Establishing the *Erga Omnes* Character of the Obligation to Prevent Transboundary Environmental Harm*

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Abstract

This article argues that the obligation to prevent transboundary environmental harm is erga omnes. *In a fractured landscape, this obligation is the closest that international environmental law comes to a general obligation to protect the environment and should its* erga omnes *character be established, all States will be able to act when it is breached. In the absence of a settled methodology for identifying* erga omnes *obligations and using methodologies put forward in the literature and the characteristics of the* erga omnes *concept, this article argues that four criteria need to be met for an obligation to be* erga omnes*, namely that the obligation (i) has an agreed upon customary content, that it protects a (ii) common and (iii) essential interest, and (iv) that the 'international community as a whole' is the ultimate beneficiary. Using these criteria, the article is able to establish the* erga omnes *character of the obligation to prevent transboundary environmental harm.*

Keywords

protection of the environment – *erga omnes* obligations – identifying *erga omnes* obligations – obligation to prevent transboundary environmental harm – common and essential interests – beneficiaries of *erga omnes* obligations

1. Introduction

When, in *Barcelona Traction*, the International Court of Justice (ICJ) declared that there exist international legal obligations owed to the international community as a whole that are so important that all States have a legal interest in seeing them upheld, the *erga omnes* concept was injected into the veins of international law.[1] A concept capable of providing collective protection to communitarian interests would have been and continues to be welcomed by those

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[1] *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (Second Phase) (Judgment)* [1970] ICJ Rep. 3, at para. 33 ('*Barcelona Traction*').

with a shared 'belief in the emergence of a value-based international public order'.[2] It is a concept that is especially apt for the legal protection of the environment, because environmental protection is 'undertaken in the common superior interest of humankind'[3] and, therefore, necessarily communitarian in character. This is notwithstanding the fact that environmental protection is fragmented in international law both in the way it appears across the discipline – in numerous principles, treaties, and soft law instruments – and in its material and geographic scope of protection, having issue and area-specific treaties.[4] The fragmented structure of international environmental law as well as the primarily bilateralist responsibility system in which it operates hinders States' ability to protect this interest.

In an attempt to provide collective protection to a communitarian concept, this article argues that the obligation to prevent transboundary environmental harm is *erga omnes*. This obligation, often considered the cornerstone of international environmental law,[5] is one of several obligations within international environmental law's arsenal of scattered obligations aimed at environmental protection. The obligation requires 'States to ensure that the activities within their jurisdiction and control respect the environment of other States or of areas beyond national jurisdiction' and is firmly 'part of the corpus of international law'.[6] On the face of it this obligation lends itself to being characterised as *erga* omnes by virtue of the fact that it protects the environment, a collective interest, and because it applies to common spaces and as a result does not easily lend itself to operationalisation within a bilateralist framework. Even so, establishing its *erga omnes* character requires more than a superficial assessment.

To prove its *erga omnes* character, Section 2 of this article dives deeper into how the environment is protected in international law to justify why the obligation to prevent transboundary harm was chosen as a potential *erga omnes* obligation. Section 3 turns to the *erga omnes* concept and, in Section 3.1, explains the characteristics of such obligations and the

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[2] C.J. Tams, *Enforcing Obligations* Erga Omnes *in International Law* (Cambridge University Press 2005), at 3.
[3] *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay) (Judgment)* (*Separate Opinion of Judge Cançado Trindade*) [2010] ICJ Rep. 14, at para. 173 ('*Pulp Mills*').
[4] P. Sands, *Principles of International Environmental Law* (2nd edn, Cambridge University Press 2003), at 15 and 16; P.-M Dupuy and J.E. Viñuales, *International Environmental Law* (Cambridge University Press 2018), at 28.
[5] P.-M Dupuy, G. Le Moli, and J.E. Viñuales, 'Customary International Law and the Environment' (2018) 2018-2 CEENRG Working Papers 3–23, at 14; Sands, *Principles of International Environmental Law*, at 236; J. Brunnée, *Procedure and Substance in International Environmental Law* (Brill 2020), at 53 referring to it as 'the conceptual core of customary international environmental law' and 'the most firmly established of international environmental law's norms'; L.A. Duvic-Paoli and J.E. Viñuales, 'Principle 2: Prevention' in J.E. Viñuales (ed.), *The Rio Declaration on Environment and Development: A Commentary* (Oxford University Press 2015) 108–138, at 108.
[6] *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep. 226, at para. 29 ('*Nuclear Weapons Advisory Opinion*').

benefits of an obligation *erga omnes*. Section 3.2 explores the methodologies and criteria authors have used for identifying *erga omnes* obligations in the absence of judicially sanctioned guidance on such identification. Using the work of preceding authors and the characteristics of *erga omnes* obligations, this author puts forward their own criteria for identifying *erga omnes* obligations. Section 4 of the article applies these four criteria to the obligation to prevent transboundary environmental harm. Section 4.1 explores the customary status and content of the obligation. Section 4.2 sets out to prove that the obligation is common and essential and Section 4.3 determines the ultimate beneficiary of the obligation, specifically whether it is the 'international community as a whole', a standard espoused by the ICJ.[7] Section 5 concludes by answering the question of whether the obligation to prevent transboundary environmental harm is *erga omnes*.

2. The Protection of the Environment in International Law

As a starting point, it is helpful to set out how the environment is protected under international law. While the environment is in reality indivisible, its legal protection is fragmented.[8] There are at least two interrelated reasons for this. The first is that the 'environment' has no settled definition under international law.[9] This is primarily because the environment is not a purely legal term or concept; as the ICJ noted, 'the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings'.[10] The fact that the environment is also important in *inter alia* the scientific and economic disciplines[11] means that its legal definition has to be nebulous. Legal instruments, especially those concerned with the environment, often have extra-disciplinary purposes and backgrounds, and the definitions adopted therein must reflect these purposes and backgrounds.[12] Within the context of protecting

[7] *Barcelona Traction*, at para. 33.

[8] Sands, *Principles of International Environmental Law*, at 15 and 16; Dupuy and Viñuales, *International Environmental Law*, at 28.

[9] UN ILC, *Yearbook of the International Law Commission 2006, vol. II (Part Two)* UN Doc. A/CN.4/SER.A/2006/Add.l (Part 2), at commentary to Principle 2, 69; Dupuy and Viñuales, *International Environmental Law*, at 28; Sands, *Principles of International Environmental Law*, at 16; P. Birnie, A. Boyle and C. Redgwell, *International Law and the Environment* (Oxford University Press 2009), at 4–5; N. Oral, 'Environmental Protection as a Peremptory Norm of General International Law' in D. Tladi (ed.), *Peremptory Norms of General International Law (Jus Cogens): Disquisitions and Disputations* (Brill Nijhoff 2021) 574–599, at 576, footnote 6.

[10] *Nuclear Weapons Advisory Opinion*, at para. 29.

[11] Sands, *Principles of International Environmental Law*, at 16; Dupuy and Viñuales, *International Environmental Law*, at 28.

[12] Sands, *Principles of International Environmental Law*, at 16; Dupuy and Viñuales, *International Environmental Law*, at 30; Scott et al. note that, 'Perhaps more than any other area, international environmental law is informed by other disciplines', K.N. Scott et al., 'An Introduction to International Environmental Law' in K.N. Scott et al. (eds), *Routledge Handbook of International Environmental Law* (2nd edn, Routledge 2020) 1–12, at 8.

the environment, the nebulous nature of the term 'environment' has both benefits and drawbacks – broad understandings can encompass ecological[13] and ecocentric approaches to the environment,[14] but too broad an understanding would significantly hinder any legal protection.[15] This drawback has proven too severe to overcome and is the basis for the second reason that international environmental law is fragmented – in order to make international instruments functional, the certainty of context-specific legal definitions of 'environment' is preferred.[16] This tendency to favour functionality over universality should be understood as both a consequence and feature of a fragmented international environmental legal system.

This legally fragmented landscape has led to international environmental law being made up of a plethora of obligations and principles all intended to protect the environment in some way. Examples of such scattered obligations include the obligations on parties to the Paris Agreement to 'pursue domestic [climate] mitigation measures',[17] the obligation of States to the Abidjan Convention to 'prevent, reduce, combat and control pollution' of the aquatic environments of Western and Central African States,[18] the obligation to 'promote the conservation of wetlands and waterfowl by establishing nature reserves on wetlands' contained in the Ramsar Convention,[19] and the Carpathian Convention's obligation to 'take appropriate measures to ensure a high level of protection and sustainable use of natural and semi-natural habitats, their continuity and connectivity, and species of flora and fauna' characteristic of the Carpathians.[20] These obligations are all focused on different parts of the global environment and require different actions from States – to *pursue* climate *mitigation* measures, *prevent* and *control* pollution, *conserve* wetlands and ensure the *sustainable use* of flora and fauna. While different, these obligations all give effect to the obligation to prevent transboundary environmental harm.

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[13] Dupuy and Viñuales, *International Environmental Law*, at 29; See also more generally V. de Lucia, 'Competing Narratives and Complex Genealogies: The Ecosystem Approach to International Environmental Law' (2015) 27(1) Journal of Environmental Law 91–117.

[14] UN ILC, *Yearbook of the International Law Commission 2006*, at commentary to Principle 2, 69; Dupuy and Viñuales, *International Environmental Law*, at 29.

[15] Dupuy and Viñuales, *International Environmental Law*, at 29.

[16] Ibid., at 28; Sands, *Principles of International Environmental Law*, at 15 and 16.

[17] Art. 4(2) of the Paris Agreement to the United Nations Framework Convention on Climate Change (adopted 12 December 2015, entered into force 4 November 2016) 3156 UNTS 79.

[18] See Arts 1 and 4(6) of the Convention for Co-Operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region: Protocol Concerning Co-Operation in Combating Pollution in Cases of Emergency (adopted 23 March 1981, entered into force 5 August 1984) 1102 UNTS 27.

[19] Art. 4(1) of the Convention on Wetlands of International Importance Especially as Waterfowl Habitat (adopted 2 December 1971, entered into force 21 December 1975) 996 UNTS 245 ('Ramsar Convention').

[20] Art. 4(1) of the Framework Convention on the Protection and Sustainable Development of the Carpathians (adopted 22 May 2003, entered into force 31 December 2005) 3372 UNTS 1.

In the *Nuclear Weapons Advisory Opinion*, the ICJ held that there exists a 'general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control'.[21] The content of this obligation will be discussed in full below, but for now it suffices to state that this obligation requires States to take preventative measures to ensure that the activities that take place in their States do not cause harm to the environment of other States and to common spaces. Because this obligation does not require States to care for their own environments, but only to show concern for environments beyond their borders, it is not the same as a general obligation to respect the environment.[22] A general obligation would not, in this author's opinion, demand care and concern for the environment to be taken only when another is potentially at risk and would instead require States to, at all times, show care and concern for all parts of the environment.[23]

Nevertheless, this obligation has practical value considering that environmental harm is rarely completely localised.[24] Examples of transboundary environmental harm that have been addressed in international law include the long-range air pollution at issue in the *Trail Smelter* arbitration,[25] the worldwide emissions of greenhouse gases leading to melting glaciers and more severe natural disasters across the world[26] and recognition in the Montreal Protocol on Substances that Deplete the Ozone Layer that 'world-wide emissions of certain substances can significantly deplete and otherwise modify the ozone layer' which covers the entire planet.[27] These examples illustrate that while the causes of environmental harm can originate in one or

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[21] *Nuclear Weapons Advisory Opinion,* at para. 29.
[22] For consideration of this obligation also requires States to take preventative measures to avoid harm to parts of the environment under their jurisdiction and control; see Sands, *Principles of International Environmental Law*, at 26 who is supportive of this and Dupuy, Le Moli and Viñuales, 'Customary International Law and the Environment', at 16 who consider that the position is unclear.
[23] Of course, States have domestic environmental obligations that rest on them either through domestic law or through the operation of other international obligations but these do not change the reality that the obligation to prevent transboundary harm is focused on protecting the environments of spaces beyond the control and jurisdiction of the acting State.
[24] J. Rockström et al., 'A Safe Operating Space for Humanity' (2009) 461 Nature 472–475, at 474 note that even where biodiversity loss occurs on local or regional levels, 'it can have pervasive effects on how the Earth system functions'; See also Snyder et al. and Werth and Avissar who note that Amazonian deforestation significantly impacts rainfall not only regionally but in parts of North America and the Western Pacific as well (P.K. Snyder et al., 'Analyzing the Effects of Complete Tropical Forest Removal on The Regional Climate Using a Detailed Three-Dimensional Energy Budget: An Application to Africa' (2004) 109(21) Journal of Geophysical Research D21102 1–19, at 2 and D. Werth and R. Avissar, 'The Local and Global Effects of Amazon Deforestation' (2002) 107(D20) Journal of Geophysical Research LBA 55-1–LBA 55-8, at LBA 55-3).
[25] *Trail Smelter Case (United States v. Canada)* [1938 and 1941] RIIA 1905, at 1907 ('*Trail Smelter*').
[26] 'Causes and Effects of Climate Change' The United Nations, available at <https://www.un.org/en/climatechange/science/causes-effects-climate-change> (accessed 22 August 2023).
[27] Preamble of the Montreal Protocol on Substances That Deplete the Ozone Layer (adopted 16 September 1987, entered into force 1 January 1989) 1522 UNTS 3.

multiple States, their impacts are diffuse. The obligation to prevent transboundary environmental harm is able to address this reality.

3. *Erga Omnes* Obligations: Why and How?

Why should the obligation to prevent transboundary environmental harm be ordained with *erga omnes* character and how might this be done? This section answers these two questions in turn. The question of why is answered by looking at the purpose and benefits of an obligation having *erga omnes* character, and the question of how is addressed by this article settling on four criteria inspired by the methodological approaches of other authors and the characteristics of *erga omnes* obligations.

3.1. Why the Moniker of '*Erga Omnes*'?

The *erga omnes* concept made its way into the lexicon of international law when the ICJ declared that

> an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.[28]

To explain itself and *erga omnes* further, the Court went on to list the prohibitions of aggression, genocide, slavery and racial discrimination as well as 'principles and rules concerning the basic rights of the human person' as examples of *erga omnes* obligations.[29] In the years since, the Court has expanded its list of *erga omnes* obligations with 'a great many rules of international humanitarian law',[30] and the right to self-determination.[31] Based on these declarations, a few characteristics of the *erga omnes* concept can be discerned. The first is that because *erga omnes* obligations are owed 'towards the international community as a whole' and because 'all States' have a legal interest in their protection, it is fair to conclude that the *erga omnes* concept is concerned with collective and communitarian concerns and

[28] *Barcelona Traction*, at para. 33.
[29] Ibid., at para. 34.
[30] *Nuclear Weapons Advisory Opinion*, at para. 79 read with *Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep. 136, at para. 157 ('*Wall Opinion*').
[31] *Case Concerning East Timor (Australia v. Portugal) (Judgment)* (*Dissenting Opinion of Judge Weeramantry*) [1995] ICJ Rep. 90, at para. 29 ('*East Timor*'); *Wall Opinion*, at para. 156; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* [2019] ICJ Rep. 96, at para. 180 ('*Chagos Advisory Opinion*').

obligations.[32] Secondly, because of this communitarian character and the examples listed by the Court it has been widely accepted that *erga omnes* obligations are evidence of a value-based international legal order[33] in which certain obligations with universally shared moral underpinnings are protected.[34] Should the obligation to prevent transboundary environmental harm be *erga omnes*, it will be evidence that the protection of the environment is a widely shared value which all States must protect because they owe it to each other and humanity as a whole.

Perhaps of more importance for the question of why the obligation to prevent transboundary environmental harm should be ordained with *erga omnes* character is the practical consequences of breaching such an obligation. Because all States have a legal interest in protecting *erga omnes* obligations, any and all States can invoke the responsibility of the offending State.[35] In other words, when collectively owed, value-laden obligations are breached, any State – not only the injured State(s) – can invoke the responsibility of the offending State. This is helpful where the injured State is unwilling or unable to invoke the responsibility of the offending State,[36] or indeed where it is not clear who the injured State is.[37] In a primarily bilateralist system, the *erga omnes* concept is able to offer an option of collective action that can operate where bilateralism falls short. Accordingly, should the obligation to prevent transboundary environmental harm be *erga omnes*, the reality that any State can invoke

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[32] Tams, *Enforcing Obligations* Erga Omnes *in International Law*, at 3; J. Allain, '*Jus Cogens* and the International Community "of States" as a Whole' in D. Tladi (ed.), *Peremptory Norms of General International Law (*Jus Cogens*): Disquisitions and Disputations* (Brill Nijhoff 2021) 68–91, at 68 and 79; Y. Tanaka, 'The Legal Consequences of Obligations *Erga Omnes* in International Law' (2021) 68 Netherlands International Law Review 1–33, at 9 and 10; J. Vidmar, 'Protecting the Community Interest in a State Centric Legal System: The UN Charter and Certain Norms of Standing' in W. Benedek, K. et al. (eds), *The Common Interest in International Law* (Intersentia 2014) 109–126, at 111.

[33] See U. Linderfalk, 'International Legal Hierarchy Revisited – The Status of Obligations *Erga Omnes*' (2011) 80(1) Nordic Journal of International Law 1–23, at 7; J. Crawford, 'Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts' in U. Fastenrath et al. (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford University Press 2011) 224–240, at 225; V. Gowlland-Debbas, 'An Emerging International Public Policy' in U. Fastenrath et al. (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford University Press 2011) 241–256, at 245; K. Zemanek, 'New Trends in the Enforcement of *Erga Omnes* Obligations' in J.A. Frowein, R. Wolfrum and C.E. Philipp (eds), *Max Planck Yearbook of United Nations Law*, vol. 4 (Brill 2000) 1–52, at 6.

[34] M. Ragazzi, *The Concept of International Obligations* Erga Omnes (Oxford University Press 1997), at 183.

[35] UN ILC, *Yearbook of the International Law Commission 2001, vol. II (Part Two)* UN Doc. A/CN.4/SER.A/2001/Add.1 (Part 2), at Arts 48, 126.

[36] R.L. Johnstone, 'Invoking Responsibility for Environmental Injury in the Arctic Ocean' (2015) 6(1) The Yearbook of Polar Law 3–35, at 26.

[37] T. Scovazzi, 'State Responsibility for Environmental Harm' (2001) 12(1) Yearbook of International Environmental Law 43–67, at 62.

the offending State's responsibility ensures that the latter State does not escape responsibility[38] and leave the environment and the people that live in it without recourse for the harm caused to them. Despite the important communitarian role that the *erga omnes* concept occupies, little is known about how an obligation is ordained with *erga omnes* character.[39]

3.2. Identifying *Erga Omnes* Obligations

There are two ways to know for certain that an obligation is *erga omnes*. The first is through a declaration by an international court or tribunal.[40] This is, so far, how most obligations have been ordained with *erga omnes* character.[41] The second is through the relationship between *erga omnes* and *jus cogens*. *Jus cogens* norms are universally applicable, hierarchically superior, non-derogable rules that 'reflect and protect fundamental values of the international community'.[42] While the ICJ has not explicitly linked the two concepts, its proclamations of obligations with *erga omnes* character have always derived from recognised *jus cogens* norms.[43] The wording used to describe the two concepts makes the relationship between them easy to accept. Though playing different roles for each, the 'international community' has a hand in both – it is the 'international community of States' that creates *jus cogens* norms[44] and *erga omnes* obligations are owed to the 'international community as a whole' because 'all States have a legal interest' in protecting them.[45] Additionally, both concepts are concerned with fundamental values and common interests.[46] This has generally led to the conclusion that all *jus cogens* norms give rise to *erga omnes* obligations.[47] But the inverse is not true; not all

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[38] It should be noted that while States have standing when invoking *erga omnes* obligations, they do not always have jurisdiction see *East Timor*, at para. 29.
[39] See A. de Hoogh, *Obligations* Erga Omnes *and International Crimes: A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States* (Kluwer Law International 1996), at 55 who goes as far as to conclude that '[d]ue to the differing character of examples given by the Court [in the *Barcelona Traction* case] […] one cannot determine any criterion on which to base the *erga omnes* character of an obligation'.
[40] Tanaka, 'The Legal Consequences of Obligations *Erga Omnes* in International Law', at 4.
[41] Tams, *Enforcing Obligations* Erga Omnes *in International Law*, at 117–118; Tanaka, 'The Legal Consequences of Obligations *Erga Omnes* in International Law', at 4–6.
[42] UN ILC, 'Report of the International Law Commission: Seventy-Third Session' (18 April–3 June and 4 July–5 August 2022) GAOR 77th Session Supp. 10 (A/77/10), at Draft Conclusion 2 and 3, 11–12.
[43] Ibid., at commentary to Draft Conclusion 17, 65–66.
[44] The international community here is specifically States, see Ibid., at Draft Conclusion 7, 37.
[45] *Barcelona Traction*, at para. 34.
[46] Tanaka, 'The Legal Consequences of Obligations *Erga Omnes* in International Law', at 2.
[47] UN ILC, 'Report of the International Law Commission: Seventy-Third Session', at Draft Conclusion 17(1), 64; S. Mateus, 'Analysing the Relationship Between Peremptory Norms of General International Law (*Jus Cogens*) and Obligations (*Erga Omnes*)' (2021) 46 Southern African Yearbook of International Law 1–26, at 1; Tams, *Enforcing Obligations* Erga Omnes *in International Law*, at 151; Tanaka, 'The Legal Consequences of Obligations *Erga Omnes* in International Law', at 11; E. de Wet, 'Invoking Obligations *Erga Omnes* in the Twenty-First Century: Progressive Developments Since *Barcelona Traction*' (2013) 37 South African Yearbook of International Law 1–20, at 9.

erga omnes obligations create *jus cogens* norms.[48] For example, the *erga omnes* obligation to preserve 'the environment of the high seas' and the deep seabed has no corresponding *jus cogens* norm.[49] Both of these methods of identification, while fool-proof, are rarities. Determining the *jus cogens* status of a norm can be an arduous process[50] and international courts and tribunals have pronounced on the *erga omnes* character of an obligation only a handful of times.[51]

In making these pronouncements, international courts and tribunals have been equally shy in sharing their methodology for the identification of *erga omnes* obligations.[52] At least a few authors have dutifully addressed this gap by offering their own methodologies for identification based on the passages in *Barcelona Traction*.[53] Ragazzi argues that based on the examples given in *Barcelona Traction*, *erga omnes* obligations share five elements: (a) they must be narrowly defined, (b) they are negative rather than positive, (c) they are strict (what one must or must not do), (d) they derive from general international law, and (e) they are important for the political climate and objectives of the time.[54] Ragazzi makes clear that these elements are not prescriptive and that there may be *erga omnes* obligations that do not comply with all of them.[55]

Tams offers a more substantial methodology, offering two approaches – the material approach and the structural approach.[56] According to the material approach, which is favoured by Tams, an *erga omnes* obligation is one which is important.[57] Outside of the reliance on *jus cogens* as an indicator of importance, the vague notion of importance raises the question of

[48] UN ILC, 'Report of the International Law Commission: Seventy-Third Session', at commentary to Draft Conclusion 17, 66; Mateus, 'Analysing the Relationship Between Peremptory Norms of General International Law (*Jus Cogens*) and Obligations (*Erga Omnes*)', at 5; Tanaka, 'The Legal Consequences of Obligations *Erga Omnes* in International Law', at 11; de Wet, 'Invoking Obligations *Erga Omnes* in the Twenty-First Century', at 9.
[49] *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Advisory Opinion)* [2011] ITLOS Rep. 59, at para. 180 ('*Responsibilities and Obligations of States*'); UN ILC, 'Report of the International Law Commission: Seventy-Third Session', at commentary to Draft Conclusion 17, 66.
[50] Ibid., at Draft Conclusions 4–9, 29–47 outline the process for the identifying *jus cogens* norms.
[51] Tams, *Enforcing Obligations* Erga Omnes *in International Law*, at 117–118.
[52] Ibid., at 117
[53] Ragazzi, *The Concept of International Obligations* Erga Omnes, at 132–134; Tams, *Enforcing Obligations* Erga Omnes *in International Law*, at 117–157, Johnstone, 'Invoking Responsibility for Environmental Injury in the Arctic Ocean', at 21–28; B.D. Lepard, *Customary International Law: A New Theory With Practical Applications* (Cambridge University Press 2010), at 261–269.
[54] Ragazzi, *The Concept of International Obligations* Erga Omnes, at 132–134.
[55] Ibid., at 134.
[56] Tams, *Enforcing Obligations* Erga Omnes *in International Law*, at 129.
[57] Ibid.

how important an obligation must be in order to be *erga omnes*.[58] Tams suggests that the presence of an obligation in the following places is indicative of its importance and potential *erga omnes* character: the United Nations Charter, universal and quasi-universal treaties, general international law, the jurisprudence of the ICJ, and the practice of United Nations organs.[59] To be considered important enough to be *erga omnes*, the obligation in question should be found in all of these sources, but even so, this will not guarantee its *erga omnes* character.[60] However, in the absence of a clear methodology, the appearance of the obligation in these places is definitely indicative of its heightened importance.[61] To the issue of determining importance, Tanaka adds that the interests protected as *erga omnes* should be those that 'reflect the common or fundamental values of the international community'.[62]

The second approach – the structural approach – considers that obligations *erga omnes* are those obligations that are non-reciprocal[63] in the sense that the obligations are not owed between States bilaterally but owed generally to States as a collective.[64] A strong view of this would render all non-reciprocal obligations, regardless of their importance, *erga omnes* – an idea that Tams and Tanaka reject.[65] A more moderate version of the structural approach considers that *erga omnes* obligations are those which are both non-reciprocal *and* important.[66] The threshold of importance would be the same as for the material approach.[67] Tams ultimately rejects this approach on the basis that the ICJ's jurisprudence shows that not all *erga omnes* obligations are non-reciprocal.[68] To prove his point, Tams argues that the *erga omnes* prohibition against aggression is essentially bilateral in nature because aggression injures only one State, not the international community as a whole.[69] Mateus rejects this conclusion and argues that the consequence of an act should not be conflated with the nature of the obligation

[58] Ibid., at 138.
[59] Ibid., at 153; The responses of States not directly affected by the breach of an *erga omnes* obligation can also indicate its importance within the international community of States, see ibid., at 154.
[60] Ibid., at 153 and 154.
[61] Ibid., at 154; Mateus, 'Analysing the Relationship Between Peremptory Norms of General International Law (*Jus Cogens*) and Obligations (*Erga Omnes*)', at 10.
[62] Tanaka, 'The Legal Consequences of Obligations *Erga Omnes* in International Law', at 9.
[63] Tams, *Enforcing Obligations* Erga Omnes *in International Law*, at 129.
[64] Lepard, *Customary International Law*, at 264, E. de Wet, '*Jus Cogens* and Obligations *Erga Omnes*' in D. Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) 521–561, at 554 and 555 and J. Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013), at 362 who reject the idea of *erga omnes* obligations being 'bundles of bilateral obligations'.
[65] Tams, *Enforcing Obligations* Erga Omnes *in International Law*, at 130; Tanaka, 'The Legal Consequences of Obligations *Erga Omnes* in International Law', at 8 and 9.
[66] Tams, *Enforcing Obligations* Erga Omnes *in International Law*, at 133.
[67] Ibid.
[68] Ibid., at 134.
[69] Ibid.

in question.[70] In other words, while a single State is indeed injured by an act of aggression, the nature of *erga omnes* obligations is such that all States are interested in seeing aggression not committed, whether against themselves or other States.[71] Mateus, therefore, argues that this moderate version of the structural approach is an acceptable methodology for identifying *erga omnes* obligations. Tanaka adopts the same approach as Mateus.[72]

In a somewhat similar vein, Johnstone, using Tams' structural approach as a springboard, approaches the question of identifying *erga omnes* obligations through the lens of invoking state responsibility for the breach of such obligations and prefers what she terms a 'modified structural approach'.[73] Relying on the prohibition of aggression, Johnstone argues that there are scenarios in which the directly injured State cannot bring the matter to the appropriate judicial body and, therefore, must rely on other States to bring the action on the basis that the prohibition of aggression is a common interest for all States.[74] This can happen where the injured State is occupied, its government expelled, or it is rendered incapable of exercising the functions necessary to institute a claim in a judicial forum subsequent to being victim to an act of aggression.[75] This reflects the practical application of Mateus' approach – all States are interested in seeing the prohibition of aggression complied with and where it is not and the injured State cannot act, all other States can step in and invoke the offending State's responsibility.

Doubling down on this point, Johnstone turns to the prohibition of genocide and argues that it is often not a State that is directly injured by a genocide; rather it is a people.[76] It is also possible that a genocide could be aimed at foreign nationals but that the State in which the genocide is occurring is either unwilling or unable to act in its own interest.[77] If other States are unable to bring the matter to the appropriate judicial forum, there will be people and peoples that lose the protection that international law specifically offers in them in these cases. Accordingly, Johnstone's 'modified structural approach' characterises obligations as *erga omnes* when the beneficiary of the obligation 'cannot invoke responsibility' and she provides three scenarios where this is likely to be the case: where an obligation has been breached but

[70] Mateus, 'Analysing the Relationship Between Peremptory Norms of General International Law (*Jus Cogens*) and Obligations (*Erga Omnes*)', at 8.
[71] Ibid.
[72] Tanaka, 'The Legal Consequences of Obligations *Erga Omnes* in International Law', at 9.
[73] Johnstone, 'Invoking Responsibility for Environmental Injury in the Arctic Ocean', at 21.
[74] Ibid., at 25.
[75] Ibid.
[76] Ibid., at 25–26.
[77] Ibid., at 26.

there is no injured State, where a victim State cannot be reasonably expected to invoke responsibility themselves and where the intended beneficiary of an obligation is not a State(s).[78]

Departing slightly from the reliance on the notions of importance and reciprocity, but still based on the examples given by the Court, Lepard offers his own methodology for identifying *erga omnes* obligations with a basis in customary international law.[79] He sets out three tests which must all be satisfied in order for a customary obligation to have *erga omnes* status.[80] The first test requires States to 'generally believe' that based on the content of the norm in question obligations owed between all States are created.[81] Most important for this test is that the content of the customary obligations is clear and that States believe that the obligations are owed between States to 'the international community as a whole' and not as a series of bilateral obligations between States.[82] In ascertaining the content of such an obligation, Ragazzi's first three descriptors of *erga omnes* obligations – that the obligation be strict, negative and narrowly defined[83] – can be of assistance, but as Ragazzi notes, these are descriptive, not prescriptive for *erga omnes*.[84]

Lepard's second test requires States to believe that all States have a legal interest in, and as a result, a right to bring legal action against the State in breach of the specific obligation.[85] This criterion is clearly based on the tail-end of the assertion in *Barcelona Traction* that 'all States have a legal interest' in the protection of *erga omnes* obligations.[86] This position is echoed by Crawford[87] and is a reflection of the idea of non-reciprocity espoused by Johnstone.[88] Lepard's final test speaks to the ethical underpinnings of the *erga omnes* concept and the rights it seeks to protect, and requires States to believe that the obligation in question is either 'at least consistent with' or 'furthers fundamental ethical principles'.[89] The

[78] Ibid. It should be noted that Johnstone's understanding of 'injured State' is understood in terms of Article 42 of the Draft Articles on States Responsibility, see UN ILC, *Yearbook of the International Law Commission 2001*, at commentary to Art. 42, 117, which defines an injured State as a State with 'an individual right to the performance of an obligation, in the way that a State party to a bilateral treaty has *vis-á-vis* the other State party'.
[79] Lepard, *Customary International Law*, at 262 and 267 where Lepard writes that the prohibitions against genocide, slavery, and racial discrimination 'appear to be consistent with [his] three tests'
[80] Ibid., at 262.
[81] Ibid.
[82] Ibid., at 264. See also de Wet, '*Jus Cogens* and Obligations *Erga Omnes*', at 554 and 555, and Crawford, *State Responsibility*, at 362.
[83] Ragazzi, *The Concept of International Obligations* Erga Omnes, at 133.
[84] Ibid., at 134.
[85] Lepard, *Customary International Law*, at 262.
[86] *Barcelona Traction,* at para. 33.
[87] Crawford, *State Responsibility*, at 362.
[88] Johnstone, 'Invoking Responsibility for Environmental Injury in the Arctic Ocean', at 26.
[89] Lepard, *Customary International Law*, at 262. Other authors that consider that *erga omnes* obligations have ethical and moral underpinnings include D. Shelton, 'Normative Hierarchy in International Law' (2006) 100(2)

'*omnes*' nature of this test stems from the fact that, according to Lepard, ethical principles 'by their very moral nature […] apply universally'.[90] Ragazzi seems to share in this position when he argues that *erga omnes* obligations have 'basic moral values' as their foundations.[91]

All three of Lepard's tests need to be satisfied for a customary obligation to have *erga omnes* character but the satisfaction of the third test can lead to positive presumptions that both the first and second tests are satisfied. Connecting the third and first tests, Lepard argues that where States believe that a norm 'furthers fundamental ethical principles', there is a favourable presumption that all States believe that the norm establishes obligations owed to all other States.[92] As for the second test, he argues that where an obligation and its corresponding right 'promote *compelling* or *ethical* principles' States are likely to believe more assuredly that they all have a right to bring an action for the violation thereof.[93] It is, therefore, norms that are underpinned by 'compelling, if not essential' ethical principles that have the potential to have *erga omnes* character.[94] This is the essence of Tam's material approach and his belief that *erga omnes* obligations are indicative of a value-based international order.[95] The Court's use of 'international community as a whole' seems to have influenced Lepard's approach to the third test. He argues that the beliefs of States to be ascertained for the first and second tests can be presumed where States believe that the norms in question are perceived as 'deriving primarily from the existence of global community of States'.[96] Such beliefs can also be presumed where a norm concerns the solving of a common dilemma or matter of common interest.[97] The latter belief can only be favourably presumed where the common dilemma or interest is universal and not simply common between a few States.[98]

Lepard's tests apply only to customary obligations and several authors agree that *erga omnes* obligations must have their origins in customary international law. Urs argues that *erga omnes* obligations are the manifestation of customary obligations of a common or collective

American Journal of International Law 291–232, at 318, and Ragazzi, *The Concept of International Obligations* Erga Omnes, at 473 and 475.

[90] Lepard, *Customary International Law*, at 265.

[91] Ragazzi, *The Concept of International Obligations* Erga Omnes, at 183. Although this is not explicitly an identifying factor for Ragazzi, it is arguably included under his requirements of contemporary importance (at 134).

[92] Lepard, *Customary International Law*, at 265.

[93] Lepard's emphasis, ibid., at 266.

[94] Ibid., at 267.

[95] Tams, *Enforcing Obligations* Erga Omnes *in International Law*, at 3 and 129.

[96] Lepard, *Customary International Law*, at 266.

[97] Ibid.

[98] Ibid.

interest.[99] For de Hoogh, because the protection of an *erga omnes* obligation is an interest that all States share, it necessarily is a universal rule of customary international law.[100] For Ragazzi, one of the requirements for *erga omnes* obligations is that they are part of 'general international law', an argument echoed by Tanaka.[101] The meaning of 'general international law' is not uniformly understood and is usually context-specific, and while it can refer to treaties and general principles, it always includes customary international law[102] which is why Tanaka concludes that customary international law is the source of *erga omnes* obligations.[103] De Wet seems to adopt this same approach, arguing that obligations contained in regional or universal human rights treaties will have an *erga omnes* effect 'to the extent they have been recognised as customary international law'.[104] Tanaka does consider that treaties may provide a basis for *erga omnes* obligations but only where that treaty rule exists alongside a rule of custom.[105]

Based on the work of these authors as well as considering the characteristics of *erga omnes* obligations and the purpose of the concept, this author now offers her own four criteria for determining the *erga omnes* character of an obligation. The first criterion agrees that an *erga omnes* obligations requires a customary basis. An important part of this criterion is not only establishing the customary status of the obligation but also, as Lepard required, the content thereof. The second criterion to be satisfied is inspired by Tanaka and Lepard, and supplemented by this author's own conclusions drawn from the characteristics and purposes of *erga omnes* and it is that an *erga omnes* obligation protects a common interest.[106] This conclusion is not hard to draw considering that when the *erga omnes* concept was introduced into international law it was by reference to the fact that they are obligations owed to 'the

[99] P. Urs, 'Obligations *Erga Omnes* and the Question of Standing Before the International Court of Justice' (2021) 34(2) Leiden Journal of International Law 505–525, at 505–506.
[100] de Hoogh, *Obligations* Erga Omnes *and International Crimes*, at 55.
[101] Tanaka, 'The Legal Consequences of Obligations *Erga Omnes* in International Law', at 3; Ragazzi, *The Concept of International Obligations* Erga Omnes, at 132.
[102] UN ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group International Law Commission, Finalized by Mr Martti Koskenniemi' (13 April 2006) UN Doc. A/CN.4/L.682 and Add.1, at para. 500; UN ILC, 'Report of the International Law Commission: Seventy-Third Session', at commentary to Draft Conclusion 5, 30–31; Tanaka, 'The Legal Consequences of Obligations *Erga Omnes* in International Law', at 3.
[103] Tanaka, 'The Legal Consequences of Obligations *Erga Omnes* in International Law', at 3.
[104] de Wet, 'Invoking Obligations *Erga Omnes* in the Twenty-First Century', at 4.
[105] In such cases, the *erga omnes* obligation overlaps with an obligation that is *erga omnes partes*, Tanaka, 'The Legal Consequences of Obligations *Erga Omnes* in International Law', at 6. For a different view on how treaties can form the base of *erga omnes* obligations, see Byers who argues that such obligations can also stem from treaty because of their unavoidable bilateral character when invoked in courts and tribunals, M. Byers, 'Conceptualising the Relationship Between *Jus Cogens* and *Erga Omnes* Rules' (1997) 66(2–3) Nordic Journal of International Law 211–239, at 231–234.
[106] Tanaka, 'The Legal Consequences of Obligations *Erga Omnes* in International Law', at 9; Lepard, *Customary International Law*, at 266.

international community as a whole' as well as the fact that all States have a legal interest in seeing such obligations complied with.[107]

In its commentary to Article 48 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, the International Law Commission (ILC) notes that *erga omnes* obligations are 'by definition collective obligations protecting the international community as a whole',[108] an idea reiterated in the ILC's Fragmentation Report which notes that violations of *erga omnes* obligations 'violate some values or interests of "all"'.[109] Urs offers further support, arguing that *erga omnes* obligations are the manifestation of common interests,[110] and Crawford similarly argues that *erga omnes* obligations are 'established in the interest of and owed to the international community as a whole'.[111] Simma adopts a similar approach, suggesting that *erga omnes* obligations protect 'the most important community interests',[112] an idea reflected in Uhlmann's reference to *erga omnes* obligations as 'state community interests' the purpose of which is to address 'compelling necessities' and benefit the international community as a whole.[113] Accordingly, *erga omnes* obligations are rooted in a common interest.

The third criterion is closely connected to the second and requires that *erga omnes* obligations protect 'essential' or 'compelling' interests.[114] This idea is based on Ragazzi's argument that *erga omnes* obligations reflect the 'main political objectives of the present time', Tams' material approach, which considers that *erga omnes* obligations are those that are important, and on the ICJ's declaration that all States have a legal interest in *erga omnes* obligations because 'of the importance of the rights involved'.[115] The ILC also states that legal interests protected in *erga omnes* obligations concern 'the fulfilment of certain essential

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[107] *Barcelona Traction*, at para. 33; Tanaka, 'The Legal Consequences of Obligations *Erga Omnes* in International Law', at 9.
[108] UN ILC, *Yearbook of the International Law Commission 2001, vol. II (Part Two)*, at 127.
[109] UN ILC, 'Fragmentation of International Law', at para. 393.
[110] Urs, 'Obligations *Erga Omnes* and the Question of Standing Before the International Court of Justice', at 505–506.
[111] Crawford, *State Responsibility*, at 362.
[112] B. Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 Collected Courses of the Hague Academy of International Law, at para. 54.
[113] E.M.K. Uhlmann, 'State Community Interests, *Jus Cogens* and Protection of the Global Environment: Developing Criteria for Peremptory Norms' (1998) 11(1) Georgetown International Environmental Law Review 101–136, at 108 writes '[t]he state community interest in the protection of the individual is particularly evident in the famous *obiter dictum* of the ICJ concerning the *Barcelona Traction case*'. At 124 Uhlmann further writes that the main purpose of *erga omnes* obligations is 'the protection of community interests'.
[114] UN ILC, *Yearbook of the International Law Commission 2001*, at commentary to Art. 1, 33; Uhlmann, 'State Community Interests, *Jus Cogens* and Protection of the Global Environment', at 107.
[115] *Barcelona Traction*, at para. 33.

obligations'.[116] That *erga omnes* obligations must be those which are substantively important is reflected in the relationship between the concept and the underlying values of the international community. Several authors have taken the position that *erga omnes* obligations reflect the basic or underlying values of international law and the international community.[117] Lepard makes a similar argument with his third test – that *erga omnes* obligations reflect 'fundamental ethical principles'.[118] The fact that *erga omnes* obligations reflect the 'values of the international community as a whole'[119] and are 'an expression' of that community's 'basic values'[120] means that they must be important. If they were not important, it would hardly be in the interest of all States to uphold them. Johnstone rejects the idea that the importance of an obligation determines its *erga omnes* character, instead arguing that the deciding factor is whether the beneficiary of the protection afforded by the obligation can invoke the responsibility of the offending State(s).[121] While importance is not the sole deciding factor, it is definitely, in this author's opinion, a key identifying factor.

The final criterion is heavily inspired by Tams and Johnstone's ideas of non-reciprocity as well as Lepard's first two tests. Based on these authors and as this author understands it, non-reciprocity essentially rejects the idea that an obligation is owed bilaterally between States and that it is instead owed to 'the international community as a whole'. As such, this criterion requires that the ultimate beneficiary of an *erga omnes* obligation is not a single State but the 'international community as a whole'. Although the 'international community' has yet to be clearly identified and defined,[122] whether it is understood as either an entity in its own right[123] or as States as a collective,[124] within the context of *erga omnes* the result is the same – the obligations are not owed to States as 'bundles of bilateral relations'[125] nor are they even always

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[116] UN ILC, *Yearbook of the International Law Commission 2001*, at commentary to Art. 1, 33
[117] Tams, *Enforcing Obligations* Erga Omnes *in International Law*, at 129 and 130; Ragazzi, *The Concept of International Obligations* Erga Omnes, at 183; Crawford, 'Responsibility for Breaches of Communitarian Norms', at 230; Linderfalk, 'International Legal Hierarchy Revisited', at 7.
[118] Lepard, *Customary International Law*, at 262.
[119] Gowlland-Debbas, 'An Emerging International Public Policy', at 245.
[120] Zemanek, 'New Trends in the Enforcement of *Erga Omnes* Obligations', at 42
[121] Johnstone, 'Invoking Responsibility for Environmental Injury in the Arctic Ocean', at 26 and 28.
[122] See Crawford, *State Responsibility*, at 366 who argues that 'there is no collective entity with capacity to act'.
[123] R. Ago, 'Obligations Erga Omnes and the International Community' in J.H.H. Weiler, A. Cassese and M. Spinedi (eds), *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (De Gruyter 1988) 237–239, at 238 and Tams, *Enforcing Obligations* Erga Omnes *in International Law*, at 227.
[124] B. Simma, 'From Bilateralism to Community Interest in International Law', at para. 58; Scovazzi also considers that within the context of *erga omnes*, 'international community as a whole' means all States besides the offending State, see Scovazzi, 'State Responsibility for Environmental Harm', at footnote 86.
[125] See Lepard, *Customary International Law*, at 264; de Wet, '*Jus Cogens* and Obligations *Erga Omnes*', at 554 and 555; Crawford, *State Responsibility*, at 362.

owed to States at all.[126] This is gleaned by the fact that the beneficiaries of the right to self-determination are not always States and are often peoples; the same is true for the prohibitions against genocide, apartheid and racial discrimination.

As for the prohibition against aggression, while there is a directly injured State, this author must agree with Johnstone that the injured State may be unable or unwilling to act in their own interest in such cases.[127] Here, the injured States requires other States to act on its behalf and on behalf of the international community as a whole because all States have a legal interest in seeing the crime of aggression not being committed.[128] The bilateral aspect of *erga omnes* exists purely because there is, as yet, no collective entity which can act on behalf of the international community[129] which means that individual States must act where *erga omnes* obligations have been breached. But this is not the same as individual States being the sole beneficiaries of such obligations. Accordingly, while not all non-reciprocal obligations will be *erga omnes*,[130] where a non-reciprocal obligation concerns an essential and common interest that is not intended to benefit either States individually or even at all, it will be indicative of an *erga omnes* obligation.

The prohibition against genocide provides a clear case for the application of these criteria as well as evidence of how the criteria can interact with each other. States 'do not have any interests of their own' in preventing genocide and instead 'merely have, one and all, a common interest' in such prevention[131] and although this prohibition stems from a treaty, it has since become part of customary international law.[132] The prevention and, by extension, the prohibition against genocide is thus a common interest with a customary basis. The essential interest that the prohibition of genocide protects is the lives of entire groups of people.[133] This essentiality is reinforced by the fact that the obligation is owed not only to States but to

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[126] Johnstone, 'Invoking Responsibility for Environmental Injury in the Arctic Ocean', at 26 and Scovazzi, 'State Responsibility for Environmental Harm', at 62.
[127] Johnstone, 'Invoking Responsibility for Environmental Injury in the Arctic Ocean', at 26.
[128] Mateus, 'Analysing the Relationship Between Peremptory Norms of General International Law (*Jus Cogens*) and Obligations (*Erga Omnes*)', at 8; Tanaka, 'The Legal Consequences of Obligations *Erga Omnes* in International Law', at 9.
[129] Crawford, *State Responsibility*, at 366.
[130] Tams, *Enforcing Obligations* Erga Omnes *in International Law*, at 134.
[131] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* [1951] ICJ Rep. 15, at 23. While these quotes are taken from an advisory opinion concerning the Genocide Convention and are not aimed at the customary rule of genocide, the idea can be extended to the customary prohibition because the norms in the Genocide Convention have attained customary status see W.A. Schabas, *Genocide in International Law: The Crimes of Crimes* (Cambridge University Press 2000), at 4.
[132] Schabas, *Genocide in International Law*, at 4.
[133] Art. II of the Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.

humanity as a whole because genocides are not typically committed against States, but against peoples.[134] Accordingly, the obligation is non-reciprocal in that no single State benefits from the prohibition but all States owe it to each other to see that it is upheld because failure to do so would see an essential common interest violated.[135]

In the absence of a judicially sanctioned approach to identifying *erga omnes* obligations, recourse must be made to academic approaches to identification. Inspired by the work of the authors discussed above, as well as by the characteristics of *erga omnes*, this author offered her own four criteria for identifying such obligations, which are relied on in the next section of this article to determine the *erga omnes* character of the obligation to prevent transboundary environmental harm.

4. Establishing the *Erga Omnes* Character of the Obligation to Prevent Transboundary Environmental Harm

To establish the *erga omnes* character of the obligation of prevention, Section 4.1 discusses the content and customary status of the obligation to prevent transboundary environmental harm. Section 4.2 determines whether the obligation concerns a common and essential interest of international law, and Section 4.3 determines who the ultimate beneficiary of the obligation is; in other words, whether it is owed to the 'international community as a whole'.

4.1. A Customary Obligation and Its Content

The obligation to prevent transboundary environmental harm[136] is widely considered the 'cornerstone' of international environmental law.[137] Although the customary status of the obligation has been confirmed by the ICJ on a few occasions,[138] the content of the obligation is slightly obscured by the various forms it has taken over the years. The content is important

[134] Johnstone, 'Invoking Responsibility for Environmental Injury in the Arctic Ocean', at 25–26.
[135] A similar approach can be taken for the right to self-determination, the prohibition of racial discrimination and apartheid, and 'a great many rules of international humanitarian law'.
[136] The obligation is often referred to as the 'prevention principle' but its status as a rule of customary international law means that it should more properly be understood as an obligation see Birnie, Boyle and Redgwell, *International Law and the Environment*, at 143.
[137] Dupuy, Le Moli, and Viñuales, 'Customary International Law and the Environment', at 14; Sands, *Principles of International Environmental Law*, at 236; Brunnée, *Procedure and Substance in International Environmental Law*, at 53 referring to it as 'the conceptual core of customary international environmental law' and 'the most firmly established of international environmental law's norms'; Duvic-Paoli and Viñuales, 'Principle 2', at 108.
[138] *Nuclear Weapons Advisory Opinion,* at para. 29; *Pulp Mills*, at para. 101; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica Along the San Juan River (Nicaragua v. Cost Rica*) *(Judgment)* [2015] ICJ Rep. 665 ('*Certain Activities: Costa Rica v. Nicaragua and Nicaragua v. Costa Rica*'), at para. 104.

because States must agree on the content of the rule that they think is *erga omnes*.[139] To determine its content, this section focuses briefly on its history in international law and its parameters – specifically on whether the obligation is one of conduct or of result and what the geographic and material scope of the obligation is – and also addresses whether the uncertainty concerning the obligation's exact content will prevent it from being *erga omnes*.

4.1.1. A Brief History[140]

In the *Trail Smelter* arbitration between the United States and Canada, the tribunal had to decide whether Canada was responsible for the harmful effects of long-range air pollution that originated in Canada but was felt in the United States.[141] Significantly the tribunal held that 'no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein'.[142] This is the first version of States' obligation not to cause transboundary environmental harm.[143] The general gist of the obligation requiring States to consider the interests of other States when conducting activities on their territory has been confirmed as a general obligation in international law.[144] Though the *Trail Smelter* version of the obligation has an environmental element to it, the ultimate purpose of the obligation was to balance the sovereign rights of each State by making it clear that States do not exist in isolation and have the potential to impact the sovereignty of other States through their activities.[145] It recognises that State sovereignty is not absolute and a degree of care should be shown by all States to the sovereignty of all other States.[146] Within environmental law, this obligation required States not to cause harm to the environment of another State.[147] Accordingly, it became known as the 'no-harm rule'.[148]

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139 Lepard, *Customary International Law*, at 263.
140 More comprehensive histories of the obligation can be found in Brunnée, *Procedure and Substance in International Environmental Law*, at 52–95, K.A. Brent, 'The *Certain Activities* Case: What Implications for the No-Harm Rule' (2017) 20 Asia Pacific Journal of Environmental Law 28–56, at 31–44 and Dupuy and Viñuales, *International Environmental Law*, at 63–69.
141 *Trail Smelter*, at 1908.
142 Ibid., at 1965.
143 Brunnée, *Procedure and Substance in International Environmental Law*, at 56; Sands, *Principles of International Environmental Law*, at 242; Dupuy and Viñuales, *International Environmental Law*, at 63; Birnie, Boyle and Redgwell, *International Law and the Environment*, at 143–144.
144 *The Corfu Channel Case (Merits) (United Kingdom v. Albania) (Judgment)* [1949] ICJ Rep. 4, at 22.
145 Brunnée, *Procedure and Substance in International Environmental Law*, at 60; Brent, 'The *Certain Activities* Case', at 34.
146 Brunnée, *Procedure and Substance in International Environmental Law*, at 60.
147 Ibid., at 62; Brent, 'The *Certain Activities* Case', at 33.
148 See Dupuy and Viñuales, *International Environmental Law*, at 63, Brunnée, *Procedure and Substance in International Environmental Law*, at 56 and Brent, 'The *Certain Activities* Case', at 33 referring to it as such.

A few decades later, the rule was included in the Stockholm Declaration where it was explicitly linked to the right of permanent sovereignty that States have over their resources.[149] According to Principle 21:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[150]

This wording was reproduced verbatim in Principle 2 of the Rio Declaration.[151] This version of the obligation formed the basis of the obligation declared as custom by the Court in the *Nuclear Weapons Advisory Opinion* where the Court held that there exists a 'general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control'.[152] These formulations expanded the geographic scope of the obligation not only to areas beyond national jurisdiction but also to any object within the 'jurisdiction and control' of the offending State thereby including registered ships and aircraft.[153] This expansion is seen as the 'progressive development' of international law, and for some authors, this new formulation indicates a shift in focus from the balancing of competing sovereignties to the protection of the environment.[154]

The shift in focus is the reason why the content of the obligation to prevent transboundary environmental harm is slightly obscured. It is unclear whether the obligation not to cause transboundary harm (the no-harm rule) is different to the obligation to prevent transboundary harm (as set out in Principles 21/2 and the *Nuclear Weapons Advisory*

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[149] Brent, 'The *Certain Activities* Case', at 35; Dupuy and Viñuales, *International Environmental Law*, at 64.
[150] UNGA Res. 2994/XXVII, 'United Nations Conference on the Human Environment' (15 December 1972) ('Stockholm Declaration').
[151] UNGA, 'Report of The United Nations Conference on Environment and Development, Annex I: Rio Declaration on the Environment and Development' (12 August 1992) UN Doc. A/CONF.151/26 (Vol. I) ('Rio Declaration').
[152] *Nuclear Weapons Advisory Opinion,* at para. 29; Sands, *Principles of International Environmental Law*, at 341 states that 'following the ICJ's 1996 Advisory Opinion on *The Legality of the Threat or Use of Nuclear Weapons* there can be no question that Principle 21 [of the Stockholm Declaration] reflects a rule of customary international law'. Sands also notes at 245–246 that the Court did not repeat Principle 21 exactly in its judgment but that it was likely not the 'intention' of the Court to 'effect substantive changes' to the principle since the Court's 'formulation […] may be broader than that of Principle 21/2'. Birnie, Boyle and Redgwell, *International Law and the Environment*, at 143 also argue that the *Nuclear Weapons Advisory Opinion* referred to 'the terms of Principle 2' of the Rio Declaration.
[153] Brent, 'The *Certain Activities* Case', at 36.
[154] Dupuy and Viñuales, *International Environmental Law*, at 66; Brent, 'The *Certain Activities* Case', at 36.

Opinion)[155] or whether they are the same rule that has simply undergone a shift in focus.[156] The confusion lies primarily in whether the obligation to prevent transboundary harm is an obligation of conduct triggered when preventative measures are not taken or an obligation of result triggered when actual harm occurs.[157]

4.1.2. An Obligation of Conduct or Result

The confusion on the parameters of the obligation can be attributed, in part, to the ICJ's reasoning in the *Certain Activities* cases between Costa Rica and Nicaragua.[158] Here, the Court had to decide whether Nicaragua had breached its obligations under international environmental law, specifically the obligation to prevent transboundary environmental harm and the obligation to conduct an environmental impact assessment when it dredged territory Costa Rica alleged belonged to it but that Nicaragua had occupied.[159] The Court also had to determine whether Costa Rica breached any of its procedural environmental law obligations as well as the obligation to prevent transboundary harm when it constructed a road along the shared San Juan river.[160] The Court split the environmental obligations into procedural obligations – namely the obligation to conduct environmental impact assessments and the obligation to notify and consult potentially affected States[161] – and the substantive obligation not to cause transboundary harm.[162] This split, according to Brunnée, evinces that the Court tends to treat the prevention of harm and no-harm as two distinct obligations – one of conduct and one of result respectively.[163]

If, on one hand, the obligation to prevent transboundary harm is purely about *prevention*, as the name suggests, it will be an obligation of conduct made up of a number of independent procedural obligations all aimed at preventing environmental harm.[164] The most important of these constituent obligations is the obligation of due diligence.[165] The due

[155] Sands, *Principles of International Environmental Law*, at 246.
[156] Brunnée, *Procedure and Substance in International Environmental Law*, at 53; See Dupuy and Viñuales, *International Environmental Law*, at 66 noting that the scope of the obligation not to cause harm expanded and eventually 'crystallised into a more comprehensive principle of prevention'.
[157] Brunnée, *Procedure and Substance in International Environmental Law*, at 91 and 92 explains how the ICJ has approached the no-harm rule and the obligation of prevention as two different rules.
[158] *Certain Activities: Costa Rica v. Nicaragua and Nicaragua v. Costa Rica.*
[159] Ibid., at para. 100.
[160] Ibid., at paras 9, 146 and 147.
[161] Ibid., at paras 101–111 and 146–173.
[162] Ibid., at paras 113–120 and 174–217.
[163] Brunnée, *Procedure and Substance in International Environmental Law*, at 91–92.
[164] Ibid., at 73, 82 and 99; Birnie, Boyle and Redgwell, *International Law and the Environment*, at 143.
[165] *Certain Activities: Costa Rica v. Nicaragua and Nicaragua v. Costa Rica*, at paras 104 and 153 where the Court states that States have an 'obligation to exercise due diligence in preventing significant transboundary harm'; See *Pulp Mills*, at para. 101 where the Court states, 'the principle of prevention, as a customary rule, has

diligence obligation is broad[166] and what exactly must be done to satisfy it is determined on a case-by-case basis.[167] However, within the context of preventing environmental harm, there are at least some other independent obligations that must be complied with in order to satisfy the due diligence obligation and as a result, the obligation to prevent transboundary harm.[168] They are, in an order suggested by Brent,[169] the duty to conduct a preliminary risk assessment,[170] the duty to conduct an environmental impact assessment,[171] and the obligation to notify and consult potentially affected States.[172] These obligations exist independently of the due diligence obligation, some as custom,[173] but also as part of it when it is the due diligence related to preventing transboundary harm. The obligation to prevent harm would be breached by a failure to comply with one or all due diligence obligations, even if no actual transboundary harm has occurred.[174] In sum, as an obligation of conduct, the obligation to prevent transboundary harm is an umbrella obligation of conduct under which a network of procedural obligations, anchored by the obligation of due diligence, rest.[175]

If, on the other hand, the obligation is understood as the obligation to ensure that activities under the jurisdiction and control of one State do not *cause harm* to other States and

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its origins in the due diligence required by a State in its territory'; See *Responsibilities and Obligations of States*, at paras 110–111 where the Tribunal explains that an obligation to 'ensure' is one of due diligence and an obligation of conduct, not result. See also Dupuy, Le Moli, and Viñuales, 'Customary International Law and the Environment', at 15; Brunnée, *Procedure and Substance in International Environmental Law*, at 63 and 96.

[166] Dupuy, Le Moli, and Viñuales, 'Customary International Law and the Environment', at 14 argue that the due diligence obligation is 'broader in scope' than the obligation of prevention.

[167] Brunnée, *Procedure and Substance in International Environmental Law*, at 115; *Responsibilities and Obligations of States*, at para. 117 asserts that that the due diligence obligation is a 'variable concept' that 'may change over time'.

[168] Brunnée, *Procedure and Substance in International Environmental Law*, at 87 and 99; Brent, 'The *Certain Activities* Case', at 52.

[169] Brent, 'The *Certain Activities* Case', at 48 argues that a State will only have to notify and consult a potentially affected State if the first State has conducted an environmental impact assessment indicating that the latter State may be affected, and such an assessment will only be conducted where a preliminary risk assessment has been done and risk is indicated. In contradiction to this, Dupuy and Viñuales, *International Environmental Law*, at 63 argue that the sequence of obligations is circumstantial.

[170] Brent, 'The *Certain Activities* Case', at 48 bases this on *Certain Activities: Costa Rica v. Nicaragua and Nicaragua v. Costa Rica*, at para. 104 where the Court states that in order to fulfill its due diligence obligations to prevent significant transboundary harm, States must 'ascertain if there is a risk' of such harm.

[171] Brent, 'The *Certain Activities* Case', at 48; Brunnée, *Procedure and Substance in International Environmental Law*, at 99; Dupuy and Viñuales, *International Environmental Law*, at 69; L.A. Duvic-Paoli, *The Prevention Principle in International Environmental Law* (Cambridge University Press 2018), at 213.

[172] Brent, 'The *Certain Activities* Case', at 48; Brunnée, *Procedure and Substance in International Environmental Law*, at 99; Dupuy and Viñuales, *International Environmental Law*, at 69.

[173] *Pulp Mills*, at para. 221; *Certain Activities: Costa Rica v. Nicaragua and Nicaragua v. Costa Rica* at paras 104 and 106; Brunnée, *Procedure and Substance in International Environmental Law*, at 99; Duvic-Paoli, *The Prevention Principle in International Environmental Law*, at 213 and 219.

[174] Brunnée, *Procedure and Substance in International Environmental Law*, at 90.

[175] Ibid., at 87; Duvic-Paoli, *The Prevention Principle in International Environmental Law*, at 208 argues that the 'content of prevention is in a flux' and that it will 'be informed by a combination of customary obligations […] and treaty norms'.

common spaces, the obligation is one of result.[176] This obligation is breached when the requisite level of harm actually occurs, and requires a causal link between the harm alleged and an activity taking place in the territory of the offending State.[177] If the ICJ's jurisprudence is to be relied on, this is a separate obligation from the obligation to prevent harm and it is possible for the latter obligation and its network of procedural obligations to be breached without the former obligation also being breached. [178] It is also possible for actual harm to occur where the due diligence and other procedural obligations are met.[179] Accordingly, a few authors treat the obligations as separate but related.[180] Brunnée, however, does not.[181]

For Brunnée the obligation not to cause harm has always included an element of prevention but has undergone a shift in focus.[182] For her, there remains one rule that has evolved to emphasise prevention and not harm.[183] Accordingly, the obligation is to *prevent* transboundary harm and where there is harm to the environment, it is important only with respect to the question of remedies for breach.[184] The obligation is, according to her, essentially one of conduct which requires States to exercise due diligence and all its constituent obligations to prevent transboundary harm where there is a risk of it occurring.[185] While Brent considers the no-harm obligation to have separate procedural and substantive parts to it, she does seem to reject the idea of the no-harm obligation being purely an obligation of result on the basis that this would limit the ability of the 'no-harm' rule to play a preventative role.[186] She further argues that state practice does not support the no-harm obligation as being one of result and that the ICJ in the *Certain Activities* cases muddied the water on the difference between procedural and substantive obligations related to the no-harm obligation.[187]

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[176] Brunnée, *Procedure and Substance in International Environmental Law*, at 63–64 and 108–109.
[177] Ibid., at 62, 63–64 and 108–109.
[178] Ibid., at 91–92; In both *Certain Activities: Costa Rica v. Nicaragua and Nicaragua v. Costa Rica* (at paras 162 and 173) and *Pulp Mills* (at paras 158 and 265) the Court found that while certain procedural environmental obligations had been breached, the substantive obligation not to cause transboundary harm had not been.
[179] Brent, 'The *Certain Activities* Case', at 54; proof of a breach of procedural obligations will have to be proved and cannot just be assumed where harm occurs, see Brunnée, *Procedure and Substance in International Environmental Law*, at 104.
[180] Brent, 'The *Certain Activities* Case', at 54; Sands, *Principles of International Environmental Law*, at 246.
[181] Brunnée, *Procedure and Substance in International Environmental Law*, at 96.
[182] Ibid., at 53.
[183] Ibid.; Dupuy and Viñuales, *International Environmental Law*, at 66 seem to share this position.
[184] Brunnée, *Procedure and Substance in International Environmental Law*, at 96.
[185] Ibid., at 96 and 99.
[186] Brent, 'The *Certain Activities* Case', at 55–56; Duvic-Paoli, *The Prevention Principle in International Environmental Law*, at 199 argues that the obligation of prevention is one of conduct that requires States to exercise due diligence.
[187] Brent, 'The *Certain Activities* Case', at 54.

This author tends to agree with Brunnée that there are not two separate obligations, but one obligation that has undergone a shift in focus from harm occurrence to harm prevention that is made up of a network of interrelated, consequential obligations. The ideas of environmental harm and prevention of such harm are intrinsically and inextricably linked because the absence of harm requires prevention and prevention ensures that there is no harm. Further, when transboundary harm has been alleged or has occurred, it is impossible to determine the responsibility of the offending State without looking to the network of procedural obligations that make up the obligation to prevent transboundary harm. If transboundary harm occurs, logically the presumption is that there has been a failure to prevent such harm. While such failure must still be proved,[188] it is clear that there are obligations of prevention involved in ensuring that no harm occurs. There are, therefore, not two separate obligations; there is only one obligation with a focus not on whether harm occurs but on ensuring that harm does not occur.[189] Accordingly, the obligation to *prevent* transboundary environmental harm is one of conduct, not result, and is made up of a network of other obligations. That being said, what triggers the application of this obligation and where does it apply?

4.1.3. Geographic and Material Scope

The shift in focus from no-harm to prevention brought with it a shift in geographic scope. In the *Trail Smelter* arbitration, the obligation was on States not to cause harm to 'the territory of another' State.[190] This type of harm is classically transboundary in that it concerns the 'territory of […] places under the jurisdiction and control' of a State that is not the offending State,[191] and clearly lends itself to operating bilaterally.[192] However, the customary form of the obligation extends its geographic scope to 'areas beyond national jurisdiction'.[193] This means that harm to global common spaces such as the high seas, the deep seabed, Antarctica and outer space must also be prevented.[194] This significantly impacts the bilateral nature of the original form of the obligation. No State in particular is harmed by harm to the global commons, but

[188] Brunnée, *Procedure and Substance in International Environmental Law*, at 104.
[189] Ibid., at 102.
[190] *Trail Smelter*, at 1965.
[191] UN ILC, *Yearbook of the International Law Commission 2001*, at commentary to Draft Art. 2, 153.
[192] Duvic-Paoli, *The Prevention Principle in International Environmental Law*, at 241.
[193] Principle 21 of the Stockholm Declaration, Principle 2 of the Rio Declaration and *Nuclear Weapons Advisory Opinion*, at para. 29.
[194] Birnie, Boyle and Redgwell, *International Law and the Environment*, at 145; Dupuy and Viñuales, *International Environmental Law*, at 66; Duvic-Paoli, *The Prevention Principle in International Environmental Law*, at 240.

ultimately all States are negatively impacted by environmental degradation in such spaces.[195] Accordingly, operationalising prevention in common spaces practically demands the obligation to have *erga omnes* status.[196] This is discussed further below.

The material scope of the obligation also deserves brief attention. What level of transboundary environmental harm triggers the application of the duty to prevent and its associated procedural obligations? The standard in the *Trail Smelter* arbitration was harm of 'serious consequence'.[197] The Stockholm Declaration, Rio Declaration and the customary form of the obligation of prevention espoused by the ICJ in the *Nuclear Weapons Advisory Opinion* do not give an indication of what level of harm or risk is required to trigger the application of the obligation. Principle 21/2 simply requires the activities to 'not cause damage'[198] and the obligation in the *Nuclear Weapons Advisory Opinion* is 'to respect the environment'.[199]

The ILC took on the topic of clarifying the content of the obligation of prevention of transboundary harm and adopted the standard of 'a risk of causing significant transboundary harm'.[200] These Articles apply when there is a risk of 'a high probability of causing significant transboundary harm and a low probability of causing disastrous transboundary harm' with 'significant' meaning 'something more than "detectable"' but not '"serious" or "substantial"'.[201] This requires 'real' and measurable 'detrimental effects' on *inter alia* the 'health, industry, property, environment or agriculture' of the injured State.[202] Though these standards are somewhat clearer, they only operate 'for the purposes of' the Articles on Prevention.[203] The ICJ also adopts the standard of 'risk of significant transboundary harm' for the general obligation, but it does not offer clarity on what this means.[204] The material scope, therefore, requires development to be certain. Does this uncertainty, coupled with the fact that the obligation of prevention is made up of a network of other obligations, themselves potentially open-ended, prevent the obligation from being *erga omnes*?

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[195] Brunnée, *Procedure and Substance in International Environmental Law*, at 96; Birnie, Boyle and Redgwell, *International Law and the Environment*, at 143; Dupuy and Viñuales, *International Environmental Law*, at 63.
[196] Birnie, Boyle and Redgwell, *International Law and the Environment*, at 145.
[197] *Trail Smelter*, at 1955.
[198] Principle 21 of the Stockholm Declaration; Principle 2 of the Rio Declaration.
[199] *Nuclear Weapons Advisory Opinion*, at para. 29.
[200] UN ILC, *Yearbook of the International Law Commission 2001*, at commentary to Draft Art. 1, 149.
[201] Ibid., at commentary to Draft Art. 2, 152.
[202] Ibid.
[203] Ibid., at Draft Art. 2, 151.
[204] *Pulp Mills*, at para. 204; *Certain Activities: Costa Rica v. Nicaragua and Nicaragua v. Costa Rica*, at para. 104.

4.1.4. The Content of the Obligation to Prevent Harm: Broad but Acceptable for *Erga Omnes*

According to Ragazzi, *erga omnes* obligations must be narrowly defined.[205] If this is the case, the obligation of prevention, constituted by other broad obligations, will fall short of being *erga omnes*. However, Ragazzi concedes that narrowness is not a prescriptive element of *erga omnes* obligations, but is merely descriptive of the *erga omnes* obligations named in *Barcelona Traction*.[206] This author argues that the broad and uncertain scope of the obligation to prevent transboundary environmental harm does not prevent it from being *erga omnes* for two reasons. The first is simply that there exist other, similarly broad *erga omnes* obligations, often found in those obligations that have *jus cogens* origins. An apt example of this is the *jus cogens* status of 'basic rules of humanitarian law' declared though not defined in the ILC's Draft Conclusions on the Identification and Legal Consequences of Peremptory Norms of General International Law (*jus cogens*)[207] and the ICJ's proclamation that 'a great many rules of humanitarian law' are *erga omnes*.[208] Neither of these constructions can fairly be considered narrow. Further examples include the *jus cogens* prohibition against racial discrimination and apartheid,[209] and the right to self-determination[210] which Judge Weeramantry, in his dissenting opinion to the *East Timor* case, argued, consists of a 'totality of duties' which 'must be tested against the basic underlying norms and principles' of the right.[211] An example of a broad *erga omnes* obligation that does not arise out of a *jus cogens* norm is the general obligation to respect human rights, declared as *erga omnes* by the Institut de Droit International.[212] Here, the *erga omnes* obligation attaches to the general obligation to ensure respect for human rights rather than to specific obligations.[213]

The second reason advanced for allowing this fairly open-ended obligation to be *erga omnes* requires placing it in the context of its larger purpose – to protect the environment. Protecting the environment requires the communitarian, collective technique offered by the

[205] Ragazzi, *The Concept of International Obligations* Erga Omnes, at 132–133.
[206] Ibid., at 134.
[207] UN ILC, 'Report of the International Law Commission: Seventy-Third Session', at annex, 89.
[208] *Nuclear Weapons Advisory Opinion*, at para. 79 read with *Wall Opinion*, at para. 157.
[209] UN ILC, 'Report of the International Law Commission: Seventy-Third Session', at annex, 89.
[210] Ibid.; for judicial confirmation of the *erga omnes* character of the right to self-determination see *East Timor*, at para. 29, the *Wall Opinion*, at para. 156, and the *Chagos Opinion*, at para. 180.
[211] *East Timor (Dissenting Opinion of Judge Weeramantry)*, at 211.
[212] Art. 1 of the Institut de Droit International, 'The Protection of Human Rights and the Principle of Non-intervention in Internal Affairs of States' (1989) Session of Santiago de Compostela, available at <https://www.idi-iil.org/app/uploads/2017/06/1989_comp_03_en.pdf> (accessed 30 August 2023).
[213] Ragazzi, *The Concept of International Obligations* Erga Omnes, at 142.

erga omnes concept. Though the obligation to prevent transboundary harm can comfortably function within the traditional bilateralist approach to environmental protection, it also extends its geographic application to areas beyond national jurisdiction. Where such areas are harmed or there is a failure to prevent them from harm, being ordained with *erga omnes* character allows all States to act to protect these areas. The larger aim – the protection of the environment – therefore lends itself to having, and perhaps needing, *erga omnes* protection. Accordingly, the broad nature of the obligation to prevent transboundary harm to the environment will not prevent it from being *erga omnes*.

In sum, the obligation to prevent transboundary environmental harm is a broad, customary obligation made up of a network of procedural obligations that focus on prevention but do not dismiss the reality that actual harm also triggers its application. It is triggered when there is a risk of significant harm and applies to common spaces as well as to the territories of States. That the content of the obligation is in some places uncertain and open-ended does not prevent it from being *erga omnes*. Having clarified the content of the obligation as far as possible, this article now turns to the question of whether the obligation satisfies the second and third criteria required for *erga omnes* character: does the obligation concern a common and essential interest?

4.2. A Common and Essential Interest

Erga omnes obligations protect common and essential interests. Common interests can arise because the factual interdependence of States means that certain issues cannot be addressed by a single State or States in isolation; shared problems require shared solutions and cooperation.[214] They can also arise because shared spaces exist[215] and need to be cooperatively managed to avoid Hardin's tragedy of the commons.[216] The obligation to prevent transboundary environmental harm can fit neatly into both of these categories when considered both as an independent obligation and within the larger context in which it operates.

[214] D. Shelton, 'Common Concern of Humanity' (2009) 1 Iustum Aequum Salutare 33–40, at 34; R. Wolfrum, *Solidarity and Community Interests: Driving Forces for the Interpretation and Development of International Law* (Brill Nijhoff 2021), at 70; S. Villalpando, 'The Legal Dimension of the International Community: How Community Interests are Protected in International Law' (2010) 21 European Journal of International Law 387–420, at 393 and 394.
[215] J. Klabbers, 'The Community Interest in the Law of Treaties: Ambivalent Conception' in U. Fastenrath et al. (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford University Press 2011) 768–780, at 769.
[216] G. Hardin, 'The Tragedy of the Commons' (1968) 162 (3859) Science 1243–1248.

As an independent obligation, the obligation to prevent transboundary harm involves, in this author's view, at least two common interests. The first connects the obligation back to its roots in balancing the sovereign interests of States and considers that it is in the interest of all States involved to see that their sovereignty is respected. Respect for the sovereignty of each State is, in fact, a founding principle of contemporary international law.[217] As such, all States involved have a common interest in seeing their sovereignty respected and the obligation to prevent harm does this. Secondly, the protection offered by the obligation can cover shared resources – such as a river.[218] Because there are spaces or resources that are shared, the protection, management and use of these spaces or resources will necessarily be common to all States that share in them.[219] Shared resources and spaces, such as a river, can operate between a few States[220] while others, such as the global commons, operate between all States.[221] Accordingly, the independent obligation to prevent transboundary harm reflects the common interest of all States to respect their sovereignty and to prevent harm to shared spaces and resources.

Through a broader lens, the obligation should be seen as one of several obligations all concerned with the larger goal of protecting the environment.[222] Although the international legal approach to protecting the environment is fragmented, the environment is in reality holistically interconnected. As Judge Cançado Trindade opined, international environmental regulation is 'undertaken in the *common superior interest* of humankind'.[223] The obligation to prevent *transboundary* harm intrinsically recognises that harm to the environment is rarely localised and that, because environmental harm can be irreparable, prevention is preferred.[224] When considering the obligation independently as well as within its broader context, it cannot

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[217] Art. 2(7) Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945), XV UNCIO 335, amendments in 557 UNTS 143, 638 UNTS 308 and 892 UNTS 119.
[218] *Certain Activities: Costa Rica v. Nicaragua and Nicaragua v. Costa Rica* concerned activities affecting the San Juan River shared by Costa Rica and Nicaragua, see paras 101 and 102; *Pulp Mills* concerned the River Uruguay shared by Argentina and Uruguay, see para. 81.
[219] In *Pulp Mills*, Uruguay and Argentina had concluded a treaty on the management and utilisation of the River Uruguay, see paras 86 and 170. In *Certain Activities: Costa Rica v. Nicaragua and Nicaragua v. Costa Rica*, Costa Rica argued that Nicaragua was obligated under the Ramsar Convention to notify and consult it before beginning work on a shared water system, see paras 106 and 110.
[220] *Pulp Mills*, at paras 86 and 170 and *Certain Activities: Costa Rica v. Nicaragua and Nicaragua v. Costa Rica*, at paras 106 and 110.
[221] See for example Arts 118, 119, and 145 of United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 ('UNCLOS').
[222] Sands, *Principles of International Environmental Law*, at 15; Birnie, Boyle and Redgwell, *International Law and the Environment*, at 13, 106 and 137; Dupuy, Le Moli and Viñuales, 'Customary International Law and the Environment', at 13 and 14.
[223] Own emphasis, *Pulp Mills (Separate Opinion of Judge Cançado Trindade)*, at para. 173.
[224] Dupuy and Viñuales, *International Environmental Law*, at 66; Brunnée, *Procedure and Substance in International Environmental Law*, at 102.

be anything other than a common interest because the protection of the environment broadly and the legal means of doing so are necessarily a common interest.[225]

That being said it is not enough, for the purposes of *erga omnes*, that the interest in question is common, it must also be essential. It will be recalled that Tams' material approach is essentially concerned with determining how important an obligation is by looking to the UN Charter, universal and quasi-universal treaties, general international law, the jurisprudence of the ICJ and the practices of UN organs, as well as by looking at the responses of non-affected States.[226] Evidence of the obligations in these places can also reinforce the commonality of the obligation.[227] The importance of the obligation to prevent transboundary environmental harm can again be looked at independently and within the broader context in which it operates.

Independently, the obligation appears in universal and quasi-universal instruments,[228] either as a binding provision in a treaty,[229] as part of the preamble,[230] or in soft law texts.[231] It has also been considered in international courts and tribunals[232] and appears both in the work of the ILC[233] and in resolutions of the General Assembly.[234] Broadly, the goal of protecting the environment has also been included in General Assembly resolutions,[235] the same soft law texts in which the independent obligation is reflected,[236] and is arguably indirectly protected in the

[225] Shelton, 'Common Concern of Humanity', at 35.
[226] Tams, *Enforcing Obligations* Erga Omnes *in International Law*, at 153 and 154.
[227] Uhlmann, 'State Community Interests, *Jus Cogens* and Protection of the Global Environment', at 108 argues that UN action plans, General Assembly resolutions as well as 'preambles or policy provisions of multilateral treaties' (the first two of which fall under Tams's practices of UN organs and the last one under universal and quasi-universal treaties) are manifestations of 'state community interests'.
[228] Sands, *Principles of International Environmental Law*, at 243; Dupuy and Viñuales, *International Environmental Law*, at 67–68; Birnie, Boyle and Ridgewell, *International Law and the Environment*, at 138–143, 145 and 147.
[229] Arts 194 (1) and (2) of UNCLOS; Art. 3 of the Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79.
[230] The United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107; Vienna Convention for the Protection of the Ozone Layer (adopted 22 March 1985, entered into force 22 September 1988) 1513 UNTS 293.
[231] Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration.
[232] *Pulp Mills*, at para. 101; *Certain Activities: Costa Rica v. Nicaragua and Nicaragua v. Costa Rica*, at para. 104; *Nuclear Weapons Advisory Opinion*, at para. 29; *Responsibilities and Obligations of States*, at paras 147 and 148.
[233] UN ILC, *Yearbook of the International Law Commission 2001*, at 148–170; UN ILC, *Yearbook of the International Law Commission 2008, vol. II (Part Two)* UN Doc. A/CN.4/SER.A/2008/Add.l (Part 2), at 22–43.
[234] UNGA Res. 2996/XXVII, 'International Responsibility of States in Regard to the Environment' (15 December 1972); UNGA Res. 44/228, 'United Nations Conference on Environment and Development' (22 December 1989).
[235] UNGA Res. 2996, 'International Responsibility of States in Regard to the Environment' (15 December 1972); UNGA Res. 38/161, 'Process of Preparation of the Environmental Perspective to the Year 2000 and Beyond' (19 December 1983).
[236] See for example Part I, para. 2 of the Stockholm Declaration which reads '[t]he protection and improvement of the human environment is a major issue which affects the well-being of peoples and economic development throughout the world; it is the urgent desire of the peoples of the whole world and the duty of all Governments' and the Preamble of the Rio Declaration which reads 'working towards international agreements which […]

UN Charter as a matter of peace and security.[237] Though not included in the final work of the ILC, the protection of the environment was at one point considered important enough that serious damage to it could have been considered an international crime.[238] The ICJ has also, at various times, delivered comments on the importance of protecting the environment.

In the *Nuclear Weapons Advisory Opinion*, the Court not only accepted the customary status of the obligation to prevent transboundary harm but also that the environment 'is not an abstraction, but represents the living space, the quality of life and the very health of human beings, including generations unborn'.[239] Shelton considers that this passage 'implicitly recognised' the existence of environmental obligations with *erga omnes* character.[240] The Court further stated that while the norms and obligations that protect the environment do not deprive a State of its right to self-defence, States must consider the potential harm to the environment when deciding whether a military objective is necessary and proportional,[241] which this author views as further endorsing the importance of preventing transboundary harm. Finally, the Court also noted that obligations under international humanitarian law that seek to protect the environment during conflict are 'powerful constraints' for States on which those obligations rest.[242] In his separate opinion, Judge Weeramantry stated that principles of environmental law that ensure 'the basic survival of civilization, and indeed, of the human species' are 'part of the *sine qua non* for human survival'.[243]

In *Gabčíkovo-Nagymoros*, the Court noted that environmental protection requires 'vigilance and prevention […] on account of the often irreversible character of damage to the environment' and that because of the growing 'awareness of the vulnerability of the environment' new environmental norms and standards have to be taken into account when States contemplate new and ongoing activities.[244] The Court further recalled the point it had

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protect the integrity of the global environment' and Principle 1 which affirms the right of people to 'live in harmony with nature'. See also Oral, 'Environmental Protection as a Peremptory Norm of General International Law', at 592 who argues that 'there can be no doubt that the protection of the environment constitutes a general norm of international law' because 'there are literally hundreds of instruments, binding and non-binding, national and international attesting to that fact'.

[237] N. Græger, 'Environmental Security?' (1996) 33(1) Journal of Peace and Security 109–116, at 109; C. de Coning et al., 'Security Risks of Environmental Crises: Environment of Peace (Part 2)' (2022) SIPRI, at 2–4.

[238] UN ILC, *Yearbook of the International Law Commission 1976, vol. II (Part Two)* UN Doc. A/CN.4/SER.4/1976/Add.1 (Part 2), at 95 and 96

[239] *Nuclear Weapons Advisory Opinion*, at para. 29.

[240] Shelton, 'Common Concern of Humanity', at 34.

[241] *Nuclear Weapons Advisory Opinion*, at para. 30.

[242] *Nuclear Weapons Advisory Opinion*, at para. 31.

[243] *Nuclear Weapons Advisory Opinion (Separate Opinion of Judge Weeramantry)*, at 504.

[244] *Case Concerning the Gabčíkovo-Nagymoros Project (Hungary v. Slovakia) (Judgment)* [1997] ICJ Rep. 7, at paras 112 and 141 ('*Gabčíkovo-Nagymoros*').

made in the *Nuclear Weapons Advisory Opinion* and stated that it attaches 'great significance [...] to respect for the environment, not only for States but for the whole of mankind'.[245] These passages emphasise, once again, the importance of environmental protection and the prevention of environmental harm.

Affirming that environmental protection is both common and essential, in his separate opinion to *Gabčíkovo-Nagymoros*, Judge Weeramantry questions whether the bilateral, *inter partes* approach to addressing cases that involve widespread and irreversible harm to the environment is appropriate, especially because environmental harm is not always localised.[246] It is worth repeating part of his opinion in full here:

> We have entered an era of international law in which international law subserves not only the interests of individual States, but looks beyond them and their parochial concerns to the greater interests of humanity and planetary welfare. In addressing such problems, which transcend the individual rights and obligations of the litigating States, international law will need to look beyond procedural rules fashioned for purely *inter partes* litigation.
>
> When we enter the arena of obligations which operate *erga omnes* rather than *inter partes,* rules based on individual fairness and procedural compliance may be inadequate. The great ecological questions now surfacing will call for thought upon this matter. International environmental law will need to proceed beyond weighing the rights and obligations of parties within a closed compartment of individual State self-interest, unrelated to the global concerns of humanity as a whole.[247]

This attitude echoes Judge Cançado Trindade's assertion that environmental regulation is 'undertaken in the common superior interest of humankind'.[248] Judge Cançado Trindade also states that the concern for environmental protection shared 'by the whole international community' is a legitimate one that indicates a move away from State-centred international law towards 'an international law for mankind' that pursues the 'preservation of the environment' for current and future generations.[249]

The obligation to prevent transboundary harm is common because it stems from a problem common to all States – the protection of their environments from the activity of other States –

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[245] Ibid., at para. 53.
[246] *Gabčíkovo-Nagymoros (Separate Opinion of Judge Weeramantry)*, at 117 and 118.
[247] Ibid., at 118.
[248] *Pulp Mills (Separate Opinion of Judge Cançado Trindade)*, at para. 173.
[249] Ibid., at para. 162.

and, therefore, requires a common solution – a rule applicable to all States. Further, the obligation is essential because of its ubiquitous presence in international law – appearing as a rule of custom, in universal and quasi-universal treaties, as the basis of arguments in the ICJ, in General Assembly resolutions, in the work of the ILC, and in soft law texts. The fact that it is found in all these places also reinforces the commonality of the obligation. Further affirmation of both its commonality and importance is garnered from understanding the obligation as one part of the larger goal of international environmental law, namely the protection of the environment. When understood in this context, there is little doubt that the obligation is a common and essential interest.

4.3. The Ultimate Beneficiary of the Obligation

The final step in establishing the *erga omnes* character of the obligation to prevent transboundary harm is to show that the ultimate beneficiary of the obligation is the 'international community as a whole'. This author does not, and cannot within the scope of this article, seek to make definitive assertions on what the international community is or who it is made up of.[250] Rather, when asserting that the 'international community as a whole' is the ultimate beneficiary of *erga omnes* obligations, this author adopts the position that certain common and essential obligations do not operate reciprocally between States and are instead owed collectively and broadly to all States, non-State entities, peoples and humanity. In other words, the obligation need not be forced into a bilateral framework that requires a victim *State* in cases of breach.

Within the context of preventing transboundary harm, the ILC defined transboundary harm as 'harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border'.[251] Here, transboundary means the territory of any State other than that State in which the harmful activity is occurring. This aligns with the *Trail Smelter* formulation of the obligation which barred activities which would cause harm 'to the territory of another' State.[252] Under this formulation, there might be no need for the obligation to be *erga omnes* because the

[250] For musings on the 'international community' see B. Simma and A.L. Paulus, 'The "International Community": Facing the Challenge of Globalization' (1998) 9 European Journal of International Law 266–277; G. Abi-Saab, 'Wither the International Community' (1998) 9 European Journal of International Law 248–265; P.S. Rao, 'The Concept of International Community in International Law: Theory and Reality' in I. Buffard et al. (eds), *International Law Between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner* (Brill Nijhoff 2008) 85–106.
[251] UN ILC, *Yearbook of the International Law Commission 2001*, at Draft Article 2(c), at 152.
[252] *Trail Smelter*, at 1965.

beneficiary of the obligation is clear – other States. As such, the obligations would be bilaterally and reciprocally owed between States.

This approach became untenable when the content of the rule shifted focus and expanded the geographic scope of the obligation to 'areas beyond national jurisdiction'. Under this, now customary, formulation it became impossible for the obligation to apply bilaterally; if the global commons are harmed, there can be no directly injured State and as such, the offending State is able to continue their harmful activities without consequences. Considering that the protection of the environment is a common and essential interest, it is hard to accept that it would be allowable for a State to offend this interest by harming the environment of the global commons with impunity. It seems only logical that when the global commons are protected by an obligation, that obligation will have to have *erga omnes* character. This approach echoes the one that was adopted by the International Tribunal for the Law of the Sea when it explicitly recognised the *erga omnes* character of 'obligations relating to the preservation of the high seas and in the Area'.[253]

Where there is no directly injured State but the occurrence of harm nevertheless needs to be prevented, the ultimate beneficiaries of an obligation that demands such prevention is the 'international community as a whole' and within the context of environmental protection, humanity as a whole because the protection of the environment is not owed to a single State or person or entity, but rather to humanity, both present and future.[254] Additionally, the *erga omnes* character of an obligation does not stop an injured State, where there is one, from invoking the responsibility of the offending State,[255] but it significantly broadens the scope of who can act when there has been a failure to uphold the common and essential interests of international law. It also ensures that where a directly injured State cannot act for some reason, another State can act on both its behalf as well as on behalf of the 'international community as a whole'.[256]

The obligation to prevent transboundary environmental harm is a customary obligation that protects common and essential interests and has as its beneficiary the 'international community

[253] *Responsibilities and Obligations of States*, at para. 180.
[254] *Pulp Mills (Separate Opinion of Judge Cançado Trindade)*, at para. 173; Mateus, 'Analysing the Relationship Between Peremptory Norms of General International Law (*Jus Cogens*) and Obligations (*Erga Omnes*)', at 17–18.
[255] UN ILC, *Yearbook of the International Law Commission 2001*, at commentary to Draft Article 48, 127.
[256] Johnstone, 'Invoking Responsibility for Environmental Injury in the Arctic Ocean', at 26.

as a whole'. This should leave little doubt as to its *erga omnes* character and, as a result, the ability of any State to act where it has been breached.

5. Conclusion

This article showed that the decently comprehensive protective obligation to prevent transboundary environmental harm is *erga omnes*. Based on the work of preceding authors and on the characteristics of the *erga omnes* concept, this author identified four criteria that need to be satisfied for the *erga omnes* character of an obligation to be established, and applied them to the obligation to prevent transboundary harm. The obligation is an accepted rule of customary international law that requires States to act with due diligence when there is a risk that their activities could harm the environments of other States and the global commons. Further, it showed that the obligation protects common and essential interests, the most important one being the protection of the environment. Finally, it showed that while the obligation can operate bilaterally, it also operates non-reciprocally and its intended beneficiary is not a single State but the 'international community as a whole' and humanity as a collective.

International environmental law and the protection it offers to the environment and all those who live in it are the '*sine qua non* for human survival';[257] humanity owes its very existence, both past and future, to the environment. Included in the arsenal of tools of international law for the protection of such important and common interests is the ability to label certain obligations as *erga omnes*. When an *erga omnes* obligation is breached all States are given the option to invoke the responsibility of the offending State. Within the context of environmental protection this offers humanity and the States that represent it the opportunity to ensure that the resource on which our lives are based is offered the fullest and widest protection possible. All of us owe environmental protection to each other and to generations born and unborn. We are all under a moral obligation to ensure that we do not harm our neighbours and our shared spaces. By establishing the *erga omnes* character of the obligation to prevent transboundary environmental harm, this article showed that this moral obligation has a strong legal foundation as well.

[257] *Nuclear Weapons Advisory Opinion (Separate Opinion of Judge Weeramantry)*, at 504.