

INDIVIDUAL STATES AS GUARDIANS OF COMMUNITY INTERESTS

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I. Introduction

It is an honour to be asked to contribute to this Festschrift for Bruno Simma who has been a mentor for many years and whose approach to international law has shaped my understanding of discipline. This contribution addresses a topic that has been one of Bruno's main concerns both as an academic and as a judge: the potential for decentralized responses against infringements of community interests.¹ This is of course one of international law's perennial topics underlying pieces on obligations *erga omnes*, *actio popularis*, and *jus cogens*, but also humanitarian intervention, third-party countermeasures, and transnational litigation. The purpose of this contribution is not to rehearse arguments about these concepts in any detail, but rather to provide a broader—and necessarily cursory—perspective on their structural features: what is provided is a comparative evaluation of how the international legal system responds to assertions, by individual States, of a right to defend community interests and thereby to act as guardians of an international public order. In order to present a comparative assessment, the focus will have to be rather broad. Hence the subsequent sections review a heterogeneous range of enforcement measures (legal proceedings before international courts, the exercise of national jurisdiction, and forcible as well as non-forcible coercive measures),

¹ See notably his Hague lectures 'From Bilateralism to Community Interest' (1994) 250 *Recueil des Cours de l'Académie de Droit International* 217, which squarely placed the topic of community interest on the agenda; and further *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Separate Opinion of Judge Simma) [2005] ICJ Rep 334 (especially paras 32 et seq); B Simma, 'Does the UN Charter Provide an Adequate Legal Basis for Individual or Collective Responses to Violations of Obligations Erga Omnes?' in J Delbrück (ed), *The Future of International Law Enforcement. New Scenarios—New Law?* (Duncker & Humblot, 1993) 125; B Simma, 'Bilateralism and Community Interest in the Law of State Responsibility' in Y Dinstein and M Tabori (eds), *International Law in a Time of Perplexity. Essays in Honour of Shabtai Rosenne* (Kluwer, 1989) 821; B Simma, 'Zur bilateralen Durchsetzung vertraglich verankerter Menschenrechte: Aktivlegitimation und zulässige Mittel nach allgemeinem Völkerrecht' in C Schreuer (ed), *Autorität und internationale Ordnung* (Duncker & Humblot, 1979) 129; B Simma, 'Fragen der zwischenstaatlichen Durchsetzung vertraglich vereinbarter Menschenrechte' in I von Münch (ed), *Staatsrecht—Völkerrecht—Europarecht. Festschrift für Hans-Jürgen Schlochauer* (Walter de Gruyter, 1981) 635.

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and take account of general international law as well as treaty-specific enforcement regimes. The overarching purpose of this exercise is to evaluate the potential, under contemporary international law, for what might be called ‘public interest enforcement’ (Section III), and to assess the common features and weaknesses of the different legal concepts used to justify it (Section IV).

II. Clarifications

Before approaching these tasks, it is necessary to clarify a number of basic notions upon which the analysis is based, and to explain the decision to focus on certain enforcement measures (while ignoring others).

1. Community interests

The subsequent discussion is concerned with the enforcement of a specific sub-set of rules of international law, namely those protecting community interests. Focused on issues of enforcement, it does not purport to assess in any detail which interests qualify as community interests, or how community interests could be generated. In this respect, a number of very brief remarks may suffice. The notion of ‘community interest’ shall be understood, in a deliberately broad sense, to encompass fundamental values as well as interests shared by groups of States collectively.² The specific sub-set of rules of international law that protects and pursues such shared interests and values will be referred to as ‘community interest norms’.³ Typically, such community interests norms seek to protect common goods (international peace, the environment, etc) or common values (notably human rights) of a community.⁴ The community in turn may be universal (often referred to as ‘the international community as a whole’⁵), but may also be understood as a community of parties to a certain multilateral agreement.⁶

² See the very clear assessment provided by I Feichtner, ‘Community Interest’ in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, online edn) paras 1–12 <<http://www.mpepil.com>> accessed 19 July 2010.

³ Others have preferred the term ‘public interest norms’ (perhaps because of its nice acronym ‘PIN’): See E Riedel, ‘International Environmental Law—A Law to Serve the Public Interest? An Analysis of the Scope of the Binding Effect of Basic Principles (Public Interest Norms)’ in J Delbrück (ed), *New Trends in International Lawmaking—International ‘Legislation’ in the Public Interest* (Duncker & Humblot, 1997) 61; J Delbrück, ‘“Laws in the Public Interest”—Some Observations on the Foundations and Identification of Erga Omnes Norms in International Law’ in V Götz et al (eds), *Liber Amicorum Günther Jaenicke—Zum 85. Geburtstag* (Springer, 1999) 17, 28.

⁴ See Simma, ‘From Bilateralism to Community Interest’ (n 1) 235–43; and Feichtner, ‘Community Interest’ (n 2) paras 13–25, for typologies.

⁵ A term popularised by the ICJ’s judgment in the *Barcelona Traction case (Belgium v Spain)* [1970] ICJ Rep 3, 32–3, paras 33–4.

⁶ Feichtner, ‘Community Interest’ (n 2) para 4; see also Simma, ‘From Bilateralism to Community Interest’ (n 1), 322 (describing multilateral treaties as ‘workhorses of community interest’).

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2. Decentralized enforcement

Just as other norms of international law, community interest norms require to be enforced. At a very general level, ‘enforcement’ may be said to encompass measures designed to ensure observance of the law, and more specifically, observance through responses against breaches of the law (as opposed to preventive measures aimed at avoiding breaches, or verification measures seeking to assess whether the law has been breached).⁷ The subsequent analysis focuses on the ‘decentralized’ enforcement of international law by individual States. The term ‘decentralized’ is used to distinguish responses by individual States from other—typically preferable—forms of law enforcement, notably (1) means of direct recourse, by individuals, groups of individuals, or legal persons against infringements of their rights,⁸ and (2) sanctions adopted within the framework of international organizations, and subject to the specific rules of that institution.⁹

More specifically, of the various means of decentralized law enforcement, three categories of measures—international proceedings, coercive measures, and the exercise of national jurisdiction—are singled out. These measures are of course very different and, as will be shown, they are subject to different regimes. However, in one respect they raise the same issues and can be meaningfully treated together: they require individual States to establish that they should be entitled to defend a given community interest;¹⁰ this notably distinguishes them from enforcement measures that are inherently lawful and can always be taken by all States, irrespective of any entitlement (such as protests or retorsions, political pressure, or the various forms of quiet diplomacy).

⁷ For similar definitions see G Dahm, J Delbrück, and R Wolfrum, *Völkerrecht* (2nd edn, Walter de Gruyter, 1989) Vol I(1), 90–1; O Schachter, *International Law in Theory and Practice* (Martinus Nijhoff, 1991) 227. For further details on my own approach see C Tams, ‘Enforcement’ in G Ulfstein et al (eds), *Making Treaties Work—Human Rights, Environment and Arms Control* (Cambridge University Press, 2007) 391.

⁸ eg under human rights treaties allowing for applications by individuals, or in investor-State arbitration.

⁹ C Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press, 2005, paperback edition with a new epilogue 2010) 6–7; D Alland, *Justice privée et ordre juridique international* (Pedone, 1994) 25–6. Examples of such institutionalized enforcement measures would include Security Council sanctions against a UN member State, or the enforcement of EU law, by the European Commission, against EU member States.

¹⁰ This is beyond doubt for coercive measures and standing to institute proceedings before international courts. With respect to jurisdiction, matters are more complex: relying on a broad construction of the Lotus presumption (*Lotus Case (France v Turkey)* [1927] PCIJ Rep Series A No 10, 18–9), some commentators suggest that States should be free to exercise jurisdiction unless a rule of international law prevents them from doing so. This however is hardly in line with international practice: States protesting against another State’s exercise of jurisdiction do not feel they have to establish a prohibitive rule, but simply dispute the other State’s entitlement to exercise jurisdiction. The better view therefore is that the legality of jurisdiction depends on some connecting factor or ‘nexus’, however remote. For more on this point see V Lowe and C Staker, ‘Jurisdiction’, in MD Evans (ed), *International Law* (3rd edn, Oxford University Press, 2010) 314, 319–20.

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The ‘entitlement’ in question is usually not discussed in the abstract, but has been translated into a range of legal concepts such as ‘(subjective) right’, ‘(legal) interest’, ‘*intérêt d’agir*’, ‘standing’, ‘*jus standi*’, ‘connecting factor’, ‘nexus’, etc. Yet at some level, these concepts serve the same function: they help to determine which States are competent to enforce the law. Law enforcement competence presents few problems where a State seeks to defend its own interests; in this case, it is typically taken for granted that it should be a guardian of its own legal interests.¹¹ However, where an individual State purports to react against a breach that affects not itself, but ‘merely’ a community interest, matters become more complex. Faced with this latter scenario, the international legal system has to strike a balance between the effective protection of community values (warranting some room for decentralized enforcement action) and the need to prevent abuse. And while that balance may be struck very differently (depending on factors such as risk of abuse; the availability of institutional or direct enforcement; or the importance of a given community interest), the balancing exercise is informed by very similar considerations.

III. Enforcing Community Interests: a Comparative Survey

International law has always relied on a mix of enforcement mechanisms. Over time, it has developed different means of direct or institutionalized enforcement. Initially devised to suit a legal system premised on an ‘essentially relative character of international obligations’,¹² law enforcement regimes more recently have accommodated demands for some form of community interest enforcement. In some areas, this demand has led to the establishment of institutional enforcement mechanisms, or prompted the recognition of direct enforcement rights of non-State actors. However, demands for the effective protection of community interests have also transformed the existing concepts of inter-State law enforcement.¹³

¹¹ See, eg, Art 42(a), (b)(i) of the ILC’s Articles on State Responsibility. For details see para 12 of the ILC’s commentary; and further Tams, *Enforcing Obligations Erga Omnes* (n 9) 40–6. It follows that a broad construction of individual legal interests can reduce the need for community interest enforcement. An example in point is the recognition, in the 1982 UN Convention on the Law of the Sea, of individual (coastal) State interests in the exclusive economic zone (EEZ), which give rise to enforcement powers of the coastal State in ‘its’ EEZ. By the same token, WTO dispute settlement bodies have broadly construed GATT provisions, which are said to protect conditions of trade, not actual trade flows; this in turn has led them to embrace a very liberal approach to standing (see, eg, the Appellate Body Report ‘European Communities–Regime for the Importation, Sale and Distribution of Bananas’ (adopted 25 September 1997) *WT/DS27/AB/R* paras 132–36; and further GATT Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna [1994] 33 ILM 839, para 5.6.).

¹² See A Verdross, *Völkerrecht* (5th edn, Springer, 1964) 126 [translation from the German]. For more on this point see A Verdross and B Simma, *Universelles Völkerrecht* (3rd edn, Duncker & Humblot, 1984) 39–40; as well as Simma, ‘From Bilateralism to Community Interest’ (n 1) 229–33.

¹³ As noted by C Tomuschat, ‘[g]iven the dramatic lack of an adequate institutional framework’, this probably was ‘the only viable way’ (‘Obligations Arising for States With or Without Their Will’ (1993) 241 *Recueil des Cours* 185, 365).

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The subsequent sections recapitulate this process by assessing to what extent contemporary rules on inter-State proceedings, inter-State coercion, and jurisdiction have been ‘opened up’ to permit for the decentralized enforcement of community interests.

1. Public interest litigation

Public interest claims before international courts or other quasi-judicial bodies are in many respects the least problematic form of enforcement action. They result in a form of dispute resolution that international law—while not being able to render it compulsory outside specific subject-matter areas¹⁴—seeks to promote. At least on paper, States have on numerous occasions proclaimed that ‘[r]ecourse to judicial settlement of legal disputes... should not be considered an unfriendly act’.¹⁵ Compared to other forms of enforcement, legal proceedings before international courts thus present the least risk of abuse. Conversely, public interest claims operate within what might be called ‘hostile territory’—within a dispute settlement system that is based on consent and that at least traditionally has been premised on a bilateralist model of inter-State litigation about rights and duties.¹⁶ Jurisdictional strictures in particular have so far limited the potential of decentralized enforcement action. Very often, would-be guardians of community interests simply have no (quasi-)judicial forum to turn to. The easiest way to prevent public interest litigation remains to block the inclusion, into international agreements, of meaningful inter-State scrutiny procedures. To give just one example, the four Geneva Conventions do not envisage any form of binding inter-State dispute settlement.¹⁷ And while this complete omission may today have become an exception,¹⁸ many community interest treaties (including the majority of universal human rights treaties) operate on the basis of optional¹⁹ or cumbersome²⁰ procedures. In fact,

¹⁴ The most prominent examples are WTO law and the law of the sea, both of which require States not only to settle their disputes peacefully (as per Art 2 para 3 UN Charter), but to accept binding forms of third-party dispute resolution. For a clear assessment see C Romano, ‘Progress in International Adjudication: *Revisiting Hudson’s Assessment of the Future of International Courts*’ in RA Miller and RM Bratspies (eds), *Progress in International Law* (Martinus Nijhoff, 2008) 433. Whether the evidence is sufficient to substantiate Romano’s broader claim that international law is moving towards a ‘compulsory paradigm’ may be open to doubt, though.

¹⁵ See notably the Manila Declaration on the Peaceful Settlement of International Disputes, Annex to UNGA Res 37/10 (15 November 1982) para II5.

¹⁶ See Simma, ‘From Bilateralism to Community Interest’ (n 1) 230.

¹⁷ But see Art 90 of Additional Protocol I to the Geneva Conventions (adopted 8 June 1977), envisaging the involvement of an International Fact-Finding Commission.

¹⁸ But see C Tams, ‘The Continued Relevance of Compromissory Clauses as a Source of ICJ Jurisdiction’ in T Giegerich (ed), *A Wiser Century?—Judicial Dispute Settlement, Disarmament and the Laws of War 100 Years after the Second Hague Peace Conference* (Duncker & Humblot, 2009) 461, 472–3 for further references.

¹⁹ See, eg, Arts 41–43 of the International Covenant on Civil and Political Rights; Art 21 of the Convention against Torture; Art 74 of the Convention on Migrant Workers (all requiring member States to make a special declaration accepting the competence of the Committee to receive inter-State complaints).

²⁰ See, eg, Arts 11–13 of the Convention on the Elimination of Racial Discrimination.

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more often than not, treaty regimes suffer from a combination of both weaknesses: hence the inter-State procedure before most of the universal human rights treaty bodies is both optional and cumbersome.

That said, where jurisdiction is established, the question of standing is less of a problem than is frequently assumed. Contrary to popular perception, the international legal system is in fact rather open to the idea of individual States raising community interest concerns before international (quasi-)judicial bodies. There are two aspects to this.

The first is typically overlooked, or not sufficiently emphasized.²¹ Very often, treaties protecting community interests expressly recognize the right of all States to raise violations. Regional human rights treaties provide the obvious example. Each of the major regional human rights agreements envisages inter-State proceedings and accepts the standing of all parties simply on the basis of their participation in the treaty regime.²² On the universal level, the procedures themselves may be unsatisfactory (because they are optional and cumbersome), but standing as such is not a problem either.²³ Outside the human rights field, liberally-formulated clauses expressly recognizing a right of all parties to institute inter-State proceedings can be found in the International Labour Organization (ILO) Convention (applicable, in principle, to each of the 188 ILO Conventions),²⁴ major environmental agreements such as the Montreal Protocol or the Aarhus Convention,²⁵ and also regional trade organisations such as the EU.²⁶ The sheer number of such clauses contradicts the commonly-held assumption²⁷ that public interest standing should be exceptional, and that international law should be hostile to the idea of an *actio popularis*: international law expressly recognizes a broad range of (subject-matter specific) *actiones populares*.²⁸

If no express clause applies (but only then), a limited number of unwritten concepts can provide alternative bases of standing in the public interest. The first one is the

²¹ But contrast the excellent study by F Voefray, *L'actio popularis—ou la défense de l'intérêt collectif devant les juridictions internationales* (Presses Universitaires de France, 2004).

²² See Art 33 of the European Convention on Human Rights, Art 45 of the American Convention on Human Rights, Art 47 Banjul Charter.

²³ See the references in nn 19–20.

²⁴ See Art 26: 'Any of the Members shall have the right to file a complaint with the International Labour Office if it is not satisfied that any other Member is securing the effective observance of any Convention which both have ratified in accordance with the foregoing articles'.

²⁵ See Art 8 of the Montreal Protocol (non-compliance procedure); Art 16 of the Aarhus Convention (optional procedure for submitting disputes to the ICJ or arbitration).

²⁶ See Art 259 of the Treaty forming the European Union (former Art 227 of the Treaty establishing the European Community).

²⁷ See, eg, the Court's judgment in the *South West Africa case (Liberia v South Africa and Ethiopia v South Africa)* [1966] ICJ Rep 6, 32 para 44; and further I Seidl-Hohenveldern, 'Actio Popularis im Völkerrecht?' (1975) 14 *Communicazione e Studi* 803; M Silagi, 'Die Popularklage als Fremdkörper im Völkerrecht' (1978) 4 *South African Ybk Intl L* 10.

²⁸ Voefray, *L'actio popularis* (n 21) 383, to whom the idea of an *actio popularis* 'ne revêt... plus un caractère exceptionnel'.

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curious category of ‘interdependent’ or ‘integral’ obligations based on the assumption of ‘global reciprocity’.²⁹ Invented by Sir Gerald Fitzmaurice,³⁰ integral obligations have been recognized as a special category requiring separate treatment in the two key codification attempts seeking to make sense of enforcement competence, ie Article 60(2)(c) of the Vienna Convention on the Law of Treaties (VCLT) and Article 42(b)(ii) of the Articles on State Responsibility (ASR).³¹ Although officially recognized, the notion of ‘integral obligations’ is only rarely studied in depth.³² It is based on the idea that in the case of specific obligations (deriving from treaties outlawing specific weapons or prohibiting the exercise of sovereign jurisdiction over territory), one breach would ‘radically ... change the position of all other States ... with respect to the further performance of the obligation’;³³ hence every single breach, by whatever party to the treaty, is said to affect the legal interests of each other party. And while that may be based on a plausible interpretation of the interests underlying specific treaties, a number of questions remain unanswered. For example, one might ask whether this narrow category of obligations really required a categorically different rule—could one not have accepted that a breach ‘specially affected’³⁴ all other States in their individual legal interests? And conversely, could one not broaden the rationale underlying integral obligations and apply it to cases in which a breach affects some other form of community interest, such as a community interest that requires protection at all costs? At present, these questions are barely asked, let alone addressed. Perhaps the concept of integral obligations is simply not relevant enough in practice to warrant serious scrutiny.

The same cannot be said of the second general concept providing for standing in the public interest, that of obligations *erga omnes*. This has fascinated commentators ever since the judgment of the International Court of Justice (ICJ) in the *Barcelona Traction* case recognized that ‘in view of the importance of the rights involved, all States can be held to have a legal interest in [the] protection’ of certain fundamental

²⁹ L-A Sicilianos, ‘The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility’ (2002) 13 Eur J Intl L 1127, 1135.

³⁰ G Fitzmaurice, ‘Second Report on the Law of Treaties, draft articles 19 (1)(ii)(b) and (iii) and commentary’ (1957) II ILC Ybk 31 and 54, para 126; G Fitzmaurice, ‘Third Report on the Law of Treaties, draft article 18(2), 19 (a) and commentary’ (1958) II ILC Ybk 27–28, 41, para 78 and 44, paras 91–93; G Fitzmaurice, ‘Fourth Report on the Law of Treaties, draft articles 18 (3)(e) and 20 (1)’ (1959) II ILC Ybk 45, 46, 66, para 82 and 70, para 102.

³¹ Hence the ILC’s commentary to Art 42 ASR, para 14, accepts that with respect to breaches of interdependent obligations, ‘[t]he other States parties ... must all be considered as individually entitled to react to a breach. This is so whether or not any one of them is particularly affected ...’ (emphasis added). The same result follows from Art 60(2)(c) VCLT, see B Simma and C Tams, ‘Commentaire de l’article 60’ in O Corten and P Klein (eds) *Commentaire article par article des Conventions de Vienne de 1969 et 1986 sur le droit des traités* (Bruylant, 2007) 2129 paras 38–9.

³² For brief comments see M Fitzmaurice and T Elias, *Contemporary Issues in the Law of Treaties* (2005) 158–64; LA Sicilianos, ‘The Classification of Obligations’ (n 29) 1127; for a more detailed assessment see B Simma, ‘Reflections on Article 60 of the Vienna Convention on the Law of Treaties and its Background in General International Law’ (1970) 20 ÖZÖR 5.

³³ See Art 42(b)(ii) ASR.

³⁴ See Art 42(b)(i) ASR.

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obligations.³⁵ There remains some uncertainty as to the precise implications of this statement. However, hints in the Court's subsequent jurisprudence suggest that it can be taken at face value, and that it indeed means that when one State violates an obligation *erga omnes*, all States have standing to raise this violation in contentious ICJ proceedings.³⁶ Among the more recent statements supporting this approach is Judge Simma's separate opinion in the *Congo–Uganda* case.³⁷ Addressing the related question of counterclaims for breach of international humanitarian and human rights law, Judge Simma noted that given 'the community interest underlying' both areas of international law,³⁸ 'Uganda . . . would undoubtedly have had standing to bring such claims [relating to rights of non-nationals]'.³⁹ By the same token, in its recent resolution on rights and obligations *erga omnes*⁴⁰ the Institut de Droit International expressly recognized that:

In the event of there being a jurisdictional link between a State alleged to have committed a breach of an obligation *erga omnes* and a State to which the obligation is owed, the latter State has standing to bring a claim to the International Court of Justice or other judicial institution in relation to a dispute concerning compliance with that obligation.⁴¹

Curiously, and perhaps unfortunately, debates about obligations *erga omnes* have almost completely eclipsed awareness of manifold treaty clauses expressly recognizing broad concepts of standing in the public interest (now popularly called 'obligations *erga omnes partes*', as if only the '*erga omnes*' label could justify a broad approach to standing). In fact, the *erga omnes* concept—even as a matter of law—is of more limited relevance. It essentially clarifies that even in the absence of an express clause recognizing standing, all States can institute proceedings if they seek to defend a small range of obligations protecting fundamental community values. Conceptually, this acknowledgement was clearly an important step, notably for the Court that, only four years earlier, had been unmoved by arguments about the importance of fundamental community interests requiring judicial protection.⁴²

³⁵ *Barcelona Traction Case (Belgium v Spain)* [1970] ICJ Rep 3, 32–3, paras 33–4. For an analysis see, notably, A de Hoogh, *Obligations Erga Omnes and International Crimes* (Kluwer, 1996); C Tams, *Enforcing Obligations Erga Omnes* (n 9); S Villalpando, *L'émergence de la communauté internationale dans la responsabilité des Etats* (Presses Universitaires de France, 2005); L-A Sicilianos, *Les réactions décentralisées à l'illicéité: des contre-mesures à la légitime défense* (Librairie générale de droit et de jurisprudence, 1990); P Picone, *Comunità internazionale e obblighi 'erga omnes'* (Jovene, 2006). Simma has addressed obligations *erga omnes* on numerous occasions, see, eg, 'From Bilateralism to Community Interest' (n 1) 293–301; 'Does the UN Charter Provide an Adequate Legal Basis . . .?' (n 1) *passim*; and the brief comments in 'Universality of International Law from the Perspective of a Practitioner' (2009), 20 *Eur J Intl L* 265, 274–5.

³⁶ For details on this point see Tams, *Enforcing Obligations Erga Omnes* (n 9) 158–97.

³⁷ *Case concerning armed activities on the territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 334.

³⁸ *Ibid*, para 38.

³⁹ *Ibid*, para 32.

⁴⁰ (2006) 71(II) *Annuaire de l'Institut de droit international* 286.

⁴¹ *Ibid*, Art 3.

⁴² *South West Africa Case (Liberia v South Africa and Ethiopia v South Africa)* [1966] ICJ Rep 6.

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Yet the concept's impact on proceedings before international courts and tribunals is likely to remain limited since the clear majority of ICJ proceedings (as well as proceedings before other courts and tribunals) concern breaches of treaty standards, not of customary international law.⁴³ In such treaty-based proceedings, the question of standing will typically turn on the interpretation of a treaty. 'Whether [b]y their very nature', to paraphrase the ICJ, obligations at stake in those proceedings 'are the concern of all States'⁴⁴ may no doubt be one factor influencing the outcome of the interpretative process, especially if the treaty does not address standing expressly. However, it is one among many considerations guiding the treaty interpretation, not a straightforward application of the *erga omnes* concept. In short, when considering the potential for public interest litigation before international courts and tribunals, it may well be that express treaty clauses deserve more attention than they usually receive, while the immediate impact of the *erga omnes* concept is more limited than the amount of debate suggests. But be that as it may, clearly, taken together, treaty-based *acciones populares* and *erga omnes* proceedings make considerable room for legal proceedings in defence of community interests.

Strangely, States have so far hardly ever made use of this potential. While permanently acknowledging the importance of peaceful dispute resolution on the basis of the law, it is only in the most exceptional situations that States decide to pursue community interests through international litigation. The absence of proper *erga omnes* cases before the ICJ in fact has almost become a source of amusement for sceptical observers.⁴⁵ Realistically, it should not come as a major surprise, given the above-mentioned jurisdictional limitations, the controversial nature of the concept, and the limited number of ICJ cases generally. Perhaps more surprising, then, is the very limited number of inter-State proceedings on the basis of treaty provisions expressly recognizing standing in the public interest. Across the board, the figures in this respect are disappointingly low:⁴⁶ a handful of States have relied on community interest arguments to establish their standing in ICJ proceedings, but usually by way of additional argument.⁴⁷ Over the years, ILO Commissions constituted

⁴³ To my knowledge, this matter has hardly ever been addressed in detail. For brief comments see S Rosenne, *The Law and Practice of the International Court of Justice 1920–2005* (Brill, 2006) 648–9; and Tams, 'The Continued Relevance' (n 18) 490–1.

⁴⁴ *Barcelona Traction Case (Belgium v Spain)* [1970] ICJ Rep 3, 32 para 33.

⁴⁵ H Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989' (1989) 60 *British Ybk Intl L* 1, 100 (*erga omnes* dictum as a 'purely theoretical category'); A Rubin, 'Comment' in J Delbrück (ed), *The Future of International Law Enforcement: New Scenarios—New Law?* (Duncker & Humblot, 1993) 171, 172 (*erga omnes* as 'the wishful thinking of... publicists').

⁴⁶ The most detailed (if now dated) assessment is that by S Leckie, 'The Inter-State Complaints Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?' (1988) 10 *Human Rights Q* 249.

⁴⁷ Notably in the *Nuclear Tests case (New Zealand v France)* [1974] ICJ Rep 253 and 474; and the *Case concerning East Timor (Portugal v Australia)* [1995] ICJ Rep 90. Questions of public interest litigation may acquire a more prominent role in the pending proceedings between Belgium and Senegal about the latter State's duty to prosecute or extradite: see the uncorrected verbatim record

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under Article 26 have heard a handful of cases (most of them low-profile),⁴⁸ and there have been occasional inter-State proceedings before the European Court of Justice (ECJ) and under the Banjul Charter.⁴⁹ Yet none of the universal human rights bodies has ever been seized with a single inter-State application. And even the slightly less underwhelming figure of inter-State applications under the Strasbourg system to a large extent consists of diplomatic protection claims espoused by home States, or of inter-State proceedings brought by States that have traditionally considered themselves to be in a special position with respect to a certain situation (such as Ireland in relation to British conduct in Northern Ireland, or Austria in relation to South Tyrol⁵⁰). While there remain a few examples of truly altruistic cases, in which individual interests (legal or perceived) played a limited role, States prefer other ways of defending community interests. What is important to note is that international law does not prevent them from going to court, but has accommodated the idea of public interest litigation to a considerable extent.

2. Coercive responses

Predictably, the international legal system is much less inclined to accept coercive responses in defence of community interests. Unlike with respect to international proceedings, the risk of abuse is considerable. There is considerable appeal in the view that only States individually affected by breaches should be entitled to resort to means of coercion (especially military force). The obvious argument is that a system recognizing a right of all States to take coercive measures would invite ‘mob violence’ and ‘vigilantism’.⁵¹ In more guarded language, one might also argue that it would be very curious indeed if the move towards community interest norms should be accompanied by increased reliance on archaic concepts of coercive private law enforcement, which a mature legal system should seek to tame and replace by institutional or collective enforcement mechanisms.⁵² The counter-arguments

of the public sittings of 6 April 2009 (3 pm) and 7 April 2009 (4.30 pm): CR 2009/9, 58–9 and CR 2009/10, 14–5.

⁴⁸ See, eg, Ghana Portugal complaint, 45 ILO Bulletin (1962), No 2, Supplement II; Portugal Liberia complaint (ILO inter-State complaint), 46 ILO Bulletin (1963), No 2, Supplement II, 803.

⁴⁹ For the ECJ see, eg, Case 141/78 *France v United Kingdom* [1979] ECR 2923; Case C-388/95 *Belgium v Spain* [2000] ECR I-3123; Case C-145/04 *Spain v United Kingdom* [2006] ECR I-7917. For the Banjul Charter see African Commission of Human Rights and Peoples’ Rights, Communication 227/99 (*DRC v Burundi, Rwanda and Uganda*).

⁵⁰ *Austria v Italy (Pfunders Case)* (App no 788/60) (1961) 4 Ybk 116 and (1963) 6 Ybk 740 (EComHR); *Ireland v United Kingdom* (1978) Series A no 25 (ECtHR).

⁵¹ See K Marek, ‘Criminalizing State Responsibility’ (1978–79) 14 *Revue Belge de Droit International* 460, 481; S McCaffrey, ‘Lex Lata or the Continuum of State Responsibility’ in JHH Weiler, A Cassese, and M Spinedi (eds), *International Crimes of States. A Critical Analysis of the ILC’s Draft Article 19 of State Responsibility* (de Gruyter, 1989) 242, 244.

⁵² R Ago, ‘Obligations Erga Omnes and the International Community’ in Weiler, Cassese, and Spinedi, *International Crimes of States* (n 51) 237, 238 (‘It is not all States [acting individually], but rather the international community that is envisaged as the possible bearer of a right of reaction to this particular serious form of internationally wrongful act’).

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are equally predictable: if international law accepts decentralized law enforcement, then one might say it would be particularly needed to protect fundamental interests of the international community.⁵³ Moreover, if international law fails to set up effective institutional mechanisms, some degree of archaic ‘vigilantism’ may simply be preferable to inertia.

These arguments have been deliberately put in a simplistic way; of course, they merely juxtapose policy considerations which the law has to balance. Not surprisingly, then, international law neither excludes coercion in defence of community interest altogether nor does it give carte blanche to self-proclaimed guardians of community interests. Instead, it adopts a middle course between ‘vigilantism’ and ‘inertia’. In this respect, it is guided by the crucial (if rather simplistic) distinction between coercion involving the use of military force, and other forms of coercion.

a) Non-forcible measures

As long as States seek to defend community interests by means of non-forcible coercion, international law requires them to justify their conduct which under normal circumstances would amount to an internationally wrongful act. Occasionally, treaty provisions may provide States with the required justification; but more often than not, States will have to rely on the concept of countermeasures.

A relatively small number of treaties expressly recognize some form of decentralized response against violations of community interests.⁵⁴ From early on, States have for example agreed on provisions laying down a right of all States to suspend treaty benefits in relation to a State that had violated an important provision of the treaty. Yet premised, as they are, on the idea of reciprocity within a given treaty, such clauses have proven to be of limited relevance: the sanctions they envisage—such as the suspension of privileges under Postal Conventions⁵⁵—are defensive in character and limited in scope. Modern treaties therefore increasingly link the performance of collective interest obligations to treaty benefits in other fields. Human rights conditionality is the most prominent of such linkages:⁵⁶ many development

⁵³ G Gaja, ‘Obligations Erga Omnes, International Crimes and Jus Cogens: A Tentative Analysis of Three Related Concepts’ in Weiler, Cassese, and Spinedi, *International Crimes of States* (n 51) 151, 158: ‘Were States not even allowed to adopt countermeasures, one would probably have to conclude that law rather protects the infringements of those [community] interests’.

⁵⁴ Where no express clause exists, general treaty law—notably the maxim *inadimplenti non est adimplendum*—may equally justify some form of inter partes response. However, Art 60 VCLT codifies a very narrow form of this maxim, which moreover follows a logic of defensive reciprocity, not of sanctions. For more on these points see Simma and Tams, ‘Commentaire de l’article 60’ (n 31) para 29.

⁵⁵ See Art 35 of the 1957 Postal Convention (adopted 3 October 1957) 364 UNTS 3; and see further similar clauses in Art 8 of the Statute of the International Regime of Maritime Ports (adopted 9 December 1923) 58 LNTS 301; or Art 4(4) of the Multilateral Agreement of Non-Scheduled Air Services in Europe (adopted 1956) 310 UNTS 229.

⁵⁶ A similar approach is followed under a number of multilateral agreements in the environmental field: thus the Kyoto Protocol and CITES, to give just two examples, envisage trade sanctions

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aid treaties today justify the suspension of development aid in response to serious human rights breaches.⁵⁷ Treaties not primarily concerned with human rights are thus being ‘humanized’ and complement the (at times rather weak) enforcement mechanism found in human rights treaties.

Still, all things considered, the number of such express clauses remains limited. States seeking to resort to coercive measures in defence of community interests therefore typically need to rely on concept of reprisals or countermeasures. In terms of the law, this means that they leave the realm of legal certainty: whether the modern rules of State responsibility recognize a right to adopt unilateral countermeasures in response to serious infringements of community interests (or at least breaches of fundamental obligations *erga omnes*), is one of contemporary international law’s great debates. What is more, the most authoritative modern restatement of the law of State responsibility—the International Law Commission’s (ILC) work on State Responsibility—deliberately leaves the matter open.⁵⁸ The written law thus seems to offer little support to States asserting a right to take what used to be called ‘third-party reprisals’.

However, practice suggests a much more liberal approach.⁵⁹ There is no shortage of instances in which States have violated their international legal obligations with the aim of protecting public interests. A detailed assessment is beyond the scope of this contribution, yet in order to illustrate the point, it may be helpful to mention four brief episodes: in 1998, European States suspended bilateral aviation agreements with the Federal Republic of Yugoslavia in response to the mounting Kosovo crisis;⁶⁰ in 1982, Western States breached their obligations under trade agreements concluded with Argentina, thus protesting against that country’s invasion of the Falklands islands;⁶¹ since 2002, Commonwealth member States have protested against human rights violations by the Zimbabwean government by imposing a

in response to treaty breaches. Admittedly, however, these treaty sanctions typically presuppose an institutional decision. For comment see Tams, ‘Enforcement’ (n 7) 398–9.

⁵⁷ See, eg, the Cotonou Agreement between EU and ACP States (adopted 23 June 2000) [2000] OJ L317/3 Arts 96, 97. For details on the EU’s approach to human rights conditionality see L Bartels, *Human Rights Conditionality in the EU’s International Agreements* (Oxford University Press, 2005); P Leino, ‘European Universalism? The EU and Human Rights Conditionality’ (2005) 24 *Ybk Eur L* 329.

⁵⁸ See Art 54 ASR, which provides: ‘This chapter 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’. For a critical assessment of the provision see Sicilianos, ‘The Classification of Obligations’ (n 29) 1127, 1139–44.

⁵⁹ For a detailed analysis see C Tams, *Enforcing Obligations Erga Omnes* (n 9) 198–251.

⁶⁰ Common Position 98/326/CFSP, [1998] OJ L143/1, and Common Position 98/426/CFSP, [1998] OJ L190/3. For the implementation see Regulation 1091/98, [1998] OJ L248/1.

⁶¹ Regulations (EEC) 877/82, [1982] OJ L102/1 and 1176/82, [1982] OJ L136/1, and the parallel measures adopted by the European Coal and Steel Community, see Regulations 82/221/ECSC, [1982] OJ L102/3, and 82/320/ECSC, [1982] OJ L136/2.

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variety of sanctions;⁶² and in the 1970s–80s, States across the globe adopted trade sanctions in order to mount pressure on South Africa’s apartheid regime.⁶³ These examples (which, it needs to be underlined, are illustrative only) suggest that contrary to the ILC’s concerns,⁶⁴ State practice is indeed ‘far from scarce’,⁶⁵ but surprisingly wide-spread. In fact, it is probably easier today to find evidence of third-party countermeasures than of countermeasures adopted in the classic bilateral context. As has been discussed elsewhere, practice is not exclusively ‘Western’ either, and it is accompanied by an *opinio juris*.⁶⁶ On that basis, the better (if contested) view is that at least where community interests are being violated in a systematic and wide-spread way, all States are entitled to adopt countermeasures to bring the breach to an end.⁶⁷ The clearest exposition of this right to act as an individual guardian of the international community can be found in Article 5 of the Institut’s resolution on rights and obligations *erga omnes*, which provides as follows:

(c) Should a widely acknowledged grave breach of an *erga omnes* obligation occur, all the States to which the obligation is owed... are entitled to take non-forcible counter-measures under conditions analogous to those applying to a State specially affected by the breach.⁶⁸

As the previous summary indicates, this ‘entitlement’ is largely brought about by international practice. Unlike with respect to judicial proceedings, States have on frequent occasions asserted a right to defend community interests by way of countermeasures. In terms of the broader policy considerations mentioned above, the

⁶² eg Common Position 2002/145/CFSP, [2002] OJ L50/1 (Arts 3 and 4); for the implementation see Regulation EC 310/2002, [2002] OJ L50/4, for sanctions adopted by EU member States; and, for the US response, Executive Order of 7 March 2003 (‘Blocking Property of Persons Undermining Democratic Processes or Institutions in Zimbabwe’) <<http://www.federalregister.gov/articles/2003/03/10/03-5848/blocking-property-of-persons-undermining-democratic-processes-or-institutions-in-zimbabwe>> accessed 11 November 2010.

⁶³ See, eg, the Comprehensive Anti-Apartheid Act (adopted 1986) (1987) 26 ILM 79, or frequent G77 resolutions proclaiming ‘the legitimacy... of economic sanctions and other measures in the struggle against apartheid’ (Declaration Adopted During at the Sixth Annual Meeting of G77 Foreign Ministers [1982], reproduced in KP Sauvart and JP Müller (eds), *The Third World Without Superpowers: The Collected Documents of the Group of 77* [Second Series] (Oceana, 1995) Vol XX, 420).

⁶⁴ See para 3 of the Commission’s commentary to Art 54; and, further, C Hillgruber, ‘The Right of Third States to Take Countermeasures’ in C Tomuschat and JM Thouvenin (eds), *The Fundamental Rules of the International Legal Order. Jus Cogens and Obligations Erga Omnes* (Martinus Nijhoff, 2006) 265.

⁶⁵ As rightly pointed out by G Gaja in his ‘Second Report on Obligations and Rights Erga Omnes in International Law’ (2005) 71(I) *Annuaire de l’Institut de droit international* 119, 200.

⁶⁶ Tams, *Enforcing Obligations Erga Omnes* (n 9) 235–9.

⁶⁷ Simma accepted this view for a long time (see, eg, ‘From Bilateralism to Community Interest’ (n 1) 313–7), but has recently professed to a ‘new uncertainty’ about the usefulness of third-party reprisals. In his view, ‘the jury is still out on the question whether this [ie the acceptance of coercive forms of decentralized enforcement] is a contribution to peace in a comprehensive sense or rather a danger to peace in the same sense. The more I think about it the less clear my view becomes’ (B Simma, ‘Peace through Law: The Role of the ILC’ in G Nolte (ed), *Peace through International Law* (Springer, 2009) 189, 191).

⁶⁸ (2006) 71(II) *Annuaire de l’Institut de droit international* 289.

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international system thus seems prepared to accept the increased risk of abuse in exchange for the increased possibility of responding against particularly serious wrongful conduct. Nevertheless, a note of caution may be in order. While third party countermeasures are indeed ‘far from scarce’,⁶⁹ they are typically of a modest character. The analysis of State practice shows that more often than not, expressions of grave concerns about serious violations have led States to adopt countermeasures of a rather limited scope—such as the severance of air links or temporary economic embargoes. What is more, countermeasures are usually taken alongside unfriendly, but legal, responses (retorsions) and often go hand-in-hand with some form of institutional condemnation (such as resolutions by UN organs). In other words, States do not rush into ‘third party reprisals’, but employ them cautiously—probably aware that they must not be seen as a ‘violent mob’.⁷⁰ Yet they have not shied away from applying non-forcible measures of coercion, and international law does not require them to do so.

b) Forcible measures

Forcible responses are subject to a rather different regime. In principle, they raise the same issues as non-forcible countermeasures—they require a balance to be struck between the effective protection of core obligations on the one hand, and the interest in outlawing decentralised coercion on the other. Yet the recognition of a strict ban on inter-State force completely changes the legal parameters of that balancing exercise. The *jus contra bellum* as laid down in the United Nations (UN) Charter and customary international law outlaws the use of military coercion comprehensively and admits of only two recognized exceptions, self-defence and Article 42 enforcement measures mandated by the Security Council.⁷¹ What is more, unlike in the case of ordinary (non-forcible) reprisals, the rules against the use of inter-State force, gradually recognized over decades and generally considered the ‘cornerstone’ of the international legal system designed to protect peace, themselves impose obligations owed towards the international community as a whole.⁷² Faced with these major obstacles, claims, by individual States, of a right to use force in defence of collective interests are very unlikely to meet with general approval.

Nevertheless, they have been made. Unlike with respect to non-forcible countermeasures, claims are typically not framed in *erga omnes* terminology. The reasons for this are not entirely clear. On the face of it, one might well put forward the argument (implausible as it may be) that a right to use force in defence of core

⁶⁹ Gaja, ‘Second Report on Obligations and Rights Erga Omnes’ (n 65).

⁷⁰ See Marek, ‘Criminalizing State Responsibility’ (n 51) and McCaffrey, ‘Lex Lata’ (n 51).

⁷¹ Verdross and Simma, *Universelles Völkerrecht* (n 12) 285–93.

⁷² For emphatic confirmations see the Separate Opinion of Judge Simma in the *Case Concerning the Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 334–8; and the Separate Opinion of Judge Simma in the *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* [2003] ICJ Rep 324, 327–34.

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community obligations should be one of the ‘corresponding rights of protection’ triggered by *erga omnes* breaches.⁷³ Yet this is hardly ever done—and where it is (as, at some point, by Michael Reisman, who considered ‘military intervention . . . a primary means of enforcing some *erga omnes* norms concerned with human rights’⁷⁴), the response is overwhelmingly critical. It seems that despite its fascination and attraction, even the *erga omnes* concept seems incapable of justifying a modification of the rules against inter-State force.

Instead, the legality of military coercion in defence of community interests is typically discussed under a special rubric, that of humanitarian intervention,⁷⁵ or more recently that of responsibility to protect.⁷⁶ Whatever terminology is used, these debates turn on whether international law should recognize a further exception to the ban on force, namely force to prevent protect human rights from abuse. Even the most ardent supporters do not suggest that this potential ‘third exception’ should have a broad scope of application; if anything, States might rely on it in exceptional circumstances of massive and well-attested atrocities.⁷⁷ Yet even the existence of this very exceptional right to use force is very difficult to establish as a matter of law. The text of the UN Charter seems to preclude it—so all one might suggest is that the Charter regime has not prevented the recognition of other, non-written, exceptions to the ban on force, notably the limited right to rescue nationals abroad.⁷⁸ International jurisprudence provides very little support either; if anything, recent ICJ decisions caution against the existence of non-written exception to the ban on force.⁷⁹ And lastly, on frequent occasions, a clear majority of States have seen fit to voice their opposition to any attempt to any attempt (perceived or real) to introduce a right to use unilateral force for humanitarian purposes.⁸⁰ So in short (and in deliberately military terminology),

⁷³ *Barcelona Traction Case (Belgium v Spain)* [1970] ICJ Rep 3, 32, para 33.

⁷⁴ M Reisman, ‘Comment’ in Delbrück, *The Future of International Law Enforcement* (n 1) 168, 171.

⁷⁵ Contrast, eg, O Corten, ‘Human Rights and Collective Security: Is There an Emerging Right of Humanitarian Interventions?’ in P Alston and E MacDonald (eds), *Human Rights, Intervention, and the Use of Force* (Oxford University Press, 2008) 87; to C Greenwood, ‘Humanitarian Intervention: the Case of Kosovo’ (1999) 10 *Finnish Ybk Intl L* 141.

⁷⁶ At some point, it seemed as if the doctrine of humanitarian intervention might become absorbed by the concept of responsibility to protect; however, that latter concept (whatever its current legal status) is now typically restricted to institutional responses. For details see C Verlage, *Responsibility to protect: ein neuer Ansatz im Völkerrecht zur Verhinderung von Völkermord, Kriegsverbrechen und Verbrechen gegen die Menschlichkeit* (Mohr Siebeck, 2009); and further C Stahn, ‘Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?’ (2007) 101 *American J Intl L* 99.

⁷⁷ eg, Greenwood, ‘Humanitarian Intervention’ (n 75) 171 speaks of ‘the most serious humanitarian emergency involving large scale loss of life’.

⁷⁸ T Gazzini, *The Changing Rules on the Use of Force in International Law* (Manchester University Press, 2005) 170–4.

⁷⁹ *Case Concerning the Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 201, para 148 (dismissing claims that force could be used to ‘protect perceived security interests’ outside the strict confines of Art 51 UN Charter).

⁸⁰ The international response to assertions, by NATO member States, of a right to use force against the Former Republic of Yugoslavia illustrates the point: see, eg, the declaration of the G77

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legally, proponents of a right of humanitarian intervention are engaged in an ‘uphill battle’.⁸¹

Yet some developments may be under way. While it is unlikely that the international community will ever accept a clear-cut right of unilateral humanitarian intervention, it may be prepared to accept forcible enforcement measures in exceptional circumstances, provided they are authorized by regional organizations and/or implemented by groups of States. During the Kosovo campaign, the ‘collective’ character of the intervention was emphasized by many western States—and was one of the factors justifying Simma’s assessment that what on the face of it seemed to be a massive violation of Article 2(4) UN Charter had only crossed ‘a thin red line’.⁸² Crucially, from the perspective of UN Charter law, it would not have mattered whether the intervention was unilateral or collective, as long as it lacked Security Council authorization. However there seems to be a sense that by requiring States to go through regional mechanisms, one would minimize the risk of abuse. More recently, a similar reasoning seems to have been translated into black-letter law: in Article 4(h) of their constitutive act, the member States of the African Union expressly recognize the Union’s right to ‘intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity’.⁸³ This provision seems difficult to bring in line with the UN Charter regime against the use of force, yet it is not openly challenged.

For present purposes, the curious Article 4(h) is probably best seen as an indication that the topic of humanitarian interventions is to remain with us for the foreseeable future. And perhaps the ‘Kosovo experience’ will one day come to be seen as signalling a more pragmatic approach—one that allows for distinctions to be drawn between clearly illegal and ‘acceptable’ instances of humanitarian intervention.⁸⁴ This would suggest that while not accepting a right to defend community interests by means of unilateral force, the international community might permit States to cross ‘thin red lines’⁸⁵ occasionally.

South Summit held in Havana, Cuba in April 2000, which expressly ‘reject[ed] the so-called ‘right’ of humanitarian intervention, which has no legal basis in the United Nations Charter or in the general principles of international law’ (Annex I to UN Doc A 55/74, para 54).

⁸¹ In his analysis of the Kosovo campaign, Simma (in more neutral words) spoke of ‘the formidable international legal obstacles’ that any assertion of a right of humanitarian intervention would have to overcome (‘NATO, the UN and the Use of Force: Legal Aspects’ (1999) 10 *Eur Ybk Intl L* 1, 6).

⁸² *Ibid.*, 10–14.

⁸³ Constitutive Act of the African Union, Art 4(h). For comment see B Kioko, ‘The Right of Intervention under the African Union’s Constitutive Act: From Non-interference to Non-intervention’ (2003) 85/852 *Intl Rev of the Red Cross* 807.

⁸⁴ See Simma, ‘NATO, the UN’ (n 81) 10–14.

⁸⁵ *Ibid.*

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3. The exercise of national jurisdiction

Of the various categories of responses dealt with in the present contribution, the exercise of national jurisdiction may be seen as ‘the odd one out’. Jurisdiction is not usually discussed as a form of international law enforcement, but occupies a separate section in international law textbooks.⁸⁶ Yet proceedings like the *Pinochet* case⁸⁷ illustrate that national courts or authorities exercising jurisdiction can be powerful vehicles of community interest enforcement—whether directly invoking international law or applying international legal standards as implemented through national legislation. Their role as enforcement agents is of course restricted by rules of immunity. While these are not static, and have themselves been challenged by ‘community interest arguments’,⁸⁸ this has meant that the exercise of national jurisdiction has been most effectively directed against threats emanating from actors not entitled to immunity.

States exercising jurisdiction are required to establish a ‘link’ with the conduct they seek to regulate or address.⁸⁹ The specific ‘jargon’ distinguishes between ‘heads’ or ‘bases’ of jurisdiction.⁹⁰ From the perspective of law enforcement adopted here, most of these bases (including controversial ones such as the ‘effects doctrine’ or the protective principle⁹¹) can be viewed as manifestations of a special link between the State exercising jurisdiction and the legal issues raised by the case at hand. Based on the logic of individual interests, for present purposes, they present few problems.⁹²

⁸⁶ In fact, it is telling that in his influential Hague lectures ‘From Bilateralism to Community Interest’ (n 1) Simma does not address questions of jurisdiction.

⁸⁷ *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 1)* [1998] 3 WLR 1456; *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)* [1999] 2 WLR 825.

⁸⁸ Most notably by claims that immunity should not be available to perpetrators of heinous crimes. For details on this major controversy see *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* [2002] ICJ Rep 3; and, further, T Giegerich, ‘Do Damages Claims Arising from *Jus Cogens* Violations Override State Immunity from the Jurisdiction of Foreign Courts?’ in Tomuschat and Thouvenin, *The Fundamental Rules of the International Legal Order* (n 64) 203. The matter is left to one side here as it does not directly concern the question of law enforcement competence.

⁸⁹ For the range of terminology see C Ryngaert, *Jurisdiction in International Law* (Oxford University Press, 2008) 31, 35 and 100–1: ‘link with, or interest in, a subject matter’; ‘genuine connection’; ‘connecting factor’; ‘nexus’. Note that even though the matter is addressed as an issue of *enforcement* here, the exercise of national jurisdiction in pursuit of community interests is separate from ‘jurisdiction to enforce’, which to date has remained largely territorial.

⁹⁰ A clear summary is provided by Lowe and Staker, ‘Jurisdiction’ (n 10) 318–31; for further details see Ryngaert, *Jurisdiction in International Law* (n 89) chs 3 and 4.

⁹¹ Ryngaert, *Jurisdiction in International Law* (n 89) 96–100; Lowe and Staker, ‘Jurisdiction’ (n 10) 322–3.

⁹² It should however be noted that in its differentiation between the various bases of jurisdiction based on ‘individual interests’, international law seems to have reached a higher degree of sophistication than in rules of State responsibility operating on the basis of a vaguely-defined ‘special effects’ criterion. Conversely, in so far as the international rules governing jurisdiction recognize rather broadly-defined spheres of special (individual) interest, they implicitly reduce the need for community interest enforcement. On this aspect see n 11.

However, two categories of jurisdictional rules take up the idea of community interest enforcement and deserve to be discussed.

a) Universal jurisdiction

The universality principle is the obvious example. It envisages the exercise of national jurisdiction in the absence of any other agreed basis, justified by reference to the nature of the conduct whose suppression is in the common interest.⁹³ Just as with respect to other responses, such assertions of jurisdiction can be based on general international law or treaty law (although in the latter case, the term ‘universal’ is misleading).

Treaty regimes providing for some form of ‘quasi-universal jurisdiction’ in fact are rather common, notably in fields such as counter-terrorism, human rights, or transnational crime: Reydams’ study, completed in 2002, for example concludes that ‘[n]early thirty treaties . . . establish a form of universal repression’.⁹⁴ ‘[U]niversal repression’⁹⁵ rarely takes the form of a simple provisions enabling or requiring States to exercise national jurisdiction, but follows rather complex rules. These typically focus on *criminal* jurisdiction and usually prescribe *duties* to exercise (criminal) jurisdiction, not entitlements. The duty, in turn, is typically qualified in two important respects. First, most treaties offer States the alternative of extradition. Moreover, and more importantly, they usually only impose enforcement duties upon a particular category of States, namely ‘custodial States’ on whose territory alleged perpetrators are found. This second qualification considerably restricts the personal scope of the duty to exercise jurisdiction, while at the same time making it a much more ‘targeted’ obligation, imposed upon a State that is more likely to be able actually to conduct a meaningful trial. Conversely, more broadly-formulated treaty provision requiring *all* States to exercise jurisdiction over certain offences have typically been ignored; this is most obviously the case for the rather demanding duty to prosecute grave breaches of the 1949 Geneva Conventions,⁹⁶ which have prompted ‘a remarkably modest corpus of national case law’.⁹⁷

Outside the scope of these treaty provisions, the scope of permissive universality is not entirely clear,⁹⁸ yet the most convincing view is that States are entitled to exercise universal jurisdiction over a core of heinous offences. A number of commentators consider this entitlement to be a consequence of the peremptory character of

⁹³ JH Marks thus speaks of the ‘common interest rationale’ (‘Mending the Web’ (2004) 42 *Columbia J Transnational L* 445, 465).

⁹⁴ L Reydams, *Universal Jurisdiction* (Oxford University Press, 2003), 79.

⁹⁵ *Ibid.*

⁹⁶ See Arts 49, 50, 129 and 146 respectively, as well as Art 85 of Additional Protocol I.

⁹⁷ *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Separate Opinion of Judges Higgins, Kooijmans and Buergenthal) [2002] ICJ Rep 3, para 32.

⁹⁸ For excellent studies see R O’Keefe, ‘Universal Jurisdiction. Clarifying the Basic Concept’ (2004) 2 *J Intl Criminal Justice* 735; and Ryngaert, *Jurisdiction in International Law* (n 89) 100–27.

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a given norm,⁹⁹ but typically fail to explain why *jus cogens* status and (permissive) universality should be linked.¹⁰⁰ Yet even in the absence of an elegant ‘deduction’ from abstract principle, permissive universality can be established inductively. In the last decades, many States have enacted legislation providing for national jurisdiction over core crimes such as genocide, war crimes, crimes against humanity and torture. Unlike various immunity statutes, these national rules on universal jurisdiction have rarely been challenged by other States.¹⁰¹ Taken together, legislation and absence of protests would seem to provide sufficient evidence for the existence of a permissive rule allowing States to defend interests of the international community by exercising national jurisdiction over particularly egregious offences.¹⁰² What is more, the better (if contested) view is that this right to exercise universal jurisdiction does not depend on the presence of the alleged wrongdoer on the custodial State’s territory: States may of course include such a requirement in their domestic rules, and often do, but international law does not preclude the possibility of trials *in absentia*.¹⁰³

Just as with respect to proceedings before international courts, States have so far been rather reluctant actually to apply provisions on universal jurisdiction. This may signal a new awareness that immunity may not be a bad thing after all, or reflect a new realism that high-profile investigations against foreign (former) leaders, exciting though they may be, are no *vade mecum*. Yet incrementally, the universality principle is becoming accepted in the domestic legal orders of States, and its losing its exceptional status.

b) Particular states as trustees of community interests

The universality principle is not the only example of a jurisdictional rule designed to protect community interests. In some areas of international law, treaties recognize the special role of a particular State and confer upon it special enforcement powers on behalf of the treaty community.

Article 218 of the UN Convention on the Law of the Sea (UNCLOS) is the most prominent example of such a ‘targeted’ jurisdictional provision.¹⁰⁴ It relies upon

⁹⁹ See, eg, ICTY, Case No IT-95-17/1, *Prosecutor v Furundzija* [1999] 37 ILM 317, paras 155–6; and Ryngaert, *Jurisdiction in International Law* (n 89) 110–1, with many further references.

¹⁰⁰ For details on this point see A Zimmermann, ‘Violations of Fundamental Norms of International Law and the Exercise of Universal Jurisdiction in Criminal Matters’ in Tomuschat and Thouvenin, *The Fundamental Rules of the International Legal Order* (n 64) 335, 337; M Cosnard, ‘La compétence universelle en matière pénale’, *ibid*, 355; Ryngaert, *Jurisdiction in International Law* (n 89) 111–3 (‘clearly requires a moral leap’).

¹⁰¹ A point stressed by Zimmermann, ‘Violations of Fundamental Norms’ (n 100) 353.

¹⁰² See, amongst many others, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Separate Opinion of Judges Higgins, Kooijmans and Buergenthal) [2002] ICJ Rep 3, paras 44–61; and the Princeton Principles on Universal Jurisdiction (2001).

¹⁰³ O’Keefe, ‘Universal Jurisdiction’ (n 98) 749–52; *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Separate Opinion of Judges Higgins, Kooijmans and Buergenthal) [2002] ICJ Rep 3, para 56.

¹⁰⁴ For details see D König, ‘The Enforcement of the International Law of the Sea by Coastal and Port States’ (2002) 62 *ZaöRV* 1.

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port States to enforce international environmental standards and provides an important exception to the principle of exclusive flag State jurisdiction on the high seas.¹⁰⁵ The provision entitles port States to ‘undertake investigations and, where the evidence so warrants, institute proceedings’ in respect of marine pollution. This might be explained as yet another manifestation of a ‘special link’ where the pollution in question has affected the port State’s territorial waters or exclusive economic zone. However, Article 218 UNCLOS also envisages port State enforcement measures to repress pollution occurring on the high seas, ie in defence of a community interest.

The regime of port State jurisdiction established by Article 218 UNCLOS—but also comparable provisions addressing safety standards¹⁰⁶—is of course rather specific; what is more, it is subject to a range of safeguards clauses protecting the position of flag States. However, it presents an interesting variant to the universality principle in its pure form: aware of the need for some form of community interest enforcement, Article 218 UNCLOS opts for a ‘targeted approach’ that entrusts the protection of community interests to one particular State, namely the port State. Structurally, port State jurisdiction resembles treaty provisions relying on ‘custodial States’ to enforce criminal laws against offenders irrespective of any territorial or nationality link. While one is permissive, and the other mandatory, in both cases international legal rules accept that a particular State could/should act as trustee of the international community simply because it is in the best position to protect the community’s interest. Taken together, these targeted approaches as well as permissive rules on universal jurisdiction permit domestic authorities to play a considerable role in the enforcement of community interests.

IV. Stocktaking and Four Lessons

The previous sections testify to the complexity of law enforcement in defence of community interests. However, from the various brief accounts emerges a general picture of how international law responds to assertions by individual guardians of community interests. It is by no means a neat and tidy picture, but one that reflects the controversies surrounding concepts such as obligations *erga omnes*, humanitarian intervention, third-party reprisals, and universal jurisdiction. Yet four main features can be made out, and four lessons can be learned as to how international lawyers should approach the thorny question of law enforcement in defence of community interests.

¹⁰⁵ See Art 94 UNCLOS.

¹⁰⁶ eg under the 1974 SOLAS Convention; see König, ‘The Enforcement of the International Law of the Sea’ (n 104) 6.

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1. Broad enforcement powers, selectively used

The first lesson concerns the law's response to the challenge of community interest. As noted above, at some point, international law was perceived as a system of relative rights and duties.¹⁰⁷ The preceding discussion shows that it has come a considerable way. Of course, debates about community interest enforcement continue to provoke debate. However, and perhaps more surprisingly (given the amount of debate), international law has accommodated community interests to a considerable extent. This accommodation has taken various forms: it is particularly clear in treaty provisions expressly recognizing the standing of States to institute proceedings before international judicial bodies, or embracing human rights conditionality or universal jurisdiction. In the absence of express treaty rules, international lawyers have devised challenging legal concepts such as obligations *erga omnes*, which at times overburden debates, but which perform an important role as 'vehicles' of community interests.

Of course, the accommodation of community interests has not been a uniform process. Predictably, the international community has been very cautious when confronted with assertions of a right to use military force in defence of community interests. As noted above, such assertions have at times shaken, but so far not moved, the 'cornerstone of the United Nations Charter',¹⁰⁸ Article 2(4). Whether an international system with limited potential (as a matter of practice) to authorize military responses centrally can in the long run maintain such a strict ban on unilateral force is a matter for speculation. The recognition of core community values that require international protection clearly places strain on the system.¹⁰⁹ Where universal institutions such as the UN are incapable of protecting these values with some degree of regularity, experience suggests that they will have to live with occasional infringements—hopefully 'tamed' through some form of collective decision-making and limited to rare circumstances. In the broader scheme of things, however, international law's reluctance to accept 'humanitarian' uses of force outside the UN Charter framework can be seen as the exception that proves the rule. All other forms of enforcement action addressed in the preceding survey—judicial claims, non-forcible coercion, and national legal proceedings in the absence of a clear 'nexus'—can be justified: contemporary international law thus makes considerable room for the decentralized enforcement of community interests.

Curiously, practice does not mirror this normative assessment. States remain cautious in making use of their enforcement powers. If anything, they seem to rely on coercive responses—hence the limited (and most would say, inconclusive) practice

¹⁰⁷ Simma, 'From Bilateralism to Community Interest' (n 1) 229–33.

¹⁰⁸ *Case Concerning the Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 201, para 148.

¹⁰⁹ A point rightly stressed by S Murphy: see his 'Protean Jus ad Bellum' in Giegerich, *A Wiser Century?* (n 18) 183, 184.

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of humanitarian intervention and the considerable (if often ignored) practice of third-party reprisals. By contrast, States are reluctant to enforce community interests through proceedings before national or international courts. While it would be simplistic to state that States never wanted to act as guardians of community interests, it seems fair to say that they assert their considerable enforcement powers very selectively. International rules on decentralized enforcement therefore seem to be ahead of State practice; the law seems to allow more than States typically want.¹¹⁰ This assessment yields a first lesson. On the one hand, international lawyers keen to promote some form of decentralized enforcement action in defence of community interests have no reason to be overly cautious, as in most cases they have the law on their side. On the other hand, the existing mechanisms of law enforcement through national and international courts clearly require to be improved. Experience suggests that at present, even States willing to act in defence of community interests do not see them as attractive forms of enforcement. Unless that perception changes, and unless there is a more regular practice of public interest litigation, the decentralized enforcement of community interests will remain controversial.

2. Enforcement rights, but no accepted enforcement duties

This leads to a second, related, observation. The previous discussion shows that, by and large, law enforcement in the public interest remains a discretionary competence of States. While international law has progressively recognized enforcement rights, it imposes specific enforcement duties only in very rare circumstances. With respect to litigation before international courts and non-forcible coercion, this may seem obvious: legal proceedings and countermeasures are generally viewed as entitlements, not as duties, and by extension, the same applies to their application to the field of community interest.¹¹¹ Humanitarian intervention is not even a right, so it is surely premature to consider a legal duty to use force, however much political decision-making in specific circumstances may be informed by moral imperatives. Slightly more complex are provisions imposing upon States generally-phrased duties to ‘ensure respect’ for international law (such as common Article 1 of the 1949 Geneva Conventions¹¹²), but even these leave States a considerable measure of discretion. More specifically, while enshrining a ‘duty . . . to raise . . . violations of international humanitarian law’,¹¹³ common Article 1 does not prejudice

¹¹⁰ Simma, ‘From Bilateralism to Community Interest’ (n 1) 372–3: ‘what is to be observed . . . is less an excessive human rights ‘vigilantism’ than remarkable lack of vigour on the part of States parties to human rights conventions to take up and counter treaty breaches by other States parties’.

¹¹¹ The ICJ in the Wall Opinion therefore was right carefully to distinguish between the treaty-based duty to react against breaches of the Geneva Conventions and the right to respond against Israel’s breaches of obligations *erga omnes*: see *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion* [2004] ICJ Rep 136, paras 155–8.

¹¹² Pursuant to Art 1, ‘[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances’.

¹¹³ *Case Concerning the Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Separate Opinion of Judge Simma)* [2005] ICJ Rep 201, para 34.

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decisions on the appropriate means of enforcement. Put differently, Geneva law requires States to defend community interests (and to do so in good faith, which they probably often fail to do), but does not impose upon them specific duties to exercise jurisdiction, institute proceedings, or resort to countermeasures.

It is only with respect to national jurisdiction that international law has moved towards stricter rules imposing enforcement duties. As noted above, it has typically done so in a ‘targeted’ way, by imposing obligations to exercise jurisdiction on custodial States. Only very few treaties (notably the Geneva Conventions) attempt to make universal jurisdiction mandatory for all States, and experience suggests that States simply are not prepared to live up to their obligations. In short, the international regime of community interest enforcement is dominated by enforcement rights, and the few existing enforcement duties tend to be approached in a rather cavalier way.

This general state of affairs is of course unsatisfactory, and has led commentators to argue in favour of stricter, mandatory legal standards.¹¹⁴ These attempts are laudable and no doubt well-meaning, but are likely to widen further the gap between the theory and reality (or ‘is’ and ‘ought’¹¹⁵) of law enforcement, and are probably counter-productive. Rather than postulating far-reaching, unacceptable, enforcement duties, it is submitted that the only way forward is to document international enforcement action and to encourage States to make use of their existing enforcement powers. In the long run—and this may be the second, sobering, lesson drawn from the above survey—a meaningful regime of community interest enforcement will have to grow gradually over time. It cannot simply be forced upon States, but has to be built, bit by bit, on their accumulated practice.

3. Conceptual maze

A third point concerns the inter-relationship between the various concepts. It is a very simple observation: it is curious how many different legal concepts are employed to explain what really can be viewed as a common problem of law enforcement in defence of community interests. As noted above, States seeking to act as guardians of such community interests, depending on the character of their enforcement action, may well be required to invoke three or four different legal concepts—from obligations *erga omnes* to humanitarian intervention.

The co-existence of different concepts should not in itself be seen as a major problem. Of course, there is the problem of ‘legalese’: the inflationary invocation of

¹¹⁴ See, eg, Amnesty International, ‘Universal Jurisdiction: 14 Principles on the Effective Exercise of Universal Jurisdiction’ (1999) <<http://www.amnesty.org/en/library/info/IOR53/001/1999>> accessed 20 July 2010 (with respect to national jurisdiction); see further Hillgruber, ‘The Right of Third States to Take Countermeasures’ (n 64) 291–2.

¹¹⁵ See Simma, ‘Does the UN Charter Provide an Adequate Legal Basis...?’ (n 1) 125: (‘Viewed realistically, the world of obligations *erga omnes* is still the world of the “ought” rather than of the “is”’).

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concepts mysteriously labelled ‘obligations *erga omnes*’, ‘*jus cogens*’, ‘*actio popularis*’ may reinforce clichés about lawyers’ deliberate reliance on impenetrable terminology.¹¹⁶ Yet that is a general problem, not particular to debates about law enforcement. Terminology aside, the co-existence of different concepts simply reflects the fact that a common concern—the perception that particular community concerns require to be protected by individual State action—has made itself felt within the various sub-areas of international law, and within their terminological and conceptual parameters. What is puzzling, however, is the relative absence of comparative studies, and the degree to which the various enforcement mechanisms continue to be analyzed in isolation. As noted in the preceding sections, States’ competence to enforce community interests clearly depends on the type of enforcement measure they seek to employ, as this is a key variable in the balancing exercise the international legal system has had to perform. Yet when discussing the different enforcement measures in isolation, one tends to overlook their inter-action and inter-relation. To give but one example, awareness of other forms of community interest enforcement would help increase the level of discourse about universal jurisdiction; by the same token, debates about *erga omnes* obligations would gain if that ‘very mysterious’¹¹⁷ concept was seen not as unique,¹¹⁸ but as part of a range of ‘vehicles’ permitting the defence of legal interests of international communities.

This should not be read as an invitation to morph the existing concepts into a general notion of ‘fundamental values’ triggering special enforcement rights.¹¹⁹ Clearly, the different legal concepts serve different function and only partly overlap. However, the preceding discussion suggests that they ought to be discussed not in clinical isolation, but as part of the international community’s arsenal of community interest rules—in full awareness of their special function, but also their embeddedness in a broader regime of ‘community interest enforcement’.

4. Simplistic concepts

The previous discussion prompts one final observation. Most of the concepts used to justify, explain and rationalize law enforcement in defence of community

¹¹⁶ See P Reuter, ‘Quelques réflexions sur le vocabulaire du droit international’ in *Mélanges offerts à M le Doyen Louis Trotabas* (Librairie générale de droit et de jurisprudence 1970) 424, 445 (deploring the ‘absence d’imagination [dans le vocabulaire du droit international] dont le recours au latin n’est pas le moindre signe!’).

¹¹⁷ I Brownlie, ‘To What Extent Are the Traditional Categories of Lex Lata and Lex Ferenda Still Viable?’ in JHH Weiler and A Cassese (eds), *Change and Stability in International Law-Making* (Walter de Gruyter, 1988) 66, 71.

¹¹⁸ For further critical comments on the ‘myth of uniqueness’ preventing a sober evaluation of obligations *erga omnes* see Tams, *Enforcing Obligations Erga Omnes* (n 9) 308–9.

¹¹⁹ But contrast C Tomuschat, ‘Reconceptualizing the Debate on Jus Cogens and Obligations Erga Omnes—Concluding Observations’, in Tomuschat and Thouvenin, *The Fundamental Rules of the International Legal Order* (n 64) 425.

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interests are curiously simplistic. This is hardly ever stated—in fact, one often reads almost referential comments about the complex nature of concepts such as obligations *erga omnes*, *actio popularis*, etc.¹²⁰ Looked at from a distance, most concepts addressed in the preceding sections are however straightforward in one important respect: they are premised upon an egalitarian approach that treats all States alike and that confers enforcement powers upon all States. Hence all States have an interest in seeing obligations *erga omnes* observed (and can exercise consequential rights of protection); all States are by definition entitled to exercise jurisdiction on the basis of the (permissive¹²¹) universality principle; all States parties to the respective community interest treaties can invoke the manifold provisions envisaging *actiones populares*; and of course, if the concept of humanitarian intervention were to be accepted, it would confer a specific, exceptional enforcement right on all States. Put differently, in their attempt to overcome enforcement problems, international legal concepts enshrining community interests have typically opted for the other extreme: they translate community interests into enforcement rights of each and every State belonging to that community. By contrast, they hardly attempt to introduce distinctions between categories of States and reject a whole range of criteria upon which distinctions could have been based: as a matter of law, geographical proximity is as irrelevant as are power equations or special circumstances linking a particular State to a given area/problem. What is more, there is no equivalent of a ‘clean hands principle’; instead, enforcement rights can be exercised by States irrespective of their own compliance with community interest norms.

At some level, this simplistic, egalitarian approach is liberating and refreshing. It is notable for its rejection (if only implicit) of notions of *regional ‘core states’*¹²² keeping order within their respective sphere of dominance, or world hegemonic powers asserting a general competence to police the world. Yet at the same time, the egalitarian approach is naïve. At the normative level, it blends out the real differences between States, but it cannot of course make them disappear. And not surprisingly, real differences reappear whenever the various concepts are put into practice: hence it is the courts of former colonial powers that exercise universal jurisdiction over crimes committed within ‘their’ former colonies;¹²³ it is third States from within the same geographical region that feel compelled to respond coercively against

¹²⁰ See, eg, P Weil’s description of obligations *erga omnes* as one of the ‘*pièces maîtresses* de l’arsenal conceptuel du droit international d’aujourd’hui’ (in ‘Le droit international en quête de son identité’ (1992) 237 *Recueil des Cours* 9, 286).

¹²¹ But see below for comments on the targeted rules of mandatory jurisdiction.

¹²² S Huntington, *The Clash of Civilizations and the Remaking of World Order* (Simon & Schuster, 1996) 155 et seq.

¹²³ See the pertinent remarks by W Schabas, ‘Preface’ in Reydams, *Universal Jurisdiction* (n 94).

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atrocities;¹²⁴ and often it is de facto ‘protecting powers’¹²⁵ like Austria (with respect to South Tyrol) or Ireland (with respect to Northern Ireland) that exceptionally do institute inter-State proceedings before human rights courts. In short, the real differences between States remain decisive when assessing which States actually make use of their enforcement rights.

Of course, at some level, this is only natural. If community interest enforcement by and large relies on entitlements, rather than duties, then it is discretionary. Yet the egalitarian approach underlying concepts such as obligations *erga omnes* or *actio popularis* may raise expectations that States, realistically, are never able to live up to. To avoid that problem, international law might draw inspiration from the more nuanced approach devised within the law of jurisdiction. As noted above, this is the only field in which international rules on community interest enforcement have moved beyond egalitarianism, have instead singled out particular categories of States (custodial States, port States), and have recognized their special role in the enforcement of community interests. Experience with these approaches so far has been limited, but it is submitted that they may indicate a way forward—a way towards a more targeted, ‘smarter’, regime of law enforcement competence that relies on tangible differences between categories of States, and translates these differences into differentiated normative enforcement powers (or even enforcement duties). These ‘smart’ regimes need not replace the existing egalitarian approach, but could complement it. The final lesson to draw from the above survey, then, may be for international lawyers to begin to devise systems of differentiated enforcement competence that avoid the problems of hegemonic power politics, but intelligently carve out special roles for particular categories of States. It is submitted that the ‘custodial State’ and ‘port State’ models tried out in existing international treaties provide at least a starting-point and could serve as models for future ‘smart’ enforcement regimes.

V. Concluding Observations

Fifteen years ago, in his Hague lectures, Bruno Simma approached the topic of community interest in a decidedly optimistic way. ‘The good news is that today . . . community interest is permeating the body of international law much more thoroughly

¹²⁴ See the European Council Presidency’s conclusions at the Berlin summit, 24–25 March 1999, justifying resort to enforcement action against the FRY to protect human rights of the Kosovo population: ‘On the threshold of the 21st century, *Europe cannot tolerate* a humanitarian catastrophe in its *midst*. It cannot be permitted that, in the middle of Europe, the predominant population of Kosovo is collectively deprived of its rights and subjected to grave human rights abuses. We, the countries of the European Union, are under a moral obligation to ensure that indiscriminate behaviour and violence, which became tangible in the massacre at Racak in January 1999, are not repeated’ (emphasis added).

¹²⁵ See Arts 8, 8, 9, and 9 respectively of the 1949 Geneva Conventions.

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than ever before'¹²⁶ was one of the opening statements, to be followed by a detailed assessment of the 'various ways in which community interest is currently marching through the time-honoured institutions of the law.'¹²⁷ With respect to decentralized law enforcement, the preceding discussion confirms this assessment: 15 years on, 'community interest' is still 'marching' and continues to 'permeat[e]' international law.¹²⁸ More specifically, the traditional mechanisms for inter-State enforcement have been opened up to make room for individual State enforcement action, thus bearing out Bruno's more general characterisation of a regime of '[c]ommunity interest on a bilateralist grounding'.¹²⁹ Just as then, decentralized enforcement only offers a second-best alternative to direct recourse or 'adequate institution- building';¹³⁰ but ultimately (as in many other areas), the international legal system pragmatically accepts the second-best option.

What may have changed is the focus of some of our discussions on community interest. At least at the level of academic discourse, the big conceptual debate about the role of community interests in international law has been won—the strictly bilateralist view of international law has been largely overcome. Academics, but also law-developing agencies like the ILC, today instead almost exclusively focus on 'operationalizing' community interests.¹³¹ The preceding sections indicate how, in my view, international lawyers should approach this new task: *confidently* (as community interests have indeed penetrated large areas of international law); *pragmatically* (avoiding premature talk about enforcement duties); *holistically* (aware that community interests are embodied in a range of related legal concepts); and *creatively* (considering how to supplement existing concepts by smarter regimes of differentiated enforcement competence). This task is no doubt challenging, but international lawyers approaching need not be concerned: they stand on the shoulders of giants whose work has helped overcome the strictures of a 'bilateral-minded', 'minimal law'.¹³² Among these giants, Bruno Simma occupies a prominent place.

¹²⁶ Simma, 'From Bilateralism to Community Interest' (n 1) 234.

¹²⁷ Ibid, 375 (a statement made in the context of treaty law, but of broader application).

¹²⁸ Ibid.

¹²⁹ Ibid, 248.

¹³⁰ Ibid, 249.

¹³¹ The ILC's attempt to translate concepts such as international crimes, *jus cogens*, and obligations *erga omnes* into specific rules on State responsibility is the most prominent example: see notably Arts 40, 41, 48 and 54 of its Articles on State Responsibility.

¹³² Simma, 'From Bilateralism to Community Interest' (n 1) 230 and 229 respectively.