centuries and, as a corollary, the development of international law, has established [the] principle of the exclusive competence of the State in regard to its own territory [i.e., sovereignty, as defined in the same award] in such a way as to make it the point of departure in settling most questions that concern international relations.⁹

In its simplest form, a social group such as this focuses on the preservation of the personal sphere of each member and relies on a set of norms limited to imposing obligations of abstention. With the intensification of international relations (notably, inter-state trade and increased transnational mobility of individuals), social intercourse is upgraded to the synallagmatic level (i.e., to the fulfilment of mutual (positive) obligations in the context of a compromise of individual interests, for example in treaties of friendship and commerce), and even to certain kinds of cooperation (for instance, in the context of free-trade zones or custom unions).¹⁰ The objective for this social interaction remains, however, that of the realization of each member's personal interests.

⁹ *Island of Palmas (Netherlands/United States of America)*, arbitral award of 4 Apr. 1928, UN Rep Int'l Arbitral Awards, ii, at 838.

¹⁰ The difference between these two latter kinds of social relations depends on the kind of interests fulfilled, but not on the individual character of such interests. In the synallagmatic relation, the parties have different personal interests, which happen to be complementary or reciprocal (*do ut des*): England trades textiles for wine with Portugal, thus fulfilling its own need for wine and Portugal's need for textiles. In the cooperation of the kind proper to a customs union, all the parties fulfil the same interest, which is equivalent for each of them: all the participants in the union protect their internal industry (e.g., agricultural production) from external competition.

In sociological terms,¹¹ this traditional model of international social intercourse can be described under the concept of 'society', i.e., a group in which the individual sees social relations in a 'profit-oriented' manner, as instrumental to the realization of his or her personal goals.¹² Social relations are, in other words, based on 'organic solidarity'¹³ and compromises or coordination of interests which are rationally motivated by the pursuit of individual objectives.

The further intensification of social intercourse among states implied, however, a transformation in the structure of the international social group. Increased relations and more stable cooperation led states to encounter a category of interests that could not be fulfilled through traditional means.¹⁴ Beyond the preservation of the individual sphere or the achievement of reciprocal advantages, states were brought to take into account collective interests at a global scale which may be satisfied only if all members of the social group are engaged in their protection: they are 'community interests'.¹⁵ In this manner, certain social relations between states became akin to the model of

¹¹ For a more detailed description of the advantages and problems encountered in the application of sociological models to international relations see S. Villalpando, *L'émergence de la communauté internationale dans la responsabilité des Etats* (2005), at 9–41. For similar application of such models at the international level see Truyló y Serra, 'Genèse et structure de la société internationale', 96 *Recueil des Cours* (1959-I) 553, at 572–574; R.-J. Dupuy, *La communauté internationale entre le mythe et l'histoire* (1986), at 14–16 or 'Communauté internationale et disparités de développement', 165 *Recueil des Cours* (1979-IV) 9, at 25–26; A. Paulus, *Die internationale Gemeinschaft im Völkerrecht. Eine Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung* (2001). See also Schindler, 'Contribution à l'étude des facteurs sociologiques et psychologiques du droit international', 46 *Recueil des Cours* (1933-IV) 229; Landheer, 'Les théories de la sociologie contemporaine et le droit international', 92 *Recueil des Cours* (1957-II) 519.

¹² In sociology, the concepts of 'society' (*Gesellschaft*), reflecting large-scale competitive social relations, and 'community' (*Gemeinschaft*), a smaller neighbourhood-based group, were first explored in these terms by Ferdinand Tönnies in his *Gemeinschaft und Gesellschaft* (first published in 1887 and later revised by the author in a 2nd edn of 1912; for a recent reprint of the 1957 English translation see F. Tönnies, *Community and Society* (2002)). Similar distinctions have been used by other sociologists, such as Emile Durkheim ('mechanical' and 'organic' solidarity in *De la division du travail social* (1893)), Max Weber ('associative' (*Vergesellschaftung*) and 'communal' (*Vergemeinschaftung*) relations in *Economy and Society: An Outline of Interpretative Sociology* (original edn 1925; English translation (G. Roth and C. Wittich (eds), 1978), at 40–43), Talcott Parsons (with his 5 pattern variables (affectivity v. neutral affectivity; self-orientation v. collectivity orientation; universalism v. particularism; achievement v. ascription; specificity v. diffuseness), for instance, in Parsons and Shills, 'Values, Motives, and Systems of Action', in T. Parsons, *Toward a General Theory of Action* (1962; original edn 1952), at 76–79), etc.

¹³ For Durkheim's definition of 'organic solidarity' see Durkheim, *supra* note 12, at 98–102.

¹⁴ This evolution is akin to the structural change in international law described by Wolfgang Friedmann from a law of 'coexistence' (based on society-like social relations) to a law of 'cooperation' (based on community-like social relations); see W. Friedmann, *The Changing Structure of International Law* (1964), notably at 60–62 and 367 (where he explicitly links the law of cooperation with the recognition of a community of interests). See also G. Schwarzenberger, *The Dynamics of International Law* (1976), at 110, who proposes the distinction between the law of power, law of coordination, and law of reciprocity, which is explicitly based on the sociological concepts of 'society' and 'community' (as defined in a glossary in *ibid.*, at 2 and 4).

¹⁵ For the use of this expression in a similar context see P. Jessup, *A Modern Law of Nations. An Introduction* (1948), at 12 and 37.

what sociologists call a ‘community’ (contrasting it with ‘society’, as defined above), i.e., a social group in which the individual actor considers himself or herself as a means to serve the goals of the group and may be called upon to sacrifice his or her own personal benefit for those goals. In this new scheme, social intercourse is based on ‘mechanical solidarity’, where members are imbued with a collective consciousness which subsumes individual awareness.¹⁶ In other words, this step reflects a shift in certain inter-state relations from an egotistic rationale to a sense of togetherness and the pursuit of goals that benefit the group as a whole.

Three questions arise, however: (1) what motivates this transformation of inter-state relations and the law which regulates them?; (2) why has this phenomenon emerged so late in the history of international law?; and (3) how does a social group without any superior entity vested with the pursuit of the common good embrace community interests?

As to the first question, it is submitted that the explanation lies in the existence of ‘public goods’.¹⁷ The shift in international relations described above appears to be motivated by the fact that states have become aware of the existence of certain common goods or values, such as peace, humanity, or the environment, and of the need to protect such goods or values in their mutual relations. These goods or values actually correspond to the category of ‘public goods’ as defined in economics, i.e., commodities the benefits of which are indivisibly spread among the entire community.¹⁸ They are characterized by the fact of being both ‘non-excludable’¹⁹ and ‘non-rivalrous’,²⁰ from which it follows directly that any attack on the public good necessarily affects the enjoyment of its benefits by all members of the community. In other terms, such attack is damaging not only to certain individual members, but to each and all of them, or to the community as a whole. For the purposes of legal regulation, the consequences are twofold: (a) the public good cannot be protected in a fragmented way, since it cannot be preserved for the benefit of certain members alone (e.g., only peace for all is real peace); (b) each and all members of the group, or the community as a whole, have an

¹⁶ See Durkheim, *supra* note 12, at 98–102.

¹⁷ For a similar approach see Kraus, ‘La morale internationale’, 16 *Recueil des Cours* (1927-I) 385, at 507–511 or Abi-Saab, ‘Cours général de droit international public’, 207 *Recueil des Cours* (1987-VII) 9, at 98–99.

¹⁸ The concept was originally proposed in Samuelson, ‘The Pure Theory of Public Expenditure’, 36 *Review of Economics and Statistics* (1954) 387. Common examples of ‘public goods’ are national defence and law enforcement (or public peace and security), lighthouses, environmental goods, etc. The particular interest of such goods for economists lies in the fact that they produce ‘positive externalities’ which cannot be remunerated (it is the well-known problem of the ‘free rider’, who enjoys the benefits of the commodity without any need to participate in its costs); it follows that the government would normally be called upon to intervene in the production of such goods since no rational private actor would readily do so. And this could also have some impact on the law, since the issue of repartition of costs needs to be somehow regulated, which in itself promotes a certain kind of social cohesion.

¹⁹ I.e., once these goods are made available, users cannot be kept away from their consumption and anyone can have access to them.

²⁰ I.e., their enjoyment by one consumer does not deprive any other user of the commodity, nor does it reduce the amount of the good available for consumption by others.

interest in the protection of the public good (e.g., everyone is concerned by the preservation of peace). In sum, the protection of the public good encourages social cohesion and calls for transformations in the legal order.

As to the second question, the late appearance of the phenomenon is explained by the fact that 'communitarian' relations among states are not inspired by the same forces which characterize inter-individual communities (common blood, affection, proximity, or traditions),²¹ but rather result from an advanced stage of cooperation.²² This may be illustrated by an example. If social interaction is scarce, an individual member of the group can remain indifferent to a state of belligerence as long as the latter does not affect its own individual interests (e.g., as long as the state is not the victim of an attack or its sovereignty is not affected). When international relations intensify, however, the fulfilment of the state's own personal interest increasingly depends on the maintenance of peace at large, even beyond its personal sphere: in other terms, it relies on the preservation of a public good in which all members of the group, or the community as a whole, have an interest. The crucial step, at this stage, is that, given that the protection of the public good cannot be ensured in a fragmented way, it relies on each member's respect for the community interest without consideration of its own occasional advantage: peace can be effectively preserved only if all states abstain from breaching it, even when the invasion of foreign territory would eventually satisfy a personal interest (e.g., a commercial outlet for the state's industry or the overthrow of a hostile foreign government to preserve national security). In other words, the appraisal of costs and benefits can no longer be made at the individual level, and the collective interest is to be realized even when it implies a sacrifice of the personal sphere of individual members of the group: the relevant social relations should thus be based on a 'communitarian' model.²³

²¹ It would not be unreasonable to conceive that such cohesive forces also apply to international relations. As a matter of fact, the *Respublica Christiana* which preceded the Treaty of Westphalia corresponded quite closely to the model of a 'community' in sociological studies: it was a static social group founded on geographical proximity, common traditions, and religion; its legal system was based on allegiances and repressive sanctions, and the relations among monarchs were dominated by the interests of Christianity (represented by the Pope and/or the Emperor) and defence against external dangers. The term 'community' has indeed often been used to refer to that system: D. Anzilotti, *Corso di diritto internazionale* (1912) (reproduced in *Opere di Dionisio Anzilotti II. Scritti di diritto internazionale pubblico* (1956), i, at 3–4); Giuliano, 'La "Respublica Cristiana" medioevale e le pretese origini della società e del diritto internazionale', in J. Tittel (ed.), *Multitudo legum ius unum. Festschrift für Wilhelm Wengler zu seinem 65. Geburtstag. Band I: Allgemeine Rechtslehre und Völkerrecht* (1973), at 159 and 161–162. See also Zimmermann, 'La crise de l'organisation internationale à la fin du Moyen-Age', 44 *Recueil des Cours* (1933-II) 315, quoting authors of the Middle Ages, such as Augustino Triumpho de Ancona ('*communitas*', at 328) or Saint Thomas Aquinas ('*tota communitas universi gubernator ratione divina*', at 321).

²² It follows from this particularity that the trend towards the protection of community interests does not necessarily correspond to a 'moralization' of international relations (in the sense in which this expression is used, for example, in Pastor Ridruejo, 'Le droit international à la veille du vingt et unième siècle: normes, faits et valeurs. Cours général de droit international public', 274 *Recueil des Cours* (1998) 9). The preservation of public goods derives from a utilitarian necessity linked to the intensification of social intercourse which, as explained below, could be encouraged by a common ethical sense but is not necessarily related to it (see Villalpando, *supra* note 11, at 64–67).

²³ On how this communitarian model co-exists with the enduring protection (and central character) of individual interests of states (including their sovereignty) see sect. 4 below.

As to the third question, the interest in the protection of public goods has been recognized, at the international level, as belonging to each and all members of the group, i.e., to states. If the model of inter-individual societies (where the collective interest usually finds its personification in a superior entity, such as the government, vested with the pursuit and protection of the common good) had been followed, the ideal holder of such interest would have been a universal body (a supranational entity) vested with the right and authority to preserve public goods, even to the sacrifice of the interests of individual states. Instead, as a sort of second best, the international social group and its law have preserved the sovereign equality of its members and have solved the paradox of enshrining the protection of public goods among equal members by recognizing that all have an individual interest in that regard. It follows that internationally there is not one collective interest, but many (as many as there are states) identical interests having a collective content.²⁴ As we shall see, this is eloquently illustrated by the fact that ‘obligations owed to the international community as a whole’ are construed as obligations *erga omnes*, i.e., owed simultaneously to all members of the international community.

B How Community Interests Have Been Incorporated by International Law

In the legal literature, the phenomenon which has been portrayed in the previous section has often been circumscribed to certain specific fields of law: there would thus be some areas naturally governed by individual interests and others where community interests could find expression.²⁵ Indeed, most of the manifestations of the trend towards the protection of community interests which will be described in the following section (obligations *erga omnes*, *jus cogens*, etc.) seem to have appeared only in particular fields of international relations, such as the maintenance of peace and security, the protection of human rights, or the preservation of the environment. On closer inspection, however, these manifestations, rather than being limited *ratione materiae*, reflect a technique of legal regulation which could potentially extend to international law as a whole.²⁶

²⁴ Compare with the concept of ‘identical collective interests’ proposed by Herbert Kraus, *supra* note 17, at 490. It is true that, in contemporary international law, the protection of certain public goods has occasionally been entrusted to a single collective entity, which has sometimes been vested with binding powers: this is the case, for instance, of the Security Council, which has the ‘primary responsibility for the maintenance of international peace and security’ (Art. 24(1) of the Charter) and may decide action with respect to threats to the peace, breaches of the peace, and acts of aggression (Ch. VII), which members of the UN agree to accept and carry out (Art. 25). However, this stage is reached only subsequently at the international level, when states conventionally agree to entrust the fulfilment of their collective interests to a single authority (and, if necessary, accept certain limitations on their own rights and powers). In addition, by so doing, states do not renounce their identical community interests, which they continue to hold.

²⁵ See particularly Friedmann, *supra* note 14, who links the emergence of a law of cooperation to technical and scientific development and identifies it in the fields of labour and health matters, communications, economical development, human rights, collective security, etc. See also the main structure of W.C. Jenks, *The Common Law of Mankind* (1958).

²⁶ See Abi-Saab, *supra* note 17, at 320.

Indeed, one could easily find 'public goods' (and corresponding community interests) in several other fields of inter-state relations, such as the fight against poverty, development, the limitation of armaments, telecommunications, the control of diseases, etc. Although it is less evident, one can also identify some subjacent public good even in areas where bilateralism is largely dominant. A good example is diplomatic and consular relations: despite the fact that these have always been governed by rules based on reciprocity, the International Court of Justice, in 1979 and 1980, recognized that there exists an underlying collective interest in the preservation of such bilateral relations.²⁷ Another example is that of the immunity granted to state officials before foreign criminal jurisdictions, which at first sight seems to be the most obvious case of protection of the individual interest of a state: in the words of three judges in the *Arrest Warrant* case, nevertheless, there is an 'interest of the community of States' to allow them to act freely on the inter-State level without unwarranted interference'.²⁸ More generally, it could be argued²⁹ that international law could potentially recognize a community interest in the respect of all legal rules, insofar as the integrity of the law is also a common matter.

The question is thus why subjacent community interests have found legal expression in some areas of international law, while in others individual interests still prevail. Several factors could explain this.

First, the autonomous pursuit of the collective good has not proven necessary in those fields where the principle of bilateralism is sufficiently effective in itself. This is the case in areas where states find themselves in a similar position of power *vis-à-vis* each other and where their individual interests can be directly affected. For instance, states have a very tangible personal interest in the field of diplomatic and consular relations, which will usually lead them to react in the event of a breach, and they have at their disposal means that can effectively counter abuses (i.e., the famous 'self-contained régime' identified by the International Court of Justice,³⁰ which provides in principle for a system of checks and balances). In a similar manner, and despite the existence of abuses,³¹ the field of diplomatic protection has remained faithful to

²⁷ In the judgment in the *Hostages* case, the Court affirmed that the respect of the obligations in that field of law was 'vital for the security and well-being of the complex international community of the present days': *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, [1980] ICJ Rep 3, at 43, para. 92. In the previous paragraph of the judgment, the Court had indicated that the corresponding obligations were 'of cardinal importance for the maintenance of good relations between States in the interdependent world of today', since they were essential for effective co-operation in the international community and for states to achieve mutual understanding and the resolution of their differences by peaceful means (*ibid.*, at 42, para. 91), referring to the Court's order of 15 Dec. 1979 in the same case ([1979] ICJ Rep 19).

²⁸ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergerthal [2002] ICJ Rep, at 85, at para. 75.

²⁹ As some authors have (for a description of those theories see B. Stern, *Le préjudice dans la théorie de la responsabilité internationale* (1973), at 57–58).

³⁰ *United States Diplomatic and Consular Staff in Tehran*, Judgment, *supra* note 27, at 40, para. 86.

³¹ See the separate opinion of Judge Padilla Nervo in *Barcelona Traction, Light and Power Company, Limited*, Judgment [1970] ICJ Rep. 3, at 246; de Visscher, 'La responsabilité des Etats', in *Bibliotheca visseriana dissertationum ius internationale illustrantium* (1924) ii, 87, at 117–188; Jessup, *supra* note 15, at 95–96.

bilateralism, given that states usually have a concrete interest in the protection of their citizens abroad and can rely on an established mechanism of self-protection through diplomatic channels.³² On the contrary, in areas such as the protection of human rights and the environment the limits of bilateralism have been more apparent: for instance, states will often be unwilling to take individual action against a state committing genocide against its own citizens or to preserve areas outside their national jurisdictions at risk of pollution, thus making it necessary to resort to mechanisms of protection that take into account the collective interests as such.

Even in these last fields of international relations, however, states have been reluctant to sacrifice their personal interests for the benefit of the community. Indeed, solidarity is as much an objective state of affairs (a material interdependence between individuals to achieve a certain goal) as a subjective state of mind (the awareness of the existence of such interdependence, and willingness to protect it as such).³³

In the emergence of the latter other factors have thus played a decisive role, namely: the essential significance that states attribute to the relevant public good in their mutual relations; the particular ethical value attached to the public good by humankind;³⁴ and the special vulnerability of the public good. Thus, for instance, it is quite apparent that the central importance attributed to peace in international relations and the public condemnation of the ravages of war have played a key role in the creation of a system of collective security. Similarly, the suffering caused by mass killings or persecutions and the damage resulting from the loss of lives and cultures have inspired international conventions on the protection of human rights and the punishment of international crimes. Furthermore, scientific discoveries revealing the irreversible deterioration of natural resources have triggered efforts to preserve

³² In this field, 'States have, with regard to their nationals, a discretionary power to grant diplomatic protection or to refuse it': *Barcelona Traction, Light and Power Company, Limited, Judgment*, *supra* note 31, at 50, para. 99. This seems reasonable if diplomatic protection is considered as a means to protect the States' personal interests, but more problematic if it is seen as 'an instrument for the furtherance of the international protection of human rights', i.e., of a common good (see Dugard, 'First Report on Diplomatic Protection', UN Doc A/CN.4506, 7 Mar. 2000, at para. 77). For this reason, Special Rapporteur Dugard had proposed that the International Law Commission adopt a draft article which would have imposed on states a legal duty to exercise diplomatic protection on behalf of the injured person upon request, if the injury resulted from a grave breach of a *jus cogens* norm (Art. 4(1), at *ibid.*, para. 74). This proposal, however, was not accepted by the Commission (see Report of the International Law Commission on the Work of its Fifty-second session, UN Doc A/55/10 (2000), at paras 447–456) and the articles finally adopted contain only a provision with a 'recommended practice' whereby a state entitled to exercise diplomatic protection should '[g]ive due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred' (see Art. 19(a) and paras 2 and 3 of the commentary thereto, Report of the International Law Commission on the Work of its Fifty-seventh Session, UN Doc A/61/10, 2006, at 94 and 95–97).

³³ See *Abi-Saab*, *supra* note 17, at 98–99.

³⁴ On the alterations suffered by human values when transferred to inter-state relations and international law see Arangio-Ruiz, 'The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations, with an Appendix on the Concept of International Law and the Theory of International Organisation', 137 *Recueil des Cours* (1972-III) 419, at 656–657.

the world environment.³⁵ References to these three factors appear clearly – and often in combination – in the preambles to key international instruments relating to peace and security,³⁶ the protection of human rights,³⁷ the punishment of international crimes,³⁸ or the protection of the environment.³⁹

In general, this awareness of the need to protect a public good needs a spark (more often a great blaze) to appear, in the form of a human or natural disaster. It was only when the scourge of war had, twice in the lifetime of those present at the San Francisco Conference in 1945, brought ‘untold sorrow to mankind’⁴⁰ that the Charter of the United Nations was adopted.⁴¹ The massacres in World War II and later in the

³⁵ In the words of the International Court of Justice, ‘in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of the damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage’; according to the Court, ‘the growing awareness of the risks for mankind – for present and future generations – of pursuit of human intervention on the environment triggered the development of new norms and standards in that field (*Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment [1997] ICJ Rep. 7, at 78, para. 140). See also [1976] II Yrbk Int’l Law Comm. 101, at para. 15 of the commentary to draft Art. 19.

³⁶ E.g., paras 1 and 4 of the preamble to the Kellogg-Briand Pact explicitly linked the renunciation of war as an instrument of national policy to the ‘solemn duty [of the signatory Powers] to promote the welfare of mankind’ and qualified it as a ‘humane endeavor’: Treaty providing for the renunciation of war as an instrument of national policy, signed at Paris, 27 Aug. 1928, League of Nations Treaty Series No. 2137, vol. XCIV, at 57).

³⁷ E.g., the Universal Declaration of Human Rights proclaims that ‘recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world’ and that ‘disregard and contempt for human rights have resulted in barbarous acts, which have outraged the conscience of mankind’, establishing the link with the ‘development of friendly relations between nations’ (paras 1, 2, and 4 of the preamble to GA Res 217 (III) of 10 Dec. 1948). See also the 1st preambular para. to the Vienna Declaration and Programme of Action (adopted at the World Conference on Human Rights on 25 June 1993, UN Doc A/CONF.157/23), whereby ‘the promotion and protection of human rights is a matter of priority for the international community’.

³⁸ E.g., the Rome Statute of the International Criminal Court declares that the states parties are ‘[c]on-scious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time’, recalls that ‘during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity’, and recognizes that ‘such grave crimes threaten the peace, security and well-being of the world’ (respectively, paras 1, 2, and 3 of the preamble to the Rome Statute, UN Doc A/CONF.183/9, 17 July 1998).

³⁹ E.g., the Stockholm Declaration emphasizes that ‘in the long and tortuous evolution of the human race on this planet a stage has been reached when, through the rapid acceleration of science and technology, man has acquired the power to transform his environment in countless ways and on an unprecedented scale’ and that ‘[t]he protection and improvement of the human environment is a major issue which affects the well-being of peoples and economic development throughout the world’ (respectively, paras 1 and 2 of the preamble to the Declaration of the United Nations Conference on the Human Environment, 16 June 1972 (UN publication, sales no. E. 73.II.A.14 and corrigendum), ch. 1).

⁴⁰ See the 1st para. of the preamble to the Charter of the United Nations.

⁴¹ Compare with Yrbk Int’l Law Comm., *supra* note 35, at para. 15 of the commentary to draft article 19 (International crimes and international delicts) on the draft Arts on State Responsibility: ‘[t]he terrible memory of the unprecedented ravages of the Second World War, the frightful cost of that war in human lives and in property and wealth of every kind, the fear of a possible recurrence of the suffering endured earlier and even of the disappearance of large fractions of mankind, and every trace of civilization, which would result from a new conflict in which the entire arsenal of weapons of mass destruction would be used – all these are factors which have implanted in peoples the conviction of the paramount importance of prohibiting the use of force as a means of settling international disputes’.

former Yugoslavia and Rwanda provoked decisive steps in the consolidation of international criminal justice, from the Nuremberg International Military Tribunal to *ad hoc* international criminal tribunals, ultimately leading to the creation of the International Criminal Court.⁴² In recent years, the 2004 tsunami in the Indian Ocean triggered renewed interest in the topic of the ‘protection of persons in the event of disasters’, which the International Law Commission included in its long-term programme of work just two years later,⁴³ and the Nargis typhoon, which devastated Myanmar in 2008, launched a discussion on the opportunity to apply the concept of ‘responsibility to protect’ to natural disasters, which is again echoed in the first debates on the topic at the International Law Commission and the Sixth Committee.⁴⁴

Among the public goods recognized by the Law of Nations, ‘international peace and security’ has always occupied a privileged position. For that reason, it has often served as a ‘Trojan horse’ for the incursion of other public values in inter-state relations. A good illustration is the prosecution of major war criminals before international military tribunals after World War II: in his opening speech at the Nuremberg trial, Justice Jackson, the United States Chief Prosecutor, emphasized that it was the ‘attack on the peace of the world’ perpetrated by the Nazi regime that had brought ‘into international cognizance crimes . . . which otherwise might be only internal concerns’. As a consequence, crimes against humanity – which later became the cornerstone of the protection of human rights through international criminal law – fell under the jurisdiction of the Tribunal only if committed ‘in execution of or in connection with’ the crime of aggression or war crimes, i.e., in relation to a serious breach of peace.⁴⁵ Another example is the practice of the Security Council under Chapter VII of the Charter. Along the years, the Council has interpreted its primary responsibility for the maintenance of international peace and security as extending not only to situations related to the (wrongful) use of armed force in international relations, but also to the denial of the right of self-determination of peoples,⁴⁶ massive and systematic violations of human

⁴² Compare with *ibid.*: ‘[t]he feeling of horror left by the systematic massacres of millions of human beings perpetrated by the Nazi regime, and the outrage felt at utterly brutal assaults on human life and dignity, have both pointed to the need to ensure that not only the internal law of States but, above all, the law of the international community itself should lay down peremptory rules guaranteeing that the fundamental rights of peoples and of the human person will be safeguarded and respected; all this has prompted the most vigorous affirmation of the prohibition of crimes such as genocide, apartheid and other inhuman practices of that kind’.

⁴³ See Report of the International Law Commission on the Work of its Fifty-eighth Session, UN Doc. A/61/10, at para. 257 and Annex C (containing an outline of the topic, which explicitly refers to the tsunami in paras 3 and 4).

⁴⁴ See Report, *supra* note 6, notably at paras 247–250 and the summary records, also *supra* note 6.

⁴⁵ This has in fact the frightening *a contrario* implication that if the Nazi regime had limited its policy of repression to its own boundaries, its crimes would have remained of ‘internal concern’. And indeed, the Tribunal found in its Judgment that ‘[t]he policy of persecution, repression and murder of civilians in Germany before the war of 1939’ and the persecution of Jews during the same period, though having been ‘established beyond all doubt’, did not constitute ‘crimes against humanity within the meaning of the Charter’ since it ‘ha[d] not been satisfactorily proved that they were done in execution of, or in connection with,’ the other two crimes under its jurisdiction, notably the conduct of an aggressive war (*Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946*, at 171).

⁴⁶ See Res. 232 (1966) and 253 (1968) on the situation in Southern Rhodesia.

rights⁴⁷ (including genocide,⁴⁸ racial discrimination,⁴⁹ *apartheid*,⁵⁰ and ethnic cleansing⁵¹), breaches of international humanitarian law,⁵² acts of terrorism,⁵³ piracy,⁵⁴ and even the fight against the HIV/AIDS pandemic.⁵⁵ In this way, the Council has been able to use its powers under the Charter to act for the protection of a great variety of interests of the international community as a whole.

3 The Protection of Community Interests in Positive International Law

The social phenomenon described in the previous section has already caused profound transformations in the very structure of the international legal order. It has resulted in the emergence of a series of new legal concepts and regimes, which have gradually crystallized in positive international law.

A Some Examples of Legal Protection of Community Interests

The protection of community interests has permeated international law at different levels, including the way legal relationships are structured, the hierarchy of international norms, and the regimes of responsibility in the event of internationally wrongful acts.⁵⁶

⁴⁷ See Res 253 (1968) and 277 (1970) on the political repression in Southern Rhodesia; Res 418 (1977) on the massive violence against and killings of the African people in South Africa in relation to *apartheid*; Res 670 (1990) on the treatment by Iraqi forces of Kuwaiti nationals, including measures to force them to leave their own country and mistreatment of persons and property in Kuwait in violation of international law; Res 688 (1991) on the repression of the Iraqi population (notably in Kurdish-populated areas) in parts of Iraq; Res 1199 (1998) on the repression by Yugoslav authorities in Kosovo; Res 1264 (1999) on the situation in East Timor.

⁴⁸ See Res 918 (1994) and 925 (1994) on the situation in Rwanda.

⁴⁹ See Res 216 (1965) on the 'unilateral declaration of independence made by a racist minority in Southern Rhodesia'.

⁵⁰ See Res 418 (1977) on the situation in South Africa.

⁵¹ See Res 757 (1992), 787 (1992), and 820 (1993) on the situation in Bosnia and Herzegovina.

⁵² See Res 666 (1990) and 670 (1990) on the situation during the invasion of Kuwait by Iraq; Res 757 (1992), 787 (1992), and 827 (1993) on the situation in Bosnia and Herzegovina; Res 918 (1994) on the situation in Rwanda; Res 1199 (1998) on the on the repression by Yugoslav authorities in Kosovo; Res 1264 (1999) on the situation in East Timor.

⁵³ See Res 731 (1992) and 748 (1992) on the Lockerbie attack; Res 1054 (1996) on the assassination attempt on the life of the President of the Arab Republic of Egypt in Addis Ababa on 26 June 1995.

⁵⁴ See Res 1838 (2008) on the situation in Somalia.

⁵⁵ See Res 1308 (2000), in which the Council found that 'the HIV/AIDS pandemic, if unchecked, may pose a risk to stability and security'.

⁵⁶ These structural transformations are similar to those criticized by Prosper Weil in 'Towards Relative Normativity in International Law', 77 *AJIL* (1983) 413 (see also his general course: 'Le droit international en quête de son identité. Cours général de droit international public', 237 *Recueil des Cours* (1992-VI) 9, notably at 227–312). On the relationship between 'relative normativity' and the phenomenon of the emergence of community interests see Villalpando, *supra* note 11, at 67–70: according to the thesis defended here, the emergence of community interests remains under the control of the legal order, although it implies an abandonment of the voluntarist conception of international law defended by Prosper Weil.

The most straightforward example of this transformation can be found in the realm of legal relationships, with the concept of obligations *erga omnes*.⁵⁷ Traditionally, international law regulates social intercourse by imposing an obligation upon a state *vis-à-vis* another state, which is attributed a corresponding right.⁵⁸ As noted by the International Court of Justice, in such a system the obligations incumbent upon a state (for instance, when it admits into its territory foreign investments or foreign nationals) 'are neither absolute nor unqualified', in the sense that they are owed to a specific state, the legal standing of which is based on the demonstration of a corresponding right.⁵⁹ The result is a web of bilateral legal relationships which powerfully mirrors the structure of a 'society' based on the protection of individual interests. This system, however, is put to a challenge by the appearance of legal regimes in which, as described by the Court with respect to the Genocide Convention, 'States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention'.⁶⁰ Indeed, under those regimes, 'one cannot speak of individual advantages and disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties'.⁶¹ The shortcomings of the traditional conception of bilateral legal relationships were blatantly illustrated by the *South West Africa* cases, where the Court denied standing to the applicants, Ethiopia and Liberia, arguing that they could not show a legal right or interest for their claims alleging a breach by South Africa of its obligations under the Mandate on the territory now known as Namibia.⁶²

⁵⁷ For studies of this aspect of the phenomenon see, e.g., M. Ragazzi, *The Concept of International Obligations Erga Omnes* (1997); C.J. Tams, *Enforcing Obligations Erga Omnes in International Law* (2005); Crawford, 'Multilateral Rights and Obligations in International Law', 319 *Recueil des Cours* (2006) 325.

⁵⁸ This 'perfect reciprocity of rights and duties' (according to the expression used by De Visscher, *supra* note 31, at 90) was the basis of the classical theory of international responsibility: see A.W. Heffter, *Le droit international de l'Europe. Quatrième édition française augmentée et annotée par F. Heinrich Geffcken* (1883; original German edn, 1844), at 226; C. Calvo, *Le droit international théorique et pratique. Tome Premier* (2nd edn, 1870), at 399–400; Anzilotti, 'La responsabilité internationale des Etats à raison des dommages soufferts par des étrangers', XIII *RGDIP* (1906) 5, at 13; P. Fauchille, *Traité de droit international public. Tome Ier. Première partie: Paix* (8th edn, 1922), at 513–515; C. Eagleton, *The Responsibility of States in International Law* (1928), at 3 and 5; Ago, 'Le délit international', 68 *Recueil des Cours* (1939-II) 415, at 433 and 441–444.

⁵⁹ See *Barcelona Traction, Judgment*, *supra* note 31, at 32, para. 33. In this judgment, the Court considered diplomatic protection as the clearest example of these legal relations; in the case at stake, this implied that the legal standing of Belgium (the Applicant) before the Court was dependent upon the demonstration of its right to exercise diplomatic protection of Belgian shareholders in a company not of Belgian nationality (*ibid.*, at 32–33, para. 35). Having not determined the existence of such a right, the Court rejected the claim (*ibid.*, at 51, para. 103).

⁶⁰ *Reservations to the Convention on Genocide, Advisory opinion* [1951] ICJ Rep. 23.

⁶¹ *Ibid.*

⁶² *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Second Phase, Judgment* [1966] ICJ Rep. 51, at paras 99 and 100. According to the Court, 'under the mandates system, and within the general framework of the League system, the various mandatories were responsible for their conduct of the mandates solely to the League [and later, the United Nations] – in particular to its Council – and were not additionally and separately responsible to each and every individual State member of the League' (*ibid.*, at 29, para. 34); however, neither the League of Nations nor the UN had access to the Court, in conformity with Art. 34 of its Statute.

It was only in the 1970 *Barcelona Traction* judgment that the Court finally clarified, in passing, the mechanism by which regimes such as the Genocide Convention would be translated into a set of legal relationships. According to the Court, the outlawing of acts of aggression and of genocide or principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination (an indirect reference to the *South West Africa* situation), creates 'obligations of a State towards the international community as a whole', very different from those arising *vis-à-vis* another state in the field of diplomatic protection.⁶³ These obligations are construed by the Court as being 'the concern of all States', in the sense that 'all States can be held to have a legal interest in their protection': in other words, they are obligations *erga omnes*.⁶⁴ The direct consequence is therefore that each and all states would have legal standing to demand the respect of those obligations, even in the absence of any injury to their personal interests.⁶⁵

A second structural transformation can be found in the concept of *jus cogens*, which affects the hierarchy of international norms. In a system based on the protection of individual interests, states could be considered as having absolute freedom in concluding treaties: subject to certain formal and substantive requirements (mainly aimed at

⁶³ *Barcelona Traction, Judgment*, *supra* note 31, at 32, paras 33–34.

⁶⁴ *Ibid.* The Court finds the justification for this particular regime in the 'importance of the rights involved', thus referring to the concurring factors for the emergence of community interests identified above in sect. 2B (the essential significance that states attribute to the public good in their public relations or the particular ethical value attached to the public good by humankind). In other words, the Court distinguishes, on the one hand, some rights which are of lesser importance and need only to be preserved through the classic mechanism of diplomatic protection (in the logic of the judgment in the *Barcelona Traction* case, those include the rights of shareholders in a company, but also protection against denial of justice, for which the Court notes that 'the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality': *ibid.*, at 47, para. 91) and, on the other hand, some 'basic rights of the human person' protected through obligations *erga omnes* (e.g., protection from slavery and racial discrimination).

⁶⁵ The immediate implication would be that the breach of an obligation *erga omnes* could in itself demonstrate the applicant's legal interest and its legal standing in a case before the Court. Although it is true that this potentiality of the concept has seldom been used, one good example of its application is found in the *Genocide* case, where Bosnia and Herzegovina had invoked the breach of the Genocide Convention not only in the person of its own nationals, but also of nationals of the respondent of Muslim origin and residing in the territory of Serbia (see notably Reply of Bosnia and Herzegovina, 23 Apr. 1998, Ch. 8, sect. 12, at 730–758; in its final submissions at the hearings, Bosnia and Herzegovina requested the Court to adjudge and declare that Serbia and Montenegro had violated the Genocide Convention 'by intentionally destroying in part the non-Serb national, ethnical or religious group within, *but not limited to*, the territory of Bosnia and Herzegovina, including in particular the Muslim population': CR 2006/37, 24 Apr. 2006, at 59, emphasis added), and Serbia and Montenegro based its counterclaim on the breach of the Convention in the person of Bosnian nationals of Serb origin on the territory of Bosnia and Herzegovina (see Counter-Memorial of Serbia and Montenegro, 22 July 1997, Ch. VII, at 349–1077). Although the counterclaim was withdrawn (Letter of the Agent of Serbia and Montenegro to the Registrar of the Court, dated 20 Apr. 2001) and the Court refrained from making a pronouncement on the abovementioned claims by Bosnia and Herzegovina (Judgment of 26 Feb. 2007, at para. 185), neither party pleaded the inadmissibility of its adversary's claims arguing a lack of legal right or interest, thus implicitly accepting the *erga omnes* character of the obligations involved.

protecting the parties themselves)⁶⁶ and to the respect of the principle *pacta tertiis nec nocent nec prosunt* (which adequately safeguards the rights of third states),⁶⁷ a treaty, whatever its content, would be valid and produce its effects among the parties without any restriction. The appearance of certain norms of general international law that protect fundamental interests of the international community as a whole again poses the question whether there should be limitations on the contractual liberty of states. This was noted by the International Law Commission when it affirmed, in 1966, that '[t]he view that in the last analysis there is no rule of international law from which States cannot at their own free will contract out has become increasingly difficult to sustain'.⁶⁸ In its codification of the law of treaties, the Commission thus identified the emergence of a certain category of international rules characterized by 'the particular nature of the subject-matter' with which they deal, including the prohibition of the use of force, slavery, piracy, or genocide.⁶⁹ The link between *jus cogens* and the phenomenon described in the previous section was further confirmed by various delegations at the Vienna Conference, where a peremptory norm was, for instance, described as:

a rule in which no individual interest of two or more States was involved and which was concerned with the over-all interests of the international community. The individual and reciprocal rights and duties of contracting parties were subject to the supreme and unanimously recognized interests of the international community.⁷⁰

⁶⁶ These are notably codified in Pt II (Conclusion and Entry into Force of Treaties) and Pt V (Invalidity, Termination and Suspension of the Operation of Treaties) of the Vienna Convention on the Law of Treaties (VCLT).

⁶⁷ On this point see 'Report on the Law of Treaties' by H. Lauterpacht, Special Rapporteur, UN Doc A/CN.4/63, reproduced in [1953] II Yrbk Int'l Law Comm. 154, at paras 1–2 of the commentary to draft Art. 15. The corresponding rules are codified in Arts 34–38 VCLT.

⁶⁸ Para. 1 of the commentary to draft Art. 50 (Treaties conflicting with a peremptory norm of general international law (*jus cogens*) of a convention on the law of treaties) [1966] II Yrbk Int'l Law Comm. 247.

⁶⁹ Paras 2 and 3 of *ibid.*, at 248. In the debates at the Commission, several members pointed out the relationship between *jus cogens* and the protection of the interests of the international community as a whole: see [1963] I Yrbk Int'l Law Comm.: 683rd meeting, at 63 (Mr Yasseen) and 65 (Radhabinod Pal); 684th meeting, at 684 (Manfred Lachs), 69 (Grigory Tunkin), and 71–72 (Antonio de Luna); 685th meeting, at 73–75 (Shabtai Rosenne) and 76–77 (Milan Bartos).

⁷⁰ Mr Amado (Brazil), UN Conference on the Law of Treaties, 1st Session, Vienna, 26 Mar.–24 May 1968, Official Records, Summary Records of the Plenary meetings and of the Meetings of the Committee of the Whole, UN Doc A/CONF.39/11, 55th plenary meeting, 7 May 1968, at 317, para. 21. Numerous delegations of all regions of the world intervened at the Vienna Conference to the same effect: see Mexico (*ibid.*, 52nd plenary meeting, 4 May 1968, at 294, para. 7: 'the rules of *jus cogens* were those rules which derived from principles that the legal conscience of mankind deemed absolutely essential to coexistence in the international community at a given stage of its historical development'); Finland (*ibid.*, at 295, para. 14); United States of America (*ibid.*, at 295, para. 17); Iraq (*ibid.*, at 296, para. 23: 'higher norms which were essential to the like of the international community and were deeply rooted in the conscience of mankind'); Kenya (*ibid.*, at 296, para. 29: '[a]t a time when the international community was developing mutual co-operation, understanding and inter-dependence, the will of the contracting States alone could not be made the sole criterion for determining what could lawfully be contracted upon by States'); Lebanon (*ibid.*, at 297, para. 44); Madagascar (*ibid.*, 53rd plenary meeting, 6 May 1968, at 301, para. 22); Uruguay (*ibid.*, at 303, para. 48: '[t]he international community recognized certain principles which

It is also widely recognized in the legal literature.⁷¹ While the legal protection of community interests is not explicitly referred to in the definition of the concept finally retained in Article 53 of the Vienna Convention on the Law of Treaties, this provision implicitly recognizes the link with this phenomenon when it qualifies a peremptory norm of general international law with reference to its recognition as such by 'the international community of States as a whole', which is symptomatic of a subjacent collective interest. The consequence, in terms of conventional relations, is that a treaty will be void if, at the time of its conclusion, it conflicts with a peremptory norm (Article 53), or will become void and be terminated if such a peremptory norm emerges after its conclusion (Article 64).

chimed with its essential interests and its fundamental moral ideas'); Sweden (*ibid.*, 54th plenary meeting, 6 May 1968, at 306–307, paras 2–3); France (*ibid.*, at 309, para. 32: '[t]he substance of *jus cogens* was what represented the undeniable expression of the universal conscience, the common denominator of what men of all nationalities regarded as sacrosanct'); Hungary (*ibid.*, at 311, para. 45: '[t]he principle contained in the article was not based on the theory of natural law, but on the reality of the relations between States. . . . [Rules of a peremptory character] were a necessity dictated by the complexity of international relations and by the interdependence of the subjects of international law'); New Zealand (*ibid.*, at 312, para. 51: 'treaties that were detrimental to an important public interest'); Romania (*ibid.*, at 312, para. 54); Japan (*ibid.*, 55th plenary meeting, 7 May 1968, at 318, para. 28: 'as international intercourse increased, the need for peremptory norms became greater. . . . [T]he question of conflicts between a treaty and a peremptory norm of international law . . . concerned the general interest of the whole community of nations'); Ecuador (*ibid.*, at 320, para. 43); Ivory Coast (*ibid.*, at 321, para. 50: 'a new solidarity of nations, based on the inter-dependence of States, international co-operation, peaceful coexistence and assistance by the wealthier to the less-favoured nations'); Zambia (*ibid.*, 56th plenary meeting, 7 May 1968, at 322, para. 9: 'to safeguard the interests of the international community as a whole'); Philippines (*ibid.*, at 322–323, para. 15: the *jus cogens* principle 'represented a formulation of the positive concept of law in the international community'); Switzerland (*ibid.*, at 324, para. 27: 'any agreement in conflict with those main principles should be considered unlawful, since it constituted an attack on the heritage of all mankind. Against such a violation, every member of the community could, and should protest'); Norway (*ibid.*, at 324, para. 35: 'certain fundamental principles designed to safeguard the interests of all'); Malaysia (*ibid.*, at 326, para. 50: '[t]ransferred to the international sphere, public policy became what could be called *jus cogens*, which was indispensable for an increasingly organized international society in which relations tended to become multilateral rather than bilateral, and in which the interest of the international community as a whole consequently prevailed over the individual interests of each State'); Mali (*ibid.*, at 327, para. 69: '[i]nternational law was thus becoming, to an increasing extent, a community law. The notion of *jus cogens* faithfully reflected the political and sociological changes that had taken place in international society'). Several delegations also referred to the notion of an international public policy (*ordre public international*): Greece (*ibid.*, 52nd plenary meeting, 4 May 1968, at 295, para. 20); Lebanon (*ibid.*, at 297, para. 44); Nigeria (*ibid.*, at 298, para. 48); Colombia (*ibid.*, 53rd plenary meeting, 6 May 1968, at 301, para. 26); Czechoslovakia (*ibid.*, 55th plenary meeting, 7 May 1968, at 318, para. 25); Germany (*ibid.*, at 318, para. 31); Switzerland (*ibid.*, 56th plenary meeting, 7 May 1968, at 323, para. 26); Monaco (*ibid.*, at 324, para. 32).

⁷¹ See, e.g., Virally, 'Réflexions sur le "jus cogens"', XII *Annuaire français de droit international* (1966) 5, at 11–12; Verdross, 'Jus Dispositivum and Jus Cogens in International Law', 60 *AJIL* (1966) 55, at 58; Suy, 'The Concept of *Jus Cogens*', in Carnegie Endowment for International Peace, *Conference on International Law. Lagonissi (Greece), April 3-8 1966. Papers and Proceedings. II The Concept of Jus Cogens in International Law* (1967), at 17, 70–71; Ago, 'Droit des traités à la lumière de la Convention de Vienne', 134 *Recueil des Cours* (1971-III) 297, at 323–324; de Visscher, 'Positivism et "jus cogens"', 75 *RGDIP* (1971) 5, at 11; Mann, 'The Doctrine of Jus Cogens in International Law', in H. Emke et al. (eds), *Festschrift für Ulrich Scheuner zum 70. Geburtstag* (1973), at 399, 441; C. Rozakis, *The Concept of Jus Cogens in the Law*

Article 103 of the Charter of the United Nations is somewhat of a hybrid *avant la lettre* between *jus cogens* and obligations *erga omnes*.⁷² Like *jus cogens*, this provision, by establishing the prevalence of the Charter over other international agreements, hints at the existence of a hierarchy in international law, giving the Charter a position that has sometimes been compared to that of a constitution.⁷³ Like obligations *erga omnes*, however, Article 103 does not implement this hierarchy at the level of norms (through the mechanism of invalidity), since it simply provides that the obligations of the Charter shall prevail. The concrete consequence of a breach of this provision (i.e., of execution by the state of an obligation under an international agreement in conflict with its obligations under the Charter) remains unclear,⁷⁴ as is the relationship between Charter obligations and customary international law.⁷⁵ However, Article 103 clearly stems from the idea that the obligations under the Charter serve a common and

of *Treaties* (1976), at 2; Scheuner, 'Conflict of Treaty Provisions with a Peremptory Norm of General International Law and its Consequences', 27 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1976) 520, at 524; Ronzitti, 'La disciplina dello *jus cogens* nella Convenzione di Vienna sul diritto dei trattati', XV *Comunicazioni e Studi* (1978) 241, at 256; Gómez Robledo, 'Le *ius cogens* international: sa genèse, sa nature, ses fonctions', 172 *Recueil des Cours* (1981-III) 9, at 185–187 and 188–208; Alexidze, 'Legal Nature of *Jus Cogens* in Contemporary International Law', 172 *Recueil des Cours* (1981-III) 219, at 260–262; F. Lattanzi, *Garanzie dei diritti dell'uomo nel diritto internazionale generale* (1983), at 312; L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law. Historical Development, Criteria, Present Status* (1988), at 18 and 282–283; Christenson, 'Jus Cogens: Guarding Interests Fundamental to International Society', 28 *Virginia J Int'l L* (1988) 585, at 587; Simma, 'From Bilateralism to Community Interest in International Law', 250 *Recueil des Cours* (1994-VI) 217, at 288; Carrillo Salcedo, 'Reflections on the Existence of a Hierarchy of Norms in International Law', 8 *EJIL* (1997) 583, at 588–591; Verhoeven, 'Jus Cogens and Reservations or "Counter-Reservations" to the Jurisdiction of the International Court of Justice', in K. Wellens (ed.), *International Law: Theory and Practice. Essays in Honour of Eric Suy* (1998), at 195, 196; A. Orakhelashvili, *Peremptory Norms in International Law* (2006), at 7–35. Contra R. Kolb, *Théorie du *ius cogens*. Essai de lecture du concept* (2001), notably at 172–184, who, while recognizing the dominant trend above, proposes a larger notion of *jus cogens* based on the idea of *utilitas publica*.

⁷² Under Art. 103, in the event of a conflict between the obligations of the Members of the UN under the Charter and their obligations under any other international agreement, the former shall prevail. This provision echoes Art. 20 of the Covenant of the League of Nations, under which the Members of the League agreed that the Covenant 'is accepted as abrogating all obligations or understandings *inter se* which are inconsistent with the terms thereof, and solemnly undertake that they will not hereafter enter into any engagements inconsistent with the terms thereof'.

⁷³ See Sciso, 'On Article 103 of the Charter of the United Nations in the Light of the Vienna Convention on the Law of Treaties', 38 *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht* (1987–1988) 161; Bernhardt, 'Article 103', in B. Simma (ed.), *The Charter of the United Nations. A Commentary* 1292 (2nd edn, 2002), at 1292, 1295, and 1302; Toublanc, 'L'article 103 et la valeur juridique de la Charte des Nations Unies', 108 *RGDIP* (2004) 439; Thouvenin, 'Article 103', in J.-P. Cot, A. Pellet, and M. Forteau (eds), *La Charte des Nations Unies. Commentaire article par article 2133* (3rd edn, 2005), at 2134; Simma, 'La Charte des Nations Unies et le *jus cogens*', in R. Chemain and A. Pellet (eds), *La Charte des Nations Unies, constitution mondiale?* (2006), at 207–209.

⁷⁴ The most straightforward consequence would be that the implementation of the obligations under conflicting international agreements would constitute a breach of the Charter and thus entail the responsibility of the state *vis-à-vis* other member states.

⁷⁵ See, e.g., Bernhardt, *supra* note 72, at 1298–1299; Thouvenin, *supra* note 72, at 2140–2142.

higher interest, which may not be opted out of by states in their reciprocal treaty relations, again fomenting a structural transformation of the system.

Yet another such transformation relates to the consequences of internationally wrongful acts. The classical theory of international responsibility, which was mainly developed in the 19th and early 20th centuries on the basis of the case law of arbitral tribunals in diplomatic protection disputes, was built upon the reciprocity of rights and obligations: the breach of an obligation by a state would cause an injury to the right of another state and entail the establishment of a new, secondary, obligation to provide reparation to that 'injured state' in particular.⁷⁶ Once again, this bilateral construction worked well in a society where social intercourse was based on the fulfilment of individual interests, but faced difficulties in those cases where collective values, such as peace, human rights, or the environment, needed to be protected. The intuition that a different regime of state responsibility existed in these cases led the International Law Commission to propose the concept of 'state crimes', in draft Article 19 of its codification of state responsibility, adopted on first reading in 1976.⁷⁷ The whole saga that ensued, and which finally led to the adoption of Articles 40, 41, and 48 of the final 2001 Articles, clarified that this separate regime was not to be 'criminal' in nature,⁷⁸ but also demonstrated that there was quasi-unanimous

⁷⁶ See *supra* note 26. In its commentary to the Articles on the Responsibility of States for internationally wrongful acts, the International Law Commission takes note of this theory, while opening up the possibility for the emergence of community interests: '[i]n international law the idea of breach of an obligation has often been equated with conduct contrary to the rights of others. . . . [S]ome have considered the correlation of obligations and rights as a general feature of international law: there are no international obligations of a subject of international law which are not matched by an international right of another subject or subjects, or even of the totality of the other subjects (the international community as a whole)': [2001] II Yrbk Int'l Law Comm., Pt 2, at 35, para. 8 of the commentary to Art. 2.

⁷⁷ See [1976] II Yrbk Int'l Law Comm., at 95–122. Under para. (2) of draft Art. 19, an 'international crime' was defined as '[a]n internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole', thus making a dual relationship with the international community both substantively (its fundamental interests being harmed) and formally (the community should recognize the act as a crime). Para. (3) gave a series of examples of such crimes, which included aggression, the establishment or maintenance by force of colonial domination, slavery, genocide, apartheid, and massive pollution of the atmosphere or of the seas. In the commentary, the Commission made clear references to the phenomenon described in the previous sect.: see, for instance, *ibid.*, at 101, para. 15 ('the imperative need to protect the most essential common property of mankind'); at 102, para. 15 ('these rules impose upon States obligations which are to be respected because of an increased collective interest on the part of the entire international community'); at 104, para. 21 ('The specially important content of certain international obligations and the fact that their fulfilment affects the realities of life in the international community'); etc.

⁷⁸ In its commentary to draft Art. 19 in 1976, the Commission rejected the analogy with criminal law, but remained somehow ambiguous as to the possibility of imposing repressive and punitive sanctions on states: see, e.g., *ibid.*, at 104, para. 21, n. 473. The consequences of an international crime identified on first reading in 1996 did not establish a criminal regime of responsibility, but did contain some repressive features: the wrongdoing state was under an obligation to provide restitution in kind even when it would involve a burden out of all proportion to the benefit which the injured state would gain from obtaining restitution in kind instead of compensation, or would seriously jeopardize its political independence or

adherence to the idea that the injury to the interests of the international community as a whole implies special consequences. In 1998, for instance, members of the Commission called for ‘the evolution of international law . . . from a bilateralism which had sought to provide reparation for the injured party only to a system of multilateralism in which a community response to the violation of community values was possible’.⁷⁹ The 2001 Articles thus identify two separate regimes of responsibility towards the international community as a whole: (1) a general regime applicable in the event of breach to any obligation *erga omnes*, by which states other than the injured state may claim the cessation of the wrongful act and assurances and guarantees of non-repetition, as well as the performance of the obligation of reparation in the interest of the injured state or of the beneficiaries of the obligation breached (Article 48);⁸⁰ and (2) an aggravated regime applicable only to serious breaches of obligations under peremptory norms of general international law, under which all states have the obligations to cooperate to bring the breach to an end through lawful means, not to recognize as lawful the ensuing situation, and not to render aid or assistance in its maintaining (Articles 40 and 41).⁸¹

One may also include in this trend the emergence of individual criminal responsibility at the international level, which appears as a novel means for international law to guarantee the respect of its most fundamental values. This responsibility made its appearance under different forms and with different justifications. With respect to piracy, international criminal responsibility expressed less a universal concern of a moral nature than a solution to a practical difficulty in protecting a community interest, namely the lack of effective means of punishment of a crime which took place outside national territorial jurisdictions and endangered the freedom and security of the high seas.⁸² Similar justifications appear to have motivated some older conventions

economic stability whereas the injured state would not be similarly affected if it did not obtain restitution in kind, and to provide satisfaction even if it impaired its dignity: see draft Art. 52 in [1966] II Yrbk Int'l Law Comm., Pt 2, at 71. The Commission abandoned the concept of criminal state responsibility at the beginning of its second reading on the draft Arts: [1998] II Yrbk Int'l Law Comm., Pt 2, at 75, paras 317–318 and at 77, paras 329 and 331.

⁷⁹ *Ibid.*, at 67, para. 265 (see also *ibid.*, at 68, para. 270; at 70, para. 283; at 73, para. 301). References were also made to community interests (*ibid.*, at 68, para. 266; at 70, paras 280 and 283; at 72, para. 297; at 73–74, paras 303–305; at 77, para. 329) and the reinforcement of solidarity (*ibid.*, at 69, para. 274; at 73, para. 301; at 75, para. 318).

⁸⁰ For a critical study of this regime see Villalpando, *supra* note 11, at 334–378.

⁸¹ Despite their apparent limited character, these supplementary obligations play a significant role for the system: while in the general regime states have discretion whether to implement the responsibility for breaches of obligations *erga omnes* (they have a *right* to claim cessation and reparation), the aggravated regime imposes upon all of them (including the injured state) *obligations* aimed at limiting the effects of the serious breach of an obligation under *jus cogens*, thus ensuring a minimum guarantee of the affected public good (see Villalpando, *supra* note 11, at 381–391). For a study of other consequences under the aggravated regime not codified by the International Law Commission see *ibid.*, at 391–413.

⁸² See, e.g., the commentary by Geffcken in Heffter, *supra* note 58, at 231; P. Fiore, *Nouveau droit international public suivant les besoins de la civilisation moderne* (2nd edn, trans. Antoine, 1885), ii, at 17; M. Travers, *Le droit pénal international et sa mise en œuvre en temps de paix et en temps de guerre* (1920), at 79–80; Pella, ‘La repression de la piraterie’, 15 *Recueil des Cours* (1926-V) 145, at 220–221.

relating to offences such as counterfeiting, interference with submarine cables, or (at least initially) terrorism. A different category of crimes under international law rather was justified by the emergence of ethical values common to all humankind: the pioneering examples of this group are the slave trade and slavery,⁸³ followed by the failed attempt to prosecute the former German Emperor William II of Hohenzollern 'for a supreme offence against international morality and the sanctity of treaties',⁸⁴ and by the condemnation of crimes against peace, war crimes, crimes against humanity, genocide, etc.⁸⁵ The underlying community interest is widely recognized in the legal literature,⁸⁶ and is clearly expressed in relevant judicial decisions⁸⁷ and treaties. The most notable illustration of the last is the Rome Statute of the International Criminal Court whereby 'the most serious crimes of concern to the international community as a whole must not go unpunished and . . . their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation'.⁸⁸

B How Community Interests Have Come to Be Protected by International Law

Like Rome, these new constructions of the international legal order were not built in a day. On the contrary, the legal protection of international community interests was the result of a gradual and, at first, almost imperceptible general trend.

⁸³ See Boschiero, 'La traite transatlantique et la responsabilité internationale des Etats', in L. Boisson de Chazournes, J.-F. Quéguiner, and S. Villalpando (eds), *Réparer les crimes de l'histoire? Réponses du droit et de la justice* (2004), at 203–262.

⁸⁴ Art. 227 of the Versailles Treaty of 28 June 1919.

⁸⁵ E.g., in the preamble to the London Agreement of 8 Aug. 1945, creating the International Military Tribunal with jurisdiction over crimes against peace, war crimes, and crimes against humanity, the Contracting Parties qualified the acts to be judged and punished as 'abominable deeds' and declared themselves to be 'acting in the interests of all the United Nations'. The preamble to the Convention for the Prevention and Punishment of the Crime of Genocide of 9 Dec. 1948 referred to genocide as 'a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world' and as 'an odious scourge' for the elimination of which international cooperation is required.

⁸⁶ E.g., Pella, *supra* note 81, at 220–222; S. Glaser, *Introduction à l'étude du droit international pénal* (1954), at 8 and 13; S. Plawski, *Etude des principes fondamentaux du droit international pénal* (1972), at 10; Lattanzi, *supra* note 71, at 354–355; Dinstein, 'International Criminal Law', 20 *Israel L Rev* (1985) 206, at 221; L. Sunga, *The Emerging System of International Criminal Law. Development in Codification and Implementation* (1997), at 229–247; Barboza, 'International Criminal Law', 278 *Recueil des Cours* (1999) 9, at 24–25; Abellán Honrubia, 'La responsabilité internationale de l'individu', 280 *Recueil des Cours* (1999) 135, at 199–203. In its draft statute of the International Criminal Court, the International Law Commission had initially considered vesting the Court with jurisdiction over crimes 'under a norm of international law accepted and recognized by the international community of States as a whole as being of such a fundamental character that its violation attracts the criminal responsibility of individuals'; while the Commission then preferred to define specific crimes, thus abandoning this proposal because of its vagueness, the idea underlying it was not challenged: see [1994] II Yrbk Int'l Law Comm., Pt 2, at 36, para. 5 of the commentary to Pt III.

⁸⁷ See Israeli Supreme Court, *Attorney-General of the Government of Israel v. Adolf Eichmann*, Judgment of 29 May 1962. 36 Int'l L Rep. 291; US, *Filartiga v. Peña Irala*, 630 F2d 876 (2nd Cir 1980), reproduced at 19 ILM (1980) 980.

⁸⁸ Rome Statute of the International Criminal Court, UN Doc A/CONF.183/9, 17 July 1998, 4th para. of the preamble.

As shown above, the various manifestations of the emergence of international community interests have arisen in a compartmentalized and asynchronous way. International law has coined new autonomous legal concepts, when necessary, to respond to specific problems faced in the regulation of international relations. Thus, for example, when a way was needed to guarantee the integrity of the newly created system of collective security embodied in the Charter of the United Nations, the mechanism of Article 103, based on a previous similar provision in the Covenant of the League of Nations, was proposed. When, in the context of the codification of the law of treaties, it was suggested that states' contractual freedom was subject to certain limitations, the concept of *jus cogens* was formulated. When the International Court of Justice looked for redemption after the rejection of the claims in the 1966 *South West Africa* cases, it recognized, in an *obiter dictum* four years later, an extended *locus standi* through the category of obligations *erga omnes*.⁸⁹ When the International Law Commission, in its codification of state responsibility, needed to satisfy the intuitive idea whereby serious crimes such as aggression or genocide could not be submitted to the same regime as minor breaches of international law, the category of state crimes was proposed. Or when the conviction arose in the international community that '[c]rimes against international law are committed by men, not by abstract entities, and [that] only by punishing individuals who commit such crimes can the provisions of international law be enforced',⁹⁰ the international criminal responsibility of individuals was affirmed.

Interestingly, in the cases described above, it was *not* initially proposed to extend the application of existing concepts to the new field in which the need for the protection of community interests made its appearance. Thus, for instance, while issuing its judgment in the *Barcelona Traction* case only a few months after the adoption of the Vienna Convention on the Law of Treaties, the International Court of Justice did not attempt to link the new concept of obligations *erga omnes* to that of *jus cogens*. Similarly, while making explicit reference to *jus cogens*, obligations *erga omnes*, and the punishment of individuals for crimes under international law in its commentary to draft Article 19,⁹¹ the International Law Commission did not propose, in 1976, to apply those notions directly to the field of international responsibility, preferring to appeal to the different

⁸⁹ The link between the *Barcelona Traction dictum* and the *South West Africa* judgment is highlighted, for instance, in Schachter, 'International Law in Theory and in Practice', 178 *Recueil des Cours* (1982-V) 9, at 341; Thirlway, 'The Law and Procedure of the International Court of Justice', LX *British Yrbk Int'l L* (1989) 1, at 94; T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989), at 190; Simma, *supra* note 71, at 295.

⁹⁰ Judgment, *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg*, 14 Nov. 1945–1 Oct. 1946, *supra* note 45, at 223.

⁹¹ The Commission invoked the passage of the *Barcelona Traction* judgment on obligations *erga omnes* in para. 10 of the commentary to draft Art. 19: [1976] II Yrbk Int'l Law Comm. 99. It later mentioned *jus cogens* and criminal responsibility for international crimes as evidence of the conviction that any breach of obligations 'which are to be respected because of an increased collective interest on the part of the entire international community' is particularly serious and subject to a different regime of responsibility: *ibid.*, at 102–104, paras 15–21.

concept of 'state crimes'.⁹² In other words, at least in a first phase, those who have been called upon to codify, interpret, or apply international law have been very careful not to extend the effect of the newly-coined concepts beyond their original scope, thus showing singular self-restraint which may be explained by the limits of their respective mandates or by the awareness that a more daring interpretation of these concepts could be opposed by certain governments or the legal community. Each of the manifestations described above has initially been tested in a limited and contained legal environment (law of treaties, legal standing before the Court, state responsibility) and has developed independently. It is only in a later phase, mostly *ex post facto* and once the concepts have consolidated themselves in legal theory and practice, that links have been made. The best example in this respect is certainly that of the 25-year-long discussion on state crimes, which resulted in the abandonment of that notion and the importation of the concepts of *jus cogens* and obligations *erga omnes* to the realm of international responsibility.⁹³ One can also find illustrations of the same tendency in the work of the international criminal tribunals, which have used the concepts of *jus cogens* and obligations *erga omnes* to specify the scope of the criminal responsibility of individuals under international law.⁹⁴ The result is an emerging web of interconnected transformations of the international legal order which may be placed under the same umbrella of the protection of the interests of the international community.

Yet another interesting feature of this phenomenon is that the protection of community interests in international law has been effected through the adaptation, not the abandonment, of existing legal regimes. The new concepts, while being revolutionary in their substance, have been formulated in such a way as to fit into well-known legal frameworks. Thus, for example, in 1970 the International Court of Justice allowed

⁹² On the reasons for this choice of terminology see *ibid.*, at 118–119, para. 59 ('the Commission chose this designation because it has come into common use in the practice of States and in contemporary learned works and because it is frequently employed in resolutions adopted by organs, first, of the League of Nations and, later, of the United Nations, as well as in important international instruments'). There is no explanation in the commentary as to why reference to obligations *erga omnes* or *jus cogens* was not used.

⁹³ See Crawford, *supra* note 57, at 452–477. In its interim conclusions on draft Art. 19, following its debate in 1998, the International Law Commission notably agreed that draft Art. 19 would be put to one side and that 'consideration should be given to whether the systematic development in the draft articles of key notions such as obligations (*erga omnes*), peremptory norms (*jus cogens*) and a possible category of the most serious breaches of international obligation could be sufficient to resolve the issues raised by article 19': [1998] II Yrbk Int'l Law Comm., Pt 2, at 77, para. 331.

⁹⁴ See, e.g., International Criminal Tribunal for the former Yugoslavia, Trial Chamber, *Prosecutor v. Anto Furundzija*, IT-95-17/1-T, Judgment of 10 Dec. 1998, at paras 151–152 (where the Chamber finds that the prohibition of torture imposes obligations *erga omnes*, from which it follows that '[w]here there exist international bodies charged with impartially monitoring compliance with treaty provisions on torture, these bodies enjoy priority over individual States in establishing whether a certain State has taken all the necessary measures to prevent and punish torture and, if they have not, in calling upon that State to fulfil its international obligations') and paras 153–157 (where the Chamber finds that the same prohibition has acquired the status of *jus cogens*, from which it draws several consequences, including universal jurisdiction for the crime of torture, the non-application of a statute of limitations, and the exclusion of any political offence exemption for the purposes of extradition).

for the possibility for all states to take legal action in vindication of a public interest by recognizing that they have, in the case of obligations *erga omnes*, a ‘legal interest’ in the protection of the rights involved: it applied, in other words, the very same test which had led it to reject the applications in the controversial *South West Africa* cases⁹⁵ without causing a rupture with the traditional means of assessing *locus standi* at the international level.⁹⁶ Similarly, in the Vienna Convention, conflict with a *jus cogens* norm is construed as a cause among others (albeit the most absolute one) of the invalidity of treaties, which remains submitted to the same implementation regime and to a mechanism of dispute settlement based on a very traditional compromissory clause.⁹⁷ As for the regime of state responsibility, the International Law Commission explicitly rejected the idea of developing a criminal type of responsibility, rather adjusting the classical consequences of internationally wrongful acts (cessation and guarantees of non-repetition, reparation in its various forms) and means of implementation, inherited from nineteenth century arbitrations, to fit the new needs of the protection of community interests.⁹⁸ International law, in other words, has been very conservative of its traditional institutions, which have not been challenged by the new developments towards the protection of community interests, a feature which has certainly facilitated the acceptance of the new concepts by states. However, this has entailed a collateral problem: the objective of achieving the common good has been pursued through legal tools that were not, at their origins, elaborated for that purpose and are better suited to the protection of individual interests. The problems of this approach will be described hereinafter.

⁹⁵ In the 1966 *South West Africa* judgment, *supra* note 62, at 51, para. 99, the Court had rejected the claims of Ethiopia and Liberia on the basis that the applicants had not ‘established any legal right or interest appertaining to them in the subject-matter of the present claims’. In its reasoning, the Court had made it clear that even legal rights or interests which did not relate to anything material or ‘tangible’ could be a basis for legal standing before it, as long as ‘such rights or interests . . . be clearly vested in those who claim them, by some text or instrument, or rule of law’: *ibid.*, at 32, para. 44. The *Barcelona Traction* judgment, *supra* note 31, at 32, para. 35, bases its definition of obligations *erga omnes* (as well as its findings on Belgium’s legal standing in the case) on the same test. It is telling in this regard that the 1970 judgment did not directly contradict the 1966 finding whereby ‘the equivalent of an “*actio popularis*”, or right resident in any member of a community to take legal action in vindication of a public interest’ was ‘not known to international law as it stands at present’: *South West Africa*, *supra* note 62, at 47, para. 88.

⁹⁶ The Court could alternatively have coined a new mechanism, closer to *actio popularis*’ as traditionally conceived, by which any state could have legal standing before the Court (i.e., a procedural right) to protect an affected community interest, regardless of any substantive legal right or interest vested in it. For a proposal in this sense prior to the 1970 *Barcelona Traction* case see G. Abi-Saab, *Les exceptions préliminaires dans la procédure de la Cour internationale. Etude des notions fondamentales de procédure et des moyens de leur mise en œuvre* (1967), at 130–145, notably at 142–145.

⁹⁷ The Vienna Conference could alternatively have vested in an international organ (for instance, the GA or the SC) the power to annul the treaty in contradiction to a peremptory norm falling under its competence (e.g., the prohibition of the use of force or of genocide).

⁹⁸ The Commission could alternatively have proposed a regime of state criminal responsibility, respecting the principles of *nullum crimen nulla poena sine lege* and of due process and accompanied by procedures for the investigation and determination of crimes, appropriate sanctions, and rehabilitation. This was proposed, for the sake of argument, by Special Rapporteur Crawford (‘First Report on State responsibility’ by James Crawford, UN Doc A/CN.4/490/Add.3, at paras 89–92) and rejected by the Commission: [1998] II Yrbk Int’l Law Comm., Pt 2, at 74–75, paras 306–316.

4 The Concurrent Protection of Community and Individual Interests in International Law

If the phenomenon described in the previous sections has caused structural transformations in inter-state relations and international law, it has not, however, entailed a complete overhaul of the system. First, as has already been pointed out, the legal protection of community interests has crystallized only in certain fields of international law, while in others bilateralism continues to be the rule.⁹⁹ Furthermore, even in those fields where the legal protection of community interests is settled, individual interests (most notably, those attached to state sovereignty) maintain their relevance and continue to be taken into account by international norms. This is illustrated by certain apparent paradoxes in the regimes of obligations *erga omnes*, *jus cogens*, responsibility towards the international community as a whole, etc. It is also at the core of increasingly frequent debates in international law on possible conflicts and the appropriate balance to be found between community and individual interests.

A The Protection of Community Interests Preserves Individual Interests

As previously explained, the protection of international community interests has been achieved through the adaptation of existing legal regimes, to which newly-coined concepts, such as obligations *erga omnes* or *jus cogens*, have been attached. As a consequence, the norms that are supposedly aimed at protecting community interests often seem to be strikingly ill-suited to this new objective.

This accounts for apparent inconsistencies in the corresponding legal regimes. Thus, for example, the 1969 Vienna Convention provides for the invalidity of a treaty in contradiction with *jus cogens* (Article 53), which implies that the parties are under the heavy duty to eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm and to bring their mutual relations into conformity with that norm (Article 71(1)).¹⁰⁰ This appears to be quite a strict regime, aimed at avoiding the treaty in question producing any damaging effect on community interests. However, the Vienna Convention reserves the initiative of invoking such invalidity solely to the parties to the relevant treaty (Article 65(1)), i.e., to those very states which reached the agreement in conflict with *jus cogens* in the first place and are probably the least interested in challenging their

⁹⁹ See sect. 2B above. As explained therein, public goods may be found in every domain of international relations, but the need for a legal mechanism of protection based on multilateralism was felt only in certain fields.

¹⁰⁰ The consequences for a treaty which becomes void and terminates by reason of the emergence of a new peremptory norm of general international law (Art. 64) are codified in Art. 71(2), whereby the termination of the treaty releases the parties from any obligation further to perform the treaty, but does not affect any right, obligation, or legal situation of the parties created through the execution of the treaty prior to its termination, provided that those rights, obligations, or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm.

previous commitment in the name of community values. To ensure the stability of conventional relations, third states are not allowed to implement the regime of invalidity under the Convention, which may be seen as constituting a flaw in the legal protection of community interests.¹⁰¹ With respect to obligations *erga omnes*, the *Barcelona Traction dictum* would in principle imply that all states have standing before the Court in the event of a breach of an obligation owed to the international community as a whole: this appears *prima facie* as a very powerful tool which would in fact be very close to achieving the same effects as an international *actio popularis*. However, as recently as 2006, the Court made it clear that ‘the *erga omnes* character of a norm [or its *jus cogens* nature] and the rule of consent to jurisdiction are two different things’ and that ‘the mere fact that rights and obligations *erga omnes* may be at issue in a dispute would not give the Court jurisdiction to entertain that dispute’.¹⁰² In other words, the consensual jurisdiction of the Court remains the rule even in this case and would limit the ability of *omnes* to exercise their legal standing for the benefit of the international community as a whole. In addition, as Portugal experienced in the *East Timor* case, the Court would in any case not rule on the merits if the ‘indispensable third party’ is absent from the proceedings.¹⁰³ All this explains in part why the potential of this concept has never been really exploited. Regarding the field of international responsibility, the International Law Commission was praised for its recognition that ‘states other than the injured state’ may invoke the responsibility of the wrongdoing state in the event of breach of obligations owed to the international community as a

¹⁰¹ For a criticism of this regime in the VCLT see Cahier, ‘Les caractéristiques de la nullité en droit international et tout particulièrement dans la Convention de Vienne de 1969 sur le droit des traités’, 76 *RGDIP* (1972) 481, at 488; Rosenne, ‘Bilateralism and Community Interest in the Codified Law of Treaties’, in W. Friedmann, L. Henkin, and O. Lissitzyn (eds), *Transnational Law in a Changing Society. Essays in Honor of Philip C. Jessup* (1972), at 221–222; J. Sztucki, *Jus Cogens and the Vienna Convention on the Law of Treaties: A Critical Appraisal* (1974), at 125–132 and 187–188; Rozakis, *supra* note 71, at 115–122; Scheuner, *supra* note 71, at 524; Ronzitti, *supra* note 71, at 272–273; Gómez Robledo, *supra* note 71, at 151–152; Gaja, ‘*Jus Cogens* beyond the Vienna Convention’, 172 *Recueil des Cours* (1981-III) 271, at 282–283; Hannikainen, *supra* note 71, at 294–296; Simma, *supra* note 71, at 288–289. Most of these authors contemplate the possibility that third states invoke the invalidity of a treaty in conflict with *jus cogens* beyond the rules of the VCLT (e.g., through state responsibility). For authors who support the regime of the VCLT see Picone, ‘Obblighi reciproci and obblighi *erga omnes* degli Stati nel campo della protezione internazionale dell’ambiente marino dall’inquinamento’, in V. Starace (ed.), *Diritto internazionale e protezione dell’ambiente marino* (1983), at 15, 41–42, n. 57; Li, ‘*Jus Cogens* and International Law’ (originally published 1982), reproduced in S. Yee and W. Treya (eds), *International Law in the Post-Cold War World. Essays in memory of Li Haopei* (2001), at 499, 520.

¹⁰² *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and admissibility, Judgment of 3 Feb. 2006, at para. 64.

¹⁰³ The Court indeed concluded in that case that it could not exercise its jurisdiction by virtue of the declarations of the parties under Art. 36(2) of its Statute ‘because, in order to decide the claims of Portugal, it would have to rule, as a prerequisite, on the lawfulness of Indonesia’s conduct in the absence of that State’s consent’: *East Timor (Portugal v. Australia)*, Judgment [1995] ICJ Rep 105, at para. 35. The Court did not therefore decide on Australia’s further objection, which could have required some examination of obligations *erga omnes*, whereby Portugal lacked standing to bring the case since it did not have a sufficient interest of its own to institute the proceedings and could not claim any right to represent the people of East Timor: *ibid.*, at 99, para. 20.

whole (Article 48). However, particularly given the fierce opposition of states in the Sixth Committee, the Commission fell short of recognizing the right of these states to adopt countermeasures,¹⁰⁴ thus depriving their claim of a fundamental support in a system still characterized by the principle of self-help.

Moreover, whenever a possible conflict between fundamental community and individual interests in international law has been envisaged, there seems to have been a marked reluctance to proclaim the primacy of the former. Thus, for instance, in 1996 the International Court of Justice stated that 'the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular to the principles and rules of humanitarian law' (a great many of which it considered to be 'fundamental to the respect of the human person and "elementary considerations of humanity"', which certainly are community interests). However, the Court then found that it could not 'conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake': in other words in a situation where a fundamental individual interest would be endangered.¹⁰⁵ Similarly, despite the fundamental community interest that justifies individual criminal responsibility for international crimes, both national courts (in particular, the House of Lords in the *Pinochet* case¹⁰⁶) and the International Court of Justice¹⁰⁷ have fallen short of recognizing a general exception, in these cases, to the immunity of high-ranking state officials from foreign criminal jurisdiction. The first exchange of views in the International Law Commission on the topic has crystallized the underlying tension: while some members argued for an exception to this immunity for crimes

¹⁰⁴ In 2000, the Commission had proposed a provision which recognized the entitlement of any state to take countermeasures at the request and on behalf of a state injured by a breach of an obligation owed to the international community as a whole or in the interest of the beneficiaries of an essential obligation to the international community which is seriously breached: see Art. 54 in [2000] II Yrbk Int'l Law Comm., Pt 2, at 70–71. Following the reactions in the Sixth Committee, the Commission finally adopted an Art. stating that the Chapter on countermeasures 'does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached': Art. 54 in [2001] II Yrbk Int'l Law Comm., Pt 2, at 137.

¹⁰⁵ See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] ICJ Rep 226, respectively at 266 (para. 105 E), 257 (para. 79), 263 (para. 96), and again 266 (para. 105 E).

¹⁰⁶ See *Regina v. Bartle and the Commissioner of Police for the Metropolis and others ex parte Pinochet*, 24 Mar. 1999 (HL), reproduced at 38 ILM (1999) 581.

¹⁰⁷ In the *Arrest Warrant* judgment, *supra* note 2, at 33, para. 78(2), where it found that 'the issue against Abdulaye Yerodia Ndombasi of the arrest warrant of 11 April 2000, and its international circulation, constituted violations of a legal obligation of the Kingdom of Belgium towards the Democratic Republic of the Congo, in that they failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo enjoyed under international law'.

condemned by the international community as a whole,¹⁰⁸ others called for a cautious approach, taking into account ‘the principles of sovereign equality and of stability of international relations’;¹⁰⁹ both factions emphasized the need to balance the interests involved.¹¹⁰ Similar preoccupations appear to have motivated a recent decision of the Assembly of Heads of State and Government of the African Union which, while ‘recognizing that universal jurisdiction is a principle of International Law whose purpose is to ensure that individuals who commit grave offences such as war crimes and crimes against humanity do not do so with impunity and are brought to justice’, emphasized that the abuse of this principle ‘is a clear violation of the sovereignty and territorial integrity’ of African states and has ‘a destabilizing effect that will negatively impact on the political, social and economic development of States and their ability to conduct international relations’, thus calling for the non-execution of the warrants concerned and the establishment of a competent international regulatory body.¹¹¹

In sum, the proclamation and protection of collective interests have not implied a renunciation to the protection of other, competing, interests in international law, including the very fundamental individual interest which underlies the concept of ‘sovereignty’. On the contrary, we witness a situation of equilibrium between the protection of community and that of individual interests. In some cases, this equilibrium appears to be quite stable. For instance, there does not seem to be any possibility today for the concept of obligations *erga omnes* (or that of *jus cogens*) to challenge the principle of consensual jurisdiction of the International Court of Justice: this would have the effect of scaring respondent states away from the Court and would undermine the latter’s role in the peaceful settlement of international disputes. In other cases, the equilibrium is, on the contrary, quite unstable and the state of international law continues to be subject to controversy, as is clearly illustrated by the debates of the International Law Commission on the immunity of state officials from foreign criminal jurisdiction. This therefore raises the key question of how international law should balance community and individual interests.

B How International Law Should Balance Community and Individual Interests

The world community is not yet ready to change the legal order which rules its activities, namely an international law centred on the figure of the state as the principal

¹⁰⁸ See Report, *supra* note 6, at para. 296. Some of these members even went on to contend that ‘the position of the International Court of Justice in the *Arrest Warrant* case ran against the general trend towards the condemnation of certain crimes by the international community as a whole . . . and that the Commission should not hesitate to either depart from that precedent or to pursue the matter as part of progressive development’: *ibid.*, at para. 295.

¹⁰⁹ *Ibid.*, at para. 297.

¹¹⁰ See *ibid.*, at paras 296 and 298.

¹¹¹ Assembly of Heads of State and Government of the African Union, *Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction*, Assembly/AU/Dec.199(XI), 11th session (30 June–1 July 2008), reproduced in Annex II to UN Doc S/2008/465.

subject, and the preservation of sovereignty continues to be one of the fundamental objectives of the system. As a consequence, the change which is brought about by the emergence of community interests needs to take into account the fact that the legal system will remain the same. The categorical allegation, professed by some, that community interests should prevail in any circumstance over individual interests entails the fundamental risk of undermining international law and its role in regulating interstate relations and maintaining peace, which could be particularly dangerous given that no alternative system seems to be available to replace the existing one. Reaching a balance between the protection of community and that of individual interests is therefore a necessity. The question is *where* the appropriate balance is.

On a first approach, the question is how international law should resolve potential conflicts in the implementation of norms protecting community and individual interests. The answer cannot be based on a straightforward presumption that community interests shall prevail over individual interests. Indeed, some of the latter may be of greater importance than certain community interests and, in certain circumstances, injury to them may entail more serious consequences. These considerations are noticeable in the reasoning of the advisory opinion on the *Legality of the Threat and Use of Nuclear Weapons*, when the International Court of Justice explained that it could not 'make a determination on the validity of the view that the recourse to nuclear weapons would be illegal in any circumstance owing to their inherent and total incompatibility with the law applicable in armed conflict',¹¹² having particularly in view the fundamental right of every state to survival.¹¹³ In addition, the fact that a norm protects a community interest and has a *jus cogens* character does not necessarily imply that its application would be incompatible in all circumstances with a norm protecting a competing individual interest: the European Court of Human Rights and the United Kingdom House of Lords, for example, found that the prohibition of torture in international law is not necessarily in conflict with state immunity from civil suit.¹¹⁴

However, the claim can be made that, whenever community interests are protected under international law and are considered to be fundamental to the system, the general trend shall be towards their prevalence over competing individual interests in those cases in which the continued preservation of the latter may undermine the common good. This would not be based on the alleged greater importance of community values, but rather on the fact that, by nature, these values benefit all and can be preserved only if there is unanimous adherence to them. The norms and obligations aimed at protecting individual interests cannot therefore remain intact and a

¹¹² *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 105, at 262, para. 95.

¹¹³ *Ibid.*, at 263, para. 96.

¹¹⁴ See, respectively, App. No. 35763/97, *Al-Adsani v. UK*, Judgment of 21 Nov. 2001, at paras 52–67 and *Jones (Respondent) v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) (Appellants)* [2006] UKHL 26, *per* Lord Hoffmann, at paras 43–44. See also International Law Commission, 'Immunity of State officials from foreign criminal jurisdiction', Memorandum by the Secretariat, UN Doc A/CN.4/596, 31 Mar. 2008, at para. 195.

compromise should be found to ensure that the community interest is achieved, even at the sacrifice of the personal sphere of individual states whenever (and only when) this is needed. Thus, for example, the international community's fundamental interest in the fight against impunity for international crimes has entailed some limitations to state sovereignty as traditionally conceived through exceptions to immunity, the exercise of universal jurisdiction, and the creation of international criminal tribunals. It does not imply, however, that immunity shall be surrendered in all circumstances (exceptions are limited), that universal jurisdiction may be exercised in any event (the *forum conveniens* may be the territorial state), or that the International Criminal Court shall intervene in every instance of international crimes (the exercise of its jurisdiction is subject to the principle of complementarity).

There is, nevertheless, a further argument to be addressed. It has often been maintained that what appear, at first sight, to be individual interests actually hide an underlying community value. Thus, for example, as noted by Judges Higgins, Kooijmans, and Buergenthal in their joint separate opinion in the *Arrest Warrant* case, the trends in the evolution of international law on the question of immunity of state officials:

reflect a balancing of interests. On the one scale, we find the interest of the community of mankind to prevent and stop impunity for perpetrators of grave crimes against its members; on the other, there is the interest of the community of States to allow them to act freely on the inter-State level without unwarranted interference. A balance therefore must be struck between two sets of functions which are both valued by the international community.¹¹⁵

In the same perspective, some of the members of the International Law Commission emphasized that, with respect to the immunity of state officials from foreign criminal jurisdiction, the principles of sovereign equality and of stability of international relations:

were not merely abstract considerations, but they reflected substantive legal values, such as the protection of weak States against discrimination by stronger States, the need to safeguard human rights, both of persons suspected of having committed a crime and of persons who could be affected by the possible disruption of inter-State relations, and finally, in extreme cases, even the need to respect the rules of the use of force.¹¹⁶

As seen in the first section, similar arguments may be made with regard to many (maybe most, or even all) international rules. The conflict at issue would thus be no longer between community and individual interests, but rather between two competing community interests.

This line of argument apparently changes the terms of the problem, since it propounds the search for a balance between interests of the same nature. It should not, however, be overestimated. While it could not be disputed, for example, that a community interest ultimately inspires the norm granting immunity to state officials, it is

¹¹⁵ *Arrest Warrant of 11 April 2000, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, supra* note 28, at 85, para. 75.

¹¹⁶ Report, *supra* note 6, at para. 297.

also true that this norm aims primarily at the protection of an individual interest of the state (its freedom of action) and only indirectly at the preservation of the underlying community value (protection against discrimination from stronger states, the safeguarding of human rights, the prohibition of the use of force). This calls for two observations. First, the community value which is thus ultimately protected appears to be quite similar, if not identical, to that underlying the norms condemning international crimes and calling for exceptions to immunity (again, the safeguarding of human rights, the preservation of peace, etc.); as a consequence, it should be possible to find a solution that preserves the ultimate community interest concerned. Secondly, the two different objectives of the norm (primary protection of the individual interest, ultimate preservation of the common value) do not necessarily coincide and may not both be fulfilled in a given instance. For example, the immunity granted to a head of state pursuing a policy of aggression against neighbouring countries and repression of his population would certainly allow him to act freely on the inter-state level without unwarranted interference, but could contribute to the perpetration of serious violations of human rights and threats against international peace and security.

Therefore, the fundamental question remains the same, although it is to be addressed at the level of the implementation of the norm in specific cases (and not theoretically at the level of the primary objective pursued by the norm): whether international law should protect individual interests when their continued preservation puts a fundamental community interest at risk. In those terms, the question finds several echoes in the contemporary international debate. One of the central ideas behind the notion of the 'responsibility to protect', for example, is that the enjoyment of sovereignty by each individual state is somehow conditional on the fulfillment of certain essential functions, particularly 'the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity', and that the international community, notably through the United Nations, should be prepared 'to take collective action . . . on a case-by-case basis . . . should peaceful means be inadequate and national authorities are manifestly failing' to abide by this responsibility.¹¹⁷

Ultimately, the core problem is not so much the solution of a conflict between competing community interests, but rather the identification of a rule or mechanism that ensures that the individual interest concerned be sacrificed only in those instances where this is justified by the preservation of the common good. Given the absence of a supranational authority or of binding means of settling potential disputes, these rules and mechanisms should play with the existing instruments to be found in international law. One could give several examples of the balance that has been proposed in this perspective. For instance, the main argument defended by the International Court of Justice in the *Arrest Warrant* case appears to be that, while a high-ranking official (such as a head of state) is in office, the danger of interference with the free conduct of the affairs of the state through arbitrarily-motivated criminal prosecutions is

¹¹⁷ See UN GA Res 60/1 of 16 Sept. 2005 (2005 World Summit Outcome), at paras 138 and 139.

so high as to justify not granting an exception to personal immunity, even for charges of international crimes.¹¹⁸ However, even if this argument is accepted, the danger for state sovereignty is not as serious in the case of officials who could easily be replaced or whose functions are not political, or in that of former high-ranking officials who no longer exercise public functions: immunity for lower officials or after the cessation of official duties should not constitute an obstacle to the prosecution of international crimes in the interest of the international community, since this prosecution would not directly, or so seriously, affect the individual interests at stake. In the field of state responsibility, the International Law Commission finally decided not to recognize, at least explicitly, the right of states other than the injured state to resort to counter-measures in the event of breaches of obligations owed to the international community as a whole: indeed, such a comprehensive right applying to all obligations *erga omnes*, irrespectively of their importance and of the seriousness of the breach, was seen as potentially opening the door to abuses. However, the dissuasive force of collective counter-measures seems to be worth the risk in the case of serious breaches of obligations deriving from *jus cogens*, and it appears to find some support in state practice.¹¹⁹ In conclusion, the assessment of the (community and individual) interests at stake and how they are affected in the implementation of international norms constitutes the key test to be applied in order to determine the most appropriate balance. And it is worth emphasizing that it should be subject to periodic review in order to follow the evolution of inter-state relations and international law.

5 Conclusion

The development of social intercourse at the international level has confronted states with the problem of how to satisfy a particular category of interests that surpass their personal sphere, i.e., community interests linked to the existence of public goods. The protection of community interests has caused structural transformations in the international legal order, which have manifested themselves through the grafting of new concepts (*jus cogens*, obligations *erga omnes*, etc.) on to traditional legal regimes, thus adapting norms to the new needs of contemporary international relations. By so doing,

¹¹⁸ An alternative mechanism (mentioned in passing by some Judges in their separate or dissenting opinions in that case) would have been that the incumbent high-ranking state official be granted personal immunity only when travelling abroad on official visits. This would have entailed that prosecution for international crimes would be possible against an incumbent state official, thus limiting the latter's ability to travel on private visits, but not the exercise of his or her official functions. This solution, however, does not seem to be supported by state practice.

¹¹⁹ See the commentary of the International Law Commission to Art. 54 (Measures taken by States other than an injured State) [2001] II Yrbk Int'l Law Comm., Pt 2, at 137–139. See also Tams, *supra* note 57, at 207–241; Dawidowicz, 'Public Law Enforcement without Public Law Safeguards? An Analysis of State Practice on Third-Party Countermeasures and their Relationship to the UN Security Council', 77 *British Yrbk Int'l L* (2006) 333.

however, states have not renounced the protection of other individual interests, and most particularly the central role attributed to sovereignty in their mutual relations. Today, international law thus evolves in search of a balance between the emerging need to protect community interests and the continuing preservation of interests attached to the personal sphere of individual states. The present study highlighted the apparent tensions between these conflicting goals and suggested some ways by which they may be solved.

At first sight, the proposed construction, based on an assessment of the underlying interests protected by international legal norms, could be perceived as being merely theoretical and as having little practical value. It is submitted, nonetheless, that the template described in the present study not only offers a helpful conceptual tool for understanding a general trend in the evolution of international law, but can also be used to solve concrete problems arising from the application of international norms, both in the identification of the precise scope of the *lex lata* and, when needed, in the context of progressive development. The usefulness of this approach is evidenced by practice: whenever judicial bodies (such as the International Court of Justice or other international, as well as national, tribunals) or law-makers (e.g., the International Law Commission or government representatives in international negotiations) have faced sensitive questions as to the state of international law in a field subject to evolution and controversy, they have felt the need to revert to the level of the subjacent interests involved in order to identify the contents of the relevant international norms. By understanding the most profound logic of the legal system in its social context, one may find solutions which, while always based on positive international law, ensure coherence in legal regulation and ultimately combat the peril of fragmentation.