International Community and Abuses of Sovereign Powers

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Abstract International law was traditionally a horizontal and state-centric system of rules. Although state-centrism is in decline, it is still reflected in some of the core concepts and procedures governing contemporary international law. This article identifies the community-oriented values in the international community that stretch beyond the interest of sovereign states. It further explores how these values can be protected by the international community when states abuse their sovereign powers. Attention is paid to the concepts of Chapter VII powers and limitations on the authority of the Security Council, as well as the concepts of obligations *erga omnes* and norms *jus cogens*. While the latter two concepts reflect fundamental values of the international community, they cannot be used as an enforcement mechanism to address the abuses of sovereign powers. The enforcement can come from Security Council resolutions adopted under Chapter VII of the UN Charter. Notably, the concept of the international peace and security nowadays covers even seemingly purely domestic gross and systematic violations of human rights. Despite this stretch of the Security Council's powers, the community-oriented rules also demand that its measures need to be interpreted with the framework of international human rights law in mind. The article concludes that the post-Second World War era has seen a turn away from state-centrism and toward a community-oriented international legal system. The international community has acknowledged the existence of a rights-

based minimum threshold of a shared value system. However, the enforcement of this value system remains subject to state-centric procedures. There is no automatic and readily available remedy against abuses of sovereign powers.

Keywords State-centrism · Community-oriented values · Abusive governments · Security Council · Obligations *erga omnes*

Introduction

Traditionally, international law was a state-centric system which did not pay much attention to factors other than the interests of sovereign states. Although many of its concepts and procedures remain state-centric even nowadays, the era of the UN Charter saw a shift away from a state-oriented to community-oriented understanding of the international legal system. The Charter itself reflects a strong sense of international community and shared values within this community. It further creates institutions and mechanisms to enforce these values, if necessary even against the interests of sovereign states. Beyond the Charter mechanisms, international law has developed concepts which also reflect the fundamental values of the international community[1] but lack an enforcement mechanism.

This article will identify the concepts and mechanisms in international law which manifest community-oriented values and explore how these values can be collectively protected when states abuse their sovereign powers. Particular attention will be paid to the concepts of Chapter VII powers and limitations on the authority of the Security Council, as well as the concepts of obligations *erga omnes* and norms *jus cogens*. While the latter two concepts reflect fundamental values of the international community, they remain virtually futile if used as an enforcement mechanism to address the abuses of sovereign powers. Conversely, the Security Council has developed a broad understanding of the concept of international peace and security and has used Chapter VII powers to address *domestic* abuses of sovereign powers. However, the Security Council's measures also need to be interpreted with the framework of international human rights law in mind.

The UN Charter and the International Community

After the Second World War, the international legal system was designed anew. Although international law remained a state-centric legal system, the UN Charter period is also an era of 'determining whether [the international community] knows of values other than the sovereign identities of its individual members [states].'[2] The UN Charter's opening words are 'we the peoples.'[3] This symbolic phrasing announced a shift away from the traditional state-centrism in international law. The

[1] See, e.g., Sivakumaran (2009).

[2] Kritsiotis (2002).

[3] UN Charter pmbl.

preamble also includes references to 'mankind' and a commitment to prevent suffering as experienced in the Second World War.[4]

Beyond these preamble pronouncements in the Charter, the operative articles created mechanisms for the enforcement of the core values of humanity. As such, the UN Charter may be seen as being in 'the centre of an international 'constitutional order'.'[5] This is because the Charter substantively protects the shared international value of the international peace and security.[6] Furthermore, the Charter provides for mechanisms through which international peace and security can be enforced. As Erika De Wet puts it, the UN Charter's 'connecting role is not only structural but also substantive in nature. In addition to providing a structural linkage of the different communities through universal State membership, the UN Charter also inspires those norms that articulate fundamental values of the international community.'[7]

In terms of formal sources of international law, the UN Charter is an international treaty. But it is a treaty which creates the core international institutions of the post-Second World War international order. Its importance is strengthened by the fact that the Charter takes precedence over other international treaties.[8] This section now turns to the Chapter VII powers of the UN Security Council and to Article 103 of the UN Charter. It demonstrates how the UN Charter can be used to address the abuses of sovereign powers by individual governments. Subsequently, it is argued that even the Security Council's powers are not unlimited.

The Chapter VII Powers

Under Chapter VII of the UN Charter, the Security Council is empowered to 'determine the existence of any threat to the peace, breach of the peace, or act of aggression.'[9] In order to bring such a situation to an end, the Security Council can take measures which are legally binding on all states. Maintenance of international peace and security is considered to be of such importance that the Security Council, acting on behalf of the entire international community, can authorise an exception to the prohibition of the use of force contained in Article 2(4) of the UN Charter.[10] Chapter VII thus allows the Security Council to override one of the core traditional guarantees that international law gives to sovereign states: non-interference in domestic affairs.

The concept of the international peace and security has become interpreted widely in practice. A threat to or breach of peace does not require a traditional trans-

[4] UN Charter pmbl para 1.

[5] McCorquodale (2004).

[6] The preamble of the UN Charter expresses the determination 'to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind.'

[7] De Wet (2006). UN

[8] Charter art 103. UN

[9] Charter art 39.

[10] UN Charter art 42.

boundary use of force. It can also be triggered by gross and systematic human rights violations domestically.[11] Chapter VII of the UN Charter has been thus employed to protect groups and individuals against their own governments, even in the absence of interference from a foreign state. The Security Council has developed various responses to abuses of sovereign powers domestically, from military interventions to international territorial administration. In the past two decades, particularly notable practice has emerged in the situations of Haiti, Afghanistan, Kosovo, East Timor, and Libya.

In 1994, the Security Council adopted Resolution 940 on Haiti, which authorised the use of force for the return of an ousted democratically elected government.[12] The Security Council acted under Chapter VII of the UN Charter, although it is generally perceived that no breach of or threat to *international* peace existed.[13] A trans-boundary element was absent. While in Haiti the Security Council authorised the use of force for the return of an ousted government, in Afghanistan force was authorised to change the incumbent Taliban government. Security Council Resolution 1378, *inter alia*, condemned 'the Taliban for allowing Afghanistan to be used as a base for the export of terrorism by the Al-Qaida network and other terrorist groups'[14] and expressed deep concern about 'serious violations by the Taliban of human rights and international humanitarian law.'[15] The Resolution further gave 'its strong support for the efforts of the Afghan people to establish a new and transitional administration leading to the formation of a government, both of which: (1) should be broad-based, multi-ethnic and fully representative of all the Afghan people and committed to peace with Afghanistan's neighbours; (2) should respect the human rights of all Afghan people, regardless of gender, ethnicity or religion; [and] (3) should respect Afghanistan's international obligations.'[16]

The Security Council thus denied legitimacy of the Taliban government in Afghanistan based on its grave human rights violations and threats to international peace, and expressed its support for a change of government. Because of the involvement in international terrorism, the traditional trans-boundary threat to the international peace and security was present in the case of the Taliban government. It is notable, however, that the Security Council went much further than that and, when challenging the legitimacy of the Taliban government, invoked several instances of human rights abuses that were of a purely domestic nature.

In the context of the Kosovo crisis, the Security Council used its binding powers in Resolution 1244 to remedy Serbia's abuses of sovereign powers, and established the regime of international territorial administration.[17] In the preamble, the Resolution expressed determination 'to resolve the grave humanitarian situation in Kosovo, Federal Republic of Yugoslavia, and to provide for the safe and free return

[11] De Wet (n 7) 64.

[12] See generally Falk (1995).

[13] ibid 342.

[14] SC Res 1378 (14 November 2001) pmbl.

[15] ibid.

[16] ibid para 1.

[17] SC Res 1244 (10 June 1999).

of all refugees and displaced persons to their homes.'[18] While the Resolution did not grant Kosovo the status of an independent state, it effectively separated the territory from Serbia and vested all legislative, executive and judicial powers in the self-governing organs, subordinated to international administration. Kosovo declared independence in 2008 and its legal status remains controversial.[19] This debate is beyond the scope of the present article, but it is important to consider what follows from the legal regime established by the Resolution.

Drawing authority from Resolution 1244, the Special Representative of the UN Secretary General[20] promulgated the document entitled 'Constitutional Framework for Provisional Self-Government.'[21] The chapter on basic provisions of the Constitutional Framework provides for the institutional setting for the exercise of Kosovo's self-government[22] and enacts an electoral system based on democratic principles[23] and mechanisms for the protection of human rights.[24] The regime of international territorial administration was set in place to remedy governmental abusiveness. Under the regime of Security Council resolution 1244, the international community implemented democratic institutions. The power of self-governing (democratic) institutions is nevertheless limited, as any decision of these institutions can be overruled by the International Civilian Representative.

Similarly to Kosovo, the Security Council also established a regime of international territorial administration for East Timor, in order to remedy gross and systematic abuses of Indonesia's sovereign powers. Acting under Chapter VII, on 15 September 1999, the Security Council adopted Resolution 1264. In the preamble, the Resolution expressed deep concern because of 'the deterioration in the security situation in East Timor, and in particular by the continuing violence against and large-scale displacement and relocation of East Timorese civilians.'[25] In the operative part, the Resolution established 'a multinational force under a unified command structure'.[26] On 25 October 1999, the Security Council, acting under Chapter VII, adopted Resolution 1272, with which it established 'a United Nations Transitional Administration in East Timor (UNTAET), which will be endowed with overall responsibility for the administration of East Timor and will be empowered to

[18] ibid pmbl para 4.

[19] For more on Kosovo's declaration of independence and legal status see generally Weller (2009), Summers (2011) and Vidmar (2009).

[20] The position of the Special Representative was created by Resolution 1244. The Resolution '[r]equests the Secretary-General to appoint, in consultation with the Security Council, a Special Representative to control the implementation of the international civil presence, and further requests the Secretary-General to instruct his Special Representative to coordinate closely with the international security presence to ensure that both presences operate towards the same goals and in a mutually supportive manner' SC Res 1244 para 6.

[21] UNMIK/REG/2001/9 (15 May 2001).

[22] ibid ch 1.

[23] ibid ch 9.1.3.

[24] ibid ch 3.

[25] SC Res 1264 pmbl para 4 (15 September 1999).

[26] ibid para 3 (15 September 1999).

exercise all legislative and executive authority, including the administration of justice.'[27]

Prior to granting independence to East Timor and transfer of power from international territorial administration to organs of the East Timorese state, the international administrative authority supervised the creation of democratic institutions.[28] Under UN auspices, elections were held on 30 August 2001[29] and on 15 September 2001, the Special Representative of the United Nations Secretary General 'swore in the 88 members of the Constituent Assembly.'[30]

Ultimately, East Timor's course to independence was also confirmed in Security Council Resolution 1338, adopted on 31 January 2001.[31] However, this resolution was not adopted under Chapter VII of the UN Charter and it cannot be said that it was creative of a new state. The Resolution was rather an affirmation of the completion of the internationalised process which resulted in the emergence of a new state and implementation of democratic procedures whereas the underlying Chapter VII resolution served as the legal authority for such an international action.

Most recently, the Security Council adopted binding Resolutions 1970 and 1973 on Libya, where it identified the existence of a threat to international peace and security on the basis of Gaddafi's domestic policies. The Security Council drew a number of legal consequences, such as: a travel ban,[32] asset freezing,[33] referral to the International Criminal Tribunal,[34] and an arms embargo.[35] In order to protect civilians, the Security Council authorised the use of *all necessary means*,[36] but specifically excluded 'a foreign occupation force of any form on any part of Libyan territory.'[37] Unlike East Timor or Kosovo, the Resolutions on Libya are not concerned with the choice of a political system. Resolution 1970, for example, urged the Libyan authorities to: 'Act with the utmost restraint, respect human rights and international humanitarian law, and allow immediate access for international human rights monitors.'[38] Resolution 1973 condemned 'the gross and systematic violation of human rights, including arbitrary detentions, enforced disappearances, torture and summary executions.'[39] In effect, the Security Council acted in a purely domestic situation in Libya and identified violations of international law on the basis of the government's abusive behaviour vis-a`-vis its own population.

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[27] SC Res 1272 para 1 (25 October 1999).

[28] UN Doc S/2001/436 (2 May 2001) paras 2–7; S/2001/983 (18 October 2001) paras 4–8.

[29] UN Doc S/2001/983 (18 October 2001) para 5.

[30] ibid.

[31] SC Res 1338, S/RES/1338 (31 January 2001).

[32] SC Res 1970 (26 February 2011) para 15.

[33] ibid paras 17–21.

[34] ibid paras 4–8.

[35] ibid paras 9–14.

[36] See Henderson (2011).

[37] SC Res 1973 (17 March 2011) para 4.

[38] SC Res 1970 para 2(a).

[39] SC Res 1973 pmbl para 4.

In sum, the practice of the Security Council indicates that the concern for international peace and security has become a widely interpreted concept and does not require a traditional trans-boundary element. The Security Council has authorised a wide range of legal responses to the abuses of sovereign powers. Although it has never directly created a new state, it has established irreversible special legal regimes for governance in separation from the abusive parent state. In Kosovo and East Timor, the Security Council even stipulated for the establishment of democratic institutions. In Haiti, the Security Council acted to bring back to power an ousted democratically elected government. In other situations, it remained confined to general human rights considerations, without addressing the issue of democratic governance. When the Security Council acts in order to protect the international peace and security, regard needs to be paid to the international human rights law framework. In other words, the Security Council's measures do not enjoy automatic primacy when they conflict with other international legal obligations.

The Boundaries of the Security Council's Powers

Obligations created by the Security Council under Chapter VII need to be implemented regardless of any other international obligation. This is because Chapter VII resolutions draw their binding force from the UN Charter which contains a supremacy clause elaborated in Article 103: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'[40] This provision elevates the UN Charter to the status of a superior international treaty. However, this general conclusion is not unqualified.

Importantly, Article 103 does not void an obligation that contravenes the Charter, but rather suspends the duty of a state to fulfil a certain obligation. As specified by the Study Group of the International Law Commission (ILC) on Fragmentation of International Law, Article 103 is a 'means for securing that Charter obligations can be performed effectively and not [a means for] abolishing other treaty regimes'.[41] This means that Article 103 is a rule of precedence rather than a manifestation of hierarchical relationship between the norms of international law.[42] In *Al-Jedda*, the House of Lords nevertheless gave a slightly different nuance to Article 103 and the Charter in general. Lord Bingham of Cornhill held that in the context of Chapter VII, 'article 103 should not… be given a narrow, contract-based, meaning. The importance of maintaining peace and security in the world can scarcely be exaggerated'.[43] Lord Bingham thereby suggested that Article 103, in combination with Chapter VII of the Charter, also has an important substantive value, as it

[40] UN Charter art 103.

[41] UN Doc A/CN.4/L.68 (2006).

[42] See Tzanakopoulos (2012a).

[43] *R (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent)*[2007] UKHL 58 (2008); 1 AC 332; ILDC 832 (UK 2007) para 34.

intends to promote and enforce international peace and security, a value in the interest of everyone in the international community. This reasoning reflects the view that the Charter expresses fundamental values of the international community and Article 103 ensures that these values are enforced regardless of any other international obligation. The rule of precedence is thus not only of institutional treaty nature but a substantive tool for enforcing the interests of the international peace and security.[44] The boundaries of Article 103 and Chapter VII powers have, however, recently attracted notable judicial scrutiny.

In *Nada*, the Swiss Federal Supreme Court had to resolve a conflict between an obligation arising under the UN Security Council's Chapter VII resolution and an obligation arising under the European Convention of Human Rights (ECHR). The Swiss court referred to Article 103 of the Charter to establish hierarchical superiority of the underlying Chapter VII resolution.[45] In effect, the court was willing to accept that Article 103 automatically trumps all other international legal obligations. However, the Swiss court's approach of accepting absolutely and unqualifiedly the Security Council's measures appears to be wrong. As one commentator noted:

> By declaring that the Security Council was only bound by *ius cogens* and that, by virtue of Article 103 of the UN Charter, obligations under the UN Charter, including binding Security Council resolutions, prevailed over all other rules of national and international law, the Federal Supreme Court imputed an enormous abundance of power to the Security Council which could hardly be justified. This result is even less appropriate as the role of the Security Council at present is not the same as it was when the UN Charter was drafted. The Security Council is no longer merely reacting to certain situations concerning mainly states or regions, but is evolving into a world legislator. This new role necessitates corresponding control mechanisms.[46]

After all, the Security Council is a political body and its decisions need to be subjected to some scrutiny. Furthermore, there needs to be some room for interpretation in Security Council's resolutions. When implementing the resolutions domestically, national organs are rarely left with an exclusive choice of 'either/or'.

In *Al-Jedda*, the House of Lords adopted a milder approach than the Swiss Federal Supreme Court. Lord Brown of Eaton-Under-Heywood still upheld the primacy of an obligation created under the UN Charter over Article 5(1) of the ECHR (the right to liberty and security of person). However, he also noted that '[n]o

[44] In this respect see also Shelton (2009), arguing that article 103 may be seen as a 'supremacy clause' which 'has been taken to suggest that the aims and purposes of the United Nations—maintenance of peace and security and protection of human rights—constitute an international public order to which other treaty regimes and the international organizations giving effect to them must conform'.

[45] *Youssef Nada v State Secretariat for Economic Affairs and Federal Department of Economic Affairs*, Administrative Appeal Judgment, BGE 133 II 450, 1A 45/2007; ILDC 461 (CH 2007) (14 November 2007) para 6.2.

[46] Oxford Reports on International Law, International Law in Domestic Courts, the *Nada case*, Analysis, para 3.

such reasoning, of course, would apply in the case of capital punishment'.[47] The House of Lords thus acknowledged that the Security Council's measures do not enjoy automatic primacy but can be subject to weighing and balancing against other international legal norms and values.

Nada ultimately ended before the European Court of Human Rights (ECtHR). The Court held that the Security Council 'must have regard to the purposes for which the United Nations was created.'[48] The ECtHR built on its reasoning in *Al-Jedda* that 'there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights'.[49] Nevertheless, the ECtHR did not go as far as stating that Article 103 did not need to be followed. Instead, the ECtHR criticised the Swiss court for not using the space for manoeuvring which was available due to the very specific circumstances of the case.[50] The applicant with severe health problems lived in an Italian enclave surrounded by Swiss territory. Since he was not allowed to enter Switzerland, he could not reach other areas of Italy—the state of his citizenship—and seek medical attention there.[51] These are very peculiar factual circumstances and the ECtHR used them to confine its decision to the facts of this case. This judicial manoeuvre was criticised by Judge Maliverni who argued that on the basis of the UN Charter and recent jurisprudence '[o]ne does not need to be a genius to conclude … that the Security Council itself must also respect human rights, even when acting in its peace-keeping role' and criticised the ECtHR for not saying this directly.[52]

The ECtHR remained somewhat elusive, but its reasoning confirmed that Chapter VII powers be interpreted as a *prima facie* authorisation to violate international human rights obligations. As Erika De Wet argues:

> The line of reasoning introduced by the ECtHR in Al-Jedda and continued in Nada, reflects that ECHR member states are under an obligation to show that it has done as much as possible to prevent a disproportionate limitation of ECHR standards by a particular UNSC resolution … [T]he Nada decision of the ECtHR has indicated that even where the language of a UNSC resolution leaves no apparent scope for interpretation, states remain under an obligation to find a way to give some effect to international human rights standards. The presumption that the UNSC did not intend to deviate from human rights standards seems to be almost irrebuttable, even where it would amount to a distortion of the text of a UNSC decision.[53]

The effect of this doctrine is not that Article 103 would be trumped by other obligations. This is rather a manifestation of systemic integration of different

[47] *Al-Jedda* (n 43) para 152.

[48] *Case of Nada v Switzerland*, ECHR, appl. No. 10593/08, Judgment of 12 September 2012, para 171.

[49] *Case of Al-Jedda* v *United Kingdom* [2011] EHRR 1092, para. 102.

[50] *Nada* (n 48) para 180.

[51] ibid paras 195–198.

[52] ibid (Judge Maliverni concurring) para 15.

[53] de Wet (2013).

international legal norms. Security Council measures need to be interpreted with the presumption that the Council did not intend to violate human rights.

It seems to be uncontested in doctrine that the Security Council, when exercising its Chapter VII powers, must not act *ultra vires*.[54] In his separate opinion in the provisional measures phase of *Bosnia Genocide*, Judge ad hoc Elihu Lauterpacht argued that the ICJ, 'as the principal judicial organ of the United Nations, is entitled, indeed bound, to ensure the rule of law within the United Nations system and, in cases properly brought before it, to insist on adherence by all United Nations organs to the rules governing their operation'.[55] Judge *ad hoc* Lauterpacht then advanced the argument that the Security Council is bound by *jus cogens*:

> The concept of jus cogens operates as a concept superior to both customary international law and treaty. The relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot—as a matter of simple hierarchy of norms—extend to a conflict between a Security Council resolution and jus cogens. Indeed, one only has to state the opposite proposition thus—that a Security Council resolution may even require participation in genocide—for its unacceptability to be apparent.[56]

This may be another potential effect of *jus cogens* in international law, although it is quite unlikely that the Security Council would ever directly demand its violation. It is notable, however, that Judge ad hoc Lauterpacht here argued in favour of the reviewability of Security Council resolutions where these obligations are not compatible with the fundamental values of the international community. Article 103 is not an absolute rule of precedence and needs to be weighed against other obligations in international law.

While Judge *ad hoc* Lauterpacht made his argument in the context of the function of the ICJ, even domestic courts have effectively performed judicial reviews of Security Council resolutions or, better, domestic measures for their implementation.[57] The boundaries of Article 103 have become better defined after *Kadi*. The complex story of this case has been examined in detail elsewhere.[58] For the purposes of this article it should be noted that the then EU Court of First Instance (CFI), on the basis of Article 103, refused to review measures against individuals taken by the Security Council.[59] However, the then European Court of Justice (ECJ) subsequently overruled this decision and adopted the so-called *Solange* argument.

This doctrine originates with the German Federal Constitutional Court. As Antonios Tzanakopoulos argues: 'In the two relevant decisions, the German Court successively

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[54] Pauwelyn (2003).

[55] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina v Yugoslavia* ('*Bosnia Genocide* case'), Request for the Indication of Provisional Measures, 14 April 1992 (1993) ICJ Rep 325, Separate Opinion of Judge *ad hoc* Lauterpacht, para 99.

[56] ibid para 100.

[57] See Tzanakopoulos (n 42) 54–61.

[58] See, e.g. de Wet (2009) and De Wet and Vidmar (2013).

[59] See Tzanakopoulos (n 42) 54.

asserted its power to review decisions of an international organisation for compliance with fundamental rights guaranteed under the German Constitution, and then decided to defer to the international organisation when it was satisfied that an equivalent level of protection was available within the international organisation's framework.'[60] In *Kadi* this meant that Security Council resolutions are to be implemented domestically as long as they can be reconciled with human rights obligations.[61]

Another instalment of the case followed in *Kadi II*.[62] The Court of Justice of the European Union (CJEU) reasoned:

> When the European Union implements Security Council resolutions adopted under Chapter VII of the Charter of the United Nations, on the basis of a Common Position or a joint action adopted by the Member States pursuant to the provisions of the EU Treaty relating to the common foreign and security policy, the competent European Union authority must take due account of the terms and objectives of the resolution concerned and of the relevant obligations under that Charter relating to such implementation.[63]

After *Kadi*, it would still be too simplistic to claim that human rights obligations prevail over Security Council measures.[64] As De Wet points out, the CJEU's decision is only binding on EU organs and does not bind the Security Council or any other UN organ. Indeed, '[t]he EU courts do not have the judicial competence to order the UNSC or its sanctions committees to de-list any particular individual, nor to introduce effective judicial protection at the international level.'[65] *Kadi II* also creates legal uncertainty as it grounds its reasoning in EU rather than international human rights law.[66] Domestic courts outside of the EU might still give precedence to Security Council measures. Nevertheless, the approach of giving Article 103 an automatic and absolute precedence is obviously incorrect. Much attention has been given to the purpose of Chapter VII, that is, maintenance of international peace and security. This is one of the fundamental values of the international community. But so is human rights protection. Article 103 is therefore not a blank cheque. Its measures need to be implemented carefully when they interfere with human rights and the balance will continue to remain subject to academic and judicial scrutiny.[67]

The International Community Values and the Problem of Enforcement

The UN Charter provides for an institutional mechanism which enables enforcement of the international concern for international peace and security. When the Security

[60] See Tzanakopoulos (2012b).

[61] ibid 204-206.

[62] C-584/10 P - *Commission and Others v Kadi*, Judgment of 18 July 2013.

[63] ibid para 106.

[64] See de Wet and Vidmar (2012).

[65] De Wet (n 53) 12.

[66] ibid.

[67] For a thorough analysis see Tzanakopoulos (2010). See also de Wet and Nollkaemper (2002).

Council acts, there needs to be a presumption that it did not intend to violate human rights. A strong sense of particularly strong common values of the international community is also reflected in the concepts of obligations *erga omnes* and norms *jus cogens*. Most norms forming these two concepts are of human rights character. Their special standing reflects a particularly strong ethical underpinning of these norms. But it would be wrong to treat obligations *erga omnes* or norms *jus cogens* as hierarchically superior in international law.

The International Community as a Whole

In the *Barcelona Traction* case *obiter dictum*, the ICJ confirmed the existence of certain obligations which do not operate solely on the basis of reciprocity between two or more states. When these obligations are breached, it is the international community of *states* as whole who is injured, not merely an individual state. This is further explained in the Report of the Study Group of the International Law Commission on Fragmentation of International Law.[68] But it remains unclear how obligations *erga omnes* are identified, what their legal effects are and, ultimately, whether the international community is to be understood as an international community of states or more broadly than that.

In one explanation, all non-bilateral obligations have an *erga omnes* character.[69] This view is problematic as it ignores the ICJ's reference to the 'importance of the rights involved' in the *Barcelona Traction* dictum. The 'importance' is a substantive issue and can only be defined by the special character of the obligations at stake. Maurizio Ragazzi argues that the obligations of this character have two components: 'the moral content' and the 'required degree of support by the international community.'[70] The concept of obligations *erga omnes* thus reflects the notion of a value loaded international community interest. When establishing importance for the international community as a whole, the ICJ has only given circular references to norms and principles of international law. In *East Timor*, the Court accepted the *erga omnes* character of the right of self-determination by arguing that self-determination was 'one of the essential principles of contemporary international law.'[71] But the ICJ failed to explain on what basis some principles are deemed to be more essential or more fundamental than others.

The ICJ has also been unable to identify obligations *erga omnes*, and their content and underpinnings, on the basis of the formal sources of law alone. As Ragazzi has put it, obligations *erga omnes* reflect 'an exceptionless [sic] moral norm (or moral absolute) prohibiting an act which, in moral terms, is intrinsically evil (*malum in se*)'.[72] According to Ragazzi, obligations *erga omnes* are binding not

[68] UN Doc A/CN.4/L.682 (2006) para 393.

[69] Annacker (1993).

[70] Ragazzi (1997).

[71] *East Timor, Portugal v Australia*, Jurisdiction, Judgment, (1995) ICJ Rep 90; ICGJ 86 (ICJ 1995) para 29.

[72] Ragazzi (n 70) 183.

only because states agree that they are, but even more importantly, 'because nobody can claim exceptions from moral absolutes.'[73] The second claim, that a 'moral absolute' operates as a direct source of international law, remains debatable. But it is undisputed that the concept of obligations *erga omnes* nevertheless has its underpinnings in strong moral values and it is these underpinnings that shape international law making.

Although the concept of obligations *erga omnes* is value loaded, it is not seen as a hierarchically superior international law or enforcement mechanism of common international values. The Report of the Study Group of the International Law Commission on Fragmentation of International Law defines the concept along the following lines:

> A norm which is creative of obligations *erga omnes* is owed to the 'international community as a whole' and all States—irrespective of their particular interest in the matter—are entitled to invoke State responsibility in case of breach. The *erga omnes* nature of an obligation, however, indicates no clear superiority of that obligation over other obligations. Although in practice norms recognized as having an *erga omnes* validity set up undoubtedly important obligations, this importance does not translate into a hierarchical superiority…[74]

Obligations *erga omnes* may thus be seen as the legal manifestation of particularly strong values shared by the international community as a whole. The concept encompasses 'moral absolutes'. But it does not take hierarchical precedence over other norms of international law. The legal effects of these obligations remain unclear. It thus also remains unclear how the international community interest is enforced within the international legal system.

The concept further remains somewhat ambiguous, as no single authoritative list exists of *erga omnes* obligations. Some guidelines follow from subsidiary sources of international law, in particular ICJ decisions and academic writings. For a long time the ICJ had been reluctant to employ the term *jus cogens* and was referring to an *erga omnes* character as a virtual synonym for *jus cogens*.[75] But the ICJ has not explored the content of obligations *erga omnes* beyond the overlap with *jus cogens*, which is itself a somewhat mysterious concept.[76] It is in the nature of *jus cogens* norms that they have an *erga omnes* effect,[77] but not all obligations *erga omnes* are to be found on the flipside of *jus cogens*.[78] Which obligations have an *erga omnes* but not *jus cogens* character remains unclear. Christian Tams concludes that '*[e]rga*

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[73] ibid.

[74] UN Doc. A/CN.4/L.682 (2006) para 380.

[75] For more on the relationship between *jus cogens* and obligations *erga omnes* see Tams (2005), De Wet (n 7) 57, Kadelbach (2006) and Byers (1997).

[76] For a survey of obligations for which the ICJ has established that they are of *erga omnes* character see Tams (2005).

[77] See De Wet (n 7) 61.

[78] ibid.

omnes outside *jus cogens* is likely to remain uncharted territory until States begin to invoke the concept more commonly in formalised proceedings'.[79]

Obligations *erga omnes* may be seen as a legal manifestation of the fundamental values of the international community. To the extent of their overlap with norms *jus cogens*, they may also be seen as an enforcement mechanism of the latter. But it is wrong to see obligations *erga omnes* as hierarchically superior law. This may be different, at least theoretically, with the concept of *jus cogens*.

Can *jus cogens* be a Remedy to Address Human Rights Abuses?

In the 1969 Vienna Convention on the Law of Treaties (VCLT), the concept of *jus cogens* was for the first time unequivocally mentioned in international treaty law.[80] But even in this instance it was only given a rather narrow power to void treaties. The Convention also remained silent on the content of the concept. Article 53 of the VCLT, *inter alia*, provides that 'a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole'.[81] The concept of peremptory norms thus also rests on the presumption of the existence of an international community of states with shared interests.

In the Article 53 definition, a peremptory norm is subject to acceptance—by the international community of states as a whole—of the normative content as well as its peremptory character. It is, however, erroneous to see *jus cogens* narrowly as a treaty law concept. Indeed, the concept predates the 1969 VCLT and was invoked by writers even in the pre-Second World War era.[82] At the time, it was unclear whether or not it was a concept generally operating in international law. This has now been generally accepted.[83] Even the VCLT reference to 'general international law' suggests that *jus cogens* is a concept of customary international law. Any norm of customary international law requires its acceptance by states through state practice and *opinio juris*. However, the acceptance of the special peremptory character, not only normative content, by 'the international community of states as a whole' points to the strong ethical underpinning of these norms.[84] Sandesh Sivakumaran argues that *jus cogens* represents a minimum threshold of the international value system.[85]

The strong community-oriented ethical underpinning of *jus cogens* norms has implications for the law-making. International law is, in principle, a consensus-

[79] Tams (n 75) 157.

[80] VCLT art 53.

[81] ibid.

[82] For more see Shelton (2006).

[83] There are currently 111 state parties to the Vienna Convention. Many of its provisions are nevertheless binding on non-parties to the Convention via customary international law. Although some states have refrained from ratification precisely because of Article 53, there is little doubt that the article has customary international law status. Indeed, the status of permanent objector to *jus cogens* has not been accepted by the international community of states.

[84] De Wet (n 7) 57.

[85] Sivakumaran (n 1) 146.

based legal system. States create treaty obligations for themselves and at their free will. It is *state* practice and *opinio juris* which leads to the emergence of customary norms of international law, from which states again have an escape route through the concept of a persistent objector. In principle, it is only new states which become automatically bound by pre-existing customary law and even automatically accede to certain treaties previously governing their territory (e.g. human rights treaties).[86] Yet the peremptory status of certain norms, encompassing the minimum threshold of the international value system, also overrides some fundamental tenets of a consensus-based international law making.

The ethical underpinning of the peremptory norms can compensate for deficiencies in universal acceptance of these norms. State practice is particularly instructive in this regard and in many respects departs from the traditional modes of international law-making. The right to the freedom from torture is supported by very strong *opinio juris*, yet state practice is rather weak. There is nevertheless little doubt that the freedom from torture has a *jus cogens* status.[87] Apartheid South Africa claimed that it was a persistent objector to the prohibition of racial discrimination. This claim was universally rejected on the basis that unlike ordinary customary law, peremptory law does not allow for the persistent objector's status.[88] France used to claim that it had never consented to the concept of *jus cogens* as such.[89] This argument was rejected and now even France has accepted the binding nature of these norms in terms of both content and character.[90]

These examples demonstrate that with regard to the peremptory norms, international law-making works differently than otherwise. As Robert McCorquodale argues, 'some human rights create legal obligations on a state irrespective of whether it has ratified a particular treaty, either because the human right is part of customary international law and so binding on all states or by virtue of a rule of *jus cogens*, which no state can derogate from or evade by contrary practice'.[91] Moreover, in *Furundzija*, the International Criminal Tribunal for the former Yugoslavia (ICTY) reasoned: 'Because of the importance of the values [which the prohibition of torture] protects, this principle has evolved into a peremptory norm of *jus cogens*, that is a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules.'[92]

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[86] See Rasulov (2003).

[87] See Garnett (1997), making the following argument: 'It may be argued… that the absolute nature of the conventional prohibitions, when coupled with the near universal *opinion juris* amongst states as to the illegality of the practice, may be a sufficient basis for concluding that torture is prohibited as a peremptory norm.'

[88] Byers (n 75) 222.

[89] ibid 229. See also Shelton (n 82) 166.

[90] See Pellet (2006), arguing: 'Several decades have… been needed for the general acceptation of this concept [*jus cogens*]—and, among the pockets of resistance was… France but also, less anecdotally, the ICJ itself (both not being without any link…). Now the way has been cleared: Asterix has stopped its rearguard action against the notion.'

[91] McCorquodale (n 5) 486.

[92] *Prosecutor v Anto Furundzija*, Case No IT-95–17/1, Trial Chamber II, at 260, para 153 (10 December 1998).

Hierarchical superiority of *jus cogens* remains a contested issue, particularly so after the ICJ's *Germany v Italy* decision on jurisdictional immunities.[93] In this decision, the ICJ, *inter alia*, had to address the questions of whether the gravity of the act has an impact on the law of jurisdictional immunities and whether a conflict exists between *jus cogens* norms and the customary law governing immunities. With regard to the question of gravity, the ICJ noted that state practice in support of the view that gravity influences immunity was coming only from Italian courts and it was precisely this practice that led to the *Germany* v. *Italy* case.[94] The Court then concluded: '[T]here is almost no State practice which might be considered to support the proposition that a State is deprived of its entitlement to immunity in such a case,'[95] and continued that 'there is a substantial body of State practice from other countries which demonstrates that customary international law does not treat a State's entitlement to immunity as dependent upon the gravity of the act of which it is accused or the peremptory nature of the rule which it is alleged to have violated.'[96] The ICJ further noted that *jus cogens* does not conflict with the law of immunities, as '[t]he two sets of rules address different matters. The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful.'[97]

In sum, the ICJ's decision in *Germany v Italy* provides for a strong authority that *jus cogens* does not automatically take precedence over all other norms of international law. In this particular case, jurisdictional immunity was strictly distinguished from gravity of breaches and the nature of the norms involved. *Jus cogens* is not hierarchically superior law. But the concept nevertheless reflects community values which override state centrism and certain classical tenets of international law-making. The concept changes the traditional paradigm of international law as voluntary law and introduces a set of norms which can be legally binding on states even in the absence of their consent. It thus manifests a strong sense of community values. However, these effects should not be conflated for enforcement mechanism. Violations of *jus cogens* may be violations of the minimum threshold of shared international values, but the concept of *jus cogens* does not create procedural remedies.

Conclusion

The UN Charter period has seen a rise of human rights and the creation of legal regimes as well as institutions for their protection. For the protection of international

[93] ICJ, Jurisdictional Immunities of the State (Germany v Italy: Greece intervening), Merits, Judgment of 3 February 2012, ICJ Rep 2012.

[94] ibid para 83.

[95] ibid.

[96] ibid para. 84.

[97] ibid.

peace and security, the Security Council can override some classical tenets of international law and act collectively against a particular state. Practice of the Security Council shows that the concept of international peace and security is interpreted widely. Not only traditional threats to or actual use of force in international relations have fallen within this category, but also gross and systematic abuses of sovereign powers within one state's borders. But not even the Security Council is unchecked in its actions. Where its decisions could lead to denial of fundamental human rights, the Security Council's measures may be perceived as being *ultra vires*. This standard has been developed from below, by domestic courts. The implementation of these measures needs to take place within the parameters of fundamental human rights.

International law also knows concepts of particularly strong, ethically underpinned, community-oriented obligations which are not a matter of reciprocal relationship between states and are binding even if a particular state has explicitly *not* accepted them as such. However, one should not overstretch the effect of these norms. Despite their special value-based standing, they do not operate as hierarchically superior law. Although reflecting a strong sense of international community and values, the enforceability of these norms is thus still lacking.

The post-Second World War era has seen a turn away from state-centrism and toward a community-oriented international legal system. The international community has acknowledged the existence of a rights-based minimum threshold of a shared value system. However, the enforcement of this value system remains subject to state-centric procedures. There is no automatic and readily available international remedy against abuses of sovereign powers.

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