

## THE THIRD WAVE OF NORMATIVITY IN GLOBAL WATER LAW

### The duty to cooperate in the peaceful management of the world's water resources: an emerging obligation *erga omnes*?

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#### INTRODUCTION

To meet the challenges of the increased competition for the planet's freshwater resources, it is necessary to align international water law with the United Nation's sustainable development goals (SDGs).<sup>1</sup> This work considers the evolution of the duty to cooperate in the context of shared transboundary waters and argues that we now witness the emergence of the duty to cooperate in the peaceful management of the world's water resources as an obligation *erga omnes* imposable on all states.

At the heart of our argument are three fundamental tenets: (i) international law has the inherent capacity to, and is in the process of, transforming to address global water-related imperatives;<sup>2</sup> (ii) the rules of international law that apply to shared water resources require a consolidated and a consolidating framework in order to address the global water crisis within and across national borders; (iii) the very notion of state sovereignty, recast in our contemporary setting, supports and provides the legal parameters for the crystallisation of an obligation *erga omnes* to ensure 'water for all' as a duty and entitlement of the international community as a whole.<sup>3</sup>

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1 See UN Sustainable Development Knowledge Platform for documents and progress on SDGs <http://sustainabledevelopment.un.org/sd21.html>.

2 Simma expressed it as law that transcends the interests of states and 'corresponds to the needs, hopes and fears of all human beings, and attempts to cope with problems the solution of which may be decisive for the survival of entire humankind'; see B Simma 'From bilateralism to community interest' at 244, discussed in B Kingsbury, M Donaldson 'From bilateralism to publicness in international law' in U Fastenrath and others (eds) *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford University Press Oxford 2011) 79–89.

3 Tams and Asteriti conclude that '...obligations *erga omnes* have become part and parcel of the international discourse and are gradually being read into the regime of international responsibility'; see C Tams, A Asteriti '*Erga omnes, jus cogens*, and their impact on the law of responsibility' in M Evans, P Koutrakis (eds) *The International Responsibility of the European Union* (Hart Publishing Oxford 2013) 28 (electronic copy available at <http://ssrn.com/abstract=2085439>).

#### THE CHALLENGES

Our proposition, while attractive in many ways, faces hard challenges on a number of fronts. The primary legal barriers to our argument include the following three core obstacles:

- the *sovereignty challenge*: the deeply embedded principle of national sovereignty, not easily limited, and which in the water domain tends to align with hydro-geopolitics and national economic and security issues, rather than with the global community's interest in shared development and management practices that take into account the interests of all stakeholders within and beyond national borders
- the *duty to cooperate normative challenge*: the difficulties in establishing the normative content of the duty to cooperate in the context of transboundary water resources management and, finally, perhaps the most difficult challenge
- the *erga omnes challenge*: the difficulties inherent in establishing obligations *erga omnes*.

Each of these challenges will be considered next with specific reference to the global water problem.

#### The state sovereignty challenge

Westphalian sovereignty, as it is often referred to, is at the heart of international law, codified in the UN Charter and in numerous treaties.<sup>4</sup> Brownlie observes: 'The sovereignty and equality of states together represent the basic constitutional doctrine of the law of nations, which governs a community of states having a uniform legal personality'.<sup>5</sup> The notion is a co-relative one, reflected throughout the UN Charter (and notably in its Article 2(7)) as conditional upon recognising a corresponding obligation to respect every other state's sovereignty. Thus, the voluntary membership in the UN has been characterised as 'the final symbol of independent sovereign statehood and thus the seal of acceptance into the community of

4 UN Charter art 2. See also definition of 'sovereignty' as 'the legal identity of a state in international law' discussed in Report of the International Commission on Intervention and State Sovereignty 'The responsibility to protect' (CISS R2P Report) (December 2011) International Development Research Centre 12.

5 Ian Brownlie *Principles of Public International Law* (6th edn Oxford University Press Oxford 2003) 287.

nations'.<sup>6</sup> This endorsement of the UN Charter does not dilute the notion of sovereignty but reconfigures it in a subtle but important way, transforming it 'from sovereignty as control to sovereignty as responsibility in both internal functions and external duties'.<sup>7</sup> Normative implications arise out of this change, reflected inter alia in the UN's relatively recent development of the notion of the 'responsibility to protect' (R2P), devised as a concept that reinforces and reformulates *sovereignty as responsibility* and which focuses 'primarily on prevention and protection with a special emphasis on peaceful means of conflict resolution' (emphasis added).<sup>8</sup> Thus, the legal contours of sovereignty are clearly malleable and subject to change, albeit firmly embedded in international state-state sovereign relations. In this light we would agree with the assertion that 'Sovereignty must not be condemned but rather celebrated, as long as it accepts some responsibilities toward the rest of humanity'.<sup>9</sup>

The R2P concept provides a good example of how the notion of sovereignty has changed to meet the needs of the global community. It requires national governments to protect communities from egregious events (mass killing, systemic rape, starvation) at the national (domestic) sovereign level; if this cannot be done, the duty to protect is an obligation of the international community. This is described not as an incursion on state sovereignty, but rather as a 'linking concept that bridges the divide between intervention and sovereignty'.<sup>10</sup> On the normative content of this duty to protect, it comprises more than the 'responsibility to react', including both the 'responsibility to prevent' and the 'responsibility to rebuild'.<sup>11</sup> This far-reaching duty is aimed primarily at considering and protecting communities at risk of life-harming events and is rather comprehensive in its reach and depth. This demonstrable malleability of the notion of sovereignty in the face of critical contemporary challenges lends support to our thesis.

The need to take into account 'communitarian needs' or the interests of the global community has been explored in a vast and growing literature in law<sup>12</sup> across

disciplines,<sup>13</sup> and elaborated through an array of practice under the aegis of the UN.<sup>14</sup> This approach has also been considered in the international environmental law field<sup>15</sup> and in the context of transboundary waters.<sup>16</sup> It is behind the raft of multilateral conventions in this field,<sup>17</sup> the recent UN Resolution on the Human Right to Water and Sanitation<sup>18</sup> and the ongoing global discourse on the SDGs.

Despite this forward-looking thinking, and significant accumulating state practice, reality on the ground is not consistently progressive. Of the more than 250 major transboundary watercourses that cross two or more countries, less than one-third are covered by treaty regimes, some of which are not fit for purpose. In the absence of treaty regimes, transboundary water resources are governed by rules of customary law, readily identified but more difficult to enforce. Big challenges thus remain – especially in upstream-downstream scenarios where hydro-geopolitics linked to national self-interest often drive development imperatives, justified in part through claims of national

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*International Law on International Cooperation: Theoretical Perspectives* (Cambridge University Press New York 2005).

13 Elinor Ostrom, awarded the Nobel Prize for her work, has studied community approaches to managing common pool resources, concluding that 'all efforts to organize collective action, whether by an external ruler, an entrepreneur, or a set of principals who wish to gain collective benefits, must address a common set of problems'. See E Ostrom *Governing the Commons: the Evolution of Institutions for Collective Action* (Cambridge University Press Cambridge 1990).

14 P Wouters 'Dynamic cooperation: exploring the origins and emergence of this rule of international law as it applies to the world's shared transboundary water resources in the long shadow of state sovereignty' in *Env. Liability* 21 [2013] 3 85.

15 Orrego Vicuña 'State responsibility, liability, and remedial measures under international law: new criteria for environmental protection' in E Brown Weiss (ed) *Environmental Change and International Law: New Challenges and Dimensions* (United Nations University Press Tokyo 1992) 102–32.

16 Eyal Benvenisti 'Collective action in the utilization of shared freshwater: the challenges of international water resources law' (1996) 90 *American Journal of International Law* 384–415; E Brown Weiss 'The coming water crisis: a common concern of humankind' (2012) 1(1) *Transnational Environmental Law* 153–68 at 165, where she suggests that the 'coming water crisis' indicates 'that all peoples have a growing common concern in the availability and use of fresh water. The interest is in ensuring robust fresh water resources, which can be used for present and future generations to satisfy basic needs, to grow food, to satisfy industrial needs, to conserve ecosystems, and to meet other purposes' p 165; see also P Wouters, S Vinogradov and B Magsig 'Water security, hydrosolidarity, and international law: a river runs through it ...' (2009) 19 *Yearbook of International Environmental Law* 97–134; P Wouters, D Ziganshina 'Tackling the global water crisis: unlocking international law as fundamental to the peaceful management of the world's shared transboundary waters – introducing the H<sub>2</sub>O paradigm' in Q Grafton, K Hussey (eds) *Water Resources Planning and Management: Challenges and Solutions* (Cambridge University Press Cambridge 2011) 175–229.

17 Relevant multilateral conventions in this field include the Convention on Wetlands of International Importance especially as Waterfowl Habitat (RAMSAR) text as amended available at [http://www.ramsar.org/cda/en/ramsar-documents-texts-convention-on/main/ramsar/1-31-38%5E20671\\_4000\\_0\\_](http://www.ramsar.org/cda/en/ramsar-documents-texts-convention-on/main/ramsar/1-31-38%5E20671_4000_0_); the UN Convention on Biological Diversity (UN CBD) <http://www.cbd.int/convention/text/>; the UN Framework Convention on Climate Change [http://unfccc.int/essential\\_background/convention/background/items/1349.php](http://unfccc.int/essential_background/convention/background/items/1349.php); and the UN Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification [http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVII-10&chapter=27&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-10&chapter=27&lang=en).

18 UN Resolution on the Human Right to Water and Sanitation UNGA Res 64/294 (adopted 3 August 2010) UN Doc A/RES/64/294.

6 CISS R2P Report (n 4) 13.

7 *ibid.*

8 Patricia O'Brien 'The responsibility to protect: inception, conceptualization, operationalization and implementation of a new concept' UN Under-Secretary-General for Legal Affairs and UN Legal Counsel address to Association of the Bar of the City of New York Human Rights Committee (7 February 2012) manuscript on file with authors.

9 E Benvenisti 'Sovereigns as trustees of humanity: on the accountability of states to foreign stakeholders *AJIL* (forthcoming, manuscript on file with the authors) 7–8. Benvenisti suggests that the notion of sovereignty, in contemporary times, must be reconfigured such that sovereigns take into account the needs of others, especially where global issues are concerned; he summarises: 'In other words, through other-regardingness, sovereigns can indirectly promote global welfare as well as global justice'.

10 CISS R2P Report (n 4) 17.

11 *ibid.*: 'It directs our attention to the costs and results of action versus no action, and provides conceptual, normative and operational linkages between assistance, intervention and reconstruction. The substance of the responsibility to protect is the provision of life-supporting protection and assistance to populations at risk'.

12 For a collection of works on this topic see inter alia Fastenrath (n 2); also B Simma 'From bilateralism to community interest in international law' (1994) 250 *Recueil des Cours de l'Academie de Droit International* 217; Eyal Benvenisti, Moshe Hirsch (eds) *The Impact of*

sovereignty over natural resources. Theories of absolute sovereignty (primarily advanced by upstream states) and absolute territorial integrity (for downstream states) have been advanced in support of national initiatives that affect transboundary waters. Limited territorial sovereignty, quite logically, has superseded these extreme positions as the appropriate theory to govern international watercourses, and provides the conceptual foundation for the primary rule of law in this field – the principle of equitable and reasonable use.

Despite this governing and overarching norm of custom and treaty law, unilateral actions still continue on transboundary waters, justified in the name of national sovereignty and forged on the back of economic self-interest. The most difficult examples often involve the upstream-downstream scenario. China, upstream on most of its 40 major transboundary waters, clearly adopts a limited territorial sovereignty approach to its relations in this regard.<sup>19</sup> Of the 50 water-related treaties it has concluded over the years, the majority of these contain imprecise provisions and cover only selected transboundary waters, mostly in its northern reaches. Thus, as China goes forward with dams upstream of India in the Yarlung Zangbo River/Brahmaputra, there are no agreements in place, leaving India with limited options in response.<sup>20</sup> China also resists compulsory dispute settlement mechanisms, preferring to resolve any conflicts through cooperation and peaceful means, the so-called 'soft-path'.<sup>21</sup> Claimants in India allege that this development will compromise downstream users in a myriad of ways, adversely affecting human populations and ecosystems.<sup>22</sup> Downstream concerns have also been expressed by Russia and Kazakhstan, although these matters are being addressed through treaties and joint commissions.<sup>23</sup>

Other upstream-downstream situations involve Turkey on the Euphrates-Tigris, and Ethiopia on the Nile.<sup>24</sup> In each case the central legal question is the same: are any unilateral actions to develop transboundary uses upstream lawful and, if not, what are the legal con-

sequences? How does limited sovereignty work in the absence of treaty arrangements? What does the 'duty to cooperate', the bedrock principle of international law, mean in the transboundary water context?

Unfortunately, even where there are watercourse treaties, the drag of sovereignty on transboundary water cooperation can be counter-productive and result in sub-optimal transboundary cooperation. Just one example is the Indus, shared between India and Pakistan.<sup>25</sup> After the partition of British Imperial India into India and the new country of Pakistan, the latter found itself dependent upon a river system that originated largely outside its territory. The rivers and headwaters of the system were controlled by a hostile neighbour who also had control over much of disputed Kashmir.<sup>26</sup> Pakistan needed both to preserve the extensive irrigation economy that the British had built and to construct large new storage facilities to expand irrigation for a burgeoning national population. During the 1950s, the World Bank attempted to broker an agreement between the two nations. However, both countries refused to adopt the Bank's expert's recommendation of a comprehensive river basin authority run by engineers modelled on the United States Tennessee Valley Authority.<sup>27</sup> Instead, the treaty that was finally concluded, with considerable assistance from the World Bank, involved a more modest 'equal' sharing of the transboundary water resources – with the use of the three primary eastern tributaries to India and the three western ones to Pakistan. The arrangement, which remains in place, continues to be tested and appears to be robust, providing the platform for a recent arbitration and ongoing litigation.<sup>28</sup>

Another example is the Mekong Agreement, concluded in 1995, following rather long-standing regional cooperation on the Mekong, despite serious conflicts in the past. The treaty is being tested as a result of the proposed Xayaburi dam in Laos. Despite rules of procedure agreed under the mother agreement aimed at addressing development-related issues, at present the parties are divided as to whether or not these have been implemented in accordance with the treaty regime. At present the parties to the Mekong Agreement and the Mekong River Commission appear divided on the Xayaburi dam, which Laos proposes to build on the

19 P Wouters, H Chen 'China's 'soft-path' to transboundary water cooperation examined in the light of two UN global water conventions: exploring the "Chinese way"' *Journal of Water Law* 22 (6) 229.

20 Recently China and India have concluded agreements to exchange information on this shared watercourse; see 'China and India sign water pacts' (22 May 2013) <http://www.populationmatters.org/2013/newswatch/china-india-sign-water-pacts/>. India and China have attempted to improve bilateral relations, signing agreements on information-sharing on the Brahmaputra, and on water-efficient irrigation and cooperation in wastewater treatment. These were concluded following meetings between Indian Prime Minister Manmohan Singh and Chinese Premier Li Keqiang, who chose India as his first foreign destination as premier.

21 Wouters and Chen 'China's "soft-path" to transboundary water cooperation' (n 19) 229–47.

22 B Chellaney *Water: Asia's New Battleground* (Georgetown University Press Washington DC 2011).

23 S Vinogradov 'Can the dragon and bear drink from the same well? Examining Sino-Russian cooperation on transboundary rivers through a legal lens' *Journal of Water Law* (forthcoming).

24 P Wouters 'Sovereignty revisited – examining the rules of international law that govern transboundary water resources with a focus on upstream/downstream state practice. Possible lessons learned for the Euphrates-Tigris' in A Kibaroglu, A J Kirschner, S Mehring and R Wolfrum (eds) *Water Law and Cooperation in the Euphrates Tigris Region: A Comparative and Inter-disciplinary Study of International and National Water Law* (Brill Publishers 2013).

25 See Niranjana D Gulhati *The Indus Waters Treaty: an Exercise in International Mediation* (Allied Publishers Bombay 1973); Arthur Michel Aloys *The Indus Rivers: a Study of the Effects of Partition* (Yale University Press New Haven 1967); and B G Verghese *Waters of Hope* (Oxford and IBH Publishing New Delhi 1990).

26 Water allocation was not covered in the 1947 India Independence Act. The two countries initially agreed to a Standstill Agreement which froze water delivery of the two main now Indian tributaries for three months. After the agreement expired in March 1948, the government of the Indian state of Punjab cut off downstream water deliveries.

27 The Tennessee Valley Authority was a New Deal program which developed a series of multiple purpose dams in the Tennessee Valley, a tributary of the Mississippi River, to demonstrate the economic and social benefits of public power and basin-wide management. President Roosevelt hoped to apply it as the model for all major United States river basins, but states and local interests rejected it. However, it served for the post Second World War model of United States aid and advice to riparian states developing their water resources.

28 *Indus Waters Kishenganga Arbitration (Pakistan v India)*. For the Order of Interim Measures see the website of the Permanent Court of Arbitration [http://www.pca-cpa.org/showpage.asp?pag\\_id=1392](http://www.pca-cpa.org/showpage.asp?pag_id=1392).

lower Mekong, upstream from Cambodia and Vietnam. China continues to build dams in the upper reaches of the Mekong, which some claim have had adverse impacts downstream. However, China is not a party to the Mekong Agreement, and Laos claims to have complied with its obligations under the treaty.

Sovereign nations continue to develop the resources of their shared transboundary waters, asserting national sovereign rights as justification for their actions. It is within this context that we suggest that the evolving rules of international law and practice around the notion of state sovereignty invite a reconceptualisation through the lens of the global community's vested interest in the peaceful management of the world's diminishing fresh water resources, in accordance with existing rules of international law in this field, including human rights, environmental protection and development needs.<sup>29</sup>

#### The duty to cooperate normative challenge

Rules of customary law are difficult to establish and to apply in practice. As elaborated in the *North Sea Continental Shelf* case, a customary rule is state practice that has hardened into a widely, but not necessarily universally followed, rule and is accepted by states as such through *opinio juris*.<sup>30</sup> In the environmental and natural resource field, the major problem with customary rules of international law are the limits that commentators and courts have imposed on their recognition and hence, application.<sup>31</sup> It is mostly a backward-looking process, which is often fraught with difficult problems of evidentiary proof. This is counter-intuitive in a field where the objective of international law-making should not be to look backwards past unsustainable and unfair practices into customary law, but rather should be forward-looking, aimed at developing a law suited for 21st century conditions, including redressing the mistakes of the past and anticipatory preparation for future threats.<sup>32</sup> Nonetheless, considerable progress has been made in the area of water resources management, where the duty to cooperate is well anchored in treaty and state practice, reviewed in the next part of this article.<sup>33</sup>

The two global instruments in this field, the UN Watercourses Convention 1997 (UNWC) and the UNECE Transboundary Water Convention 1992 (UNECE TWC) are both founded on the duty to cooperate, as are the rules and practices adopted under the many water-

related treaties concluded around the world.<sup>34</sup> The concept also permeates national state practice under the umbrella of Integrated Water Resources Management (IWRM) adopted by the international community as best practice for the effective management of water resources. Further, instruments such as the UN Resolution on the Human Right to Water and Sanitation,<sup>35</sup> the ongoing UN work on transboundary aquifers<sup>36</sup> and water-related multilateral conventions such as RAMSAR,<sup>37</sup> the Convention on Biological Diversity,<sup>38</sup> the UN Framework Convention on Climate Change (UNFCCC)<sup>39</sup> and the UN Desertification Convention (UNCD)<sup>40</sup> have each contributed to cooperation in water resources management in a myriad of ways.

International jurisprudence also recognises the duty to cooperate. The ICJ, in *obiter dicta* in the *Gabikovo-Nagyymaros* case,<sup>41</sup> cited with approval the 1997 UNWC's governing rule of equitable and reasonable use, despite its non-entry into force at the time. The Court held that Slovakia's unilateral diversion of 90 per cent of the Danube's flow violated Hungary's right to an equitable and reasonable use of the waters. The Court also found that the duty to cooperate was contained and forged in the 'integrated joint regime' and 'single and indivisible nature' of the treaty agreed to by the parties. In his separate opinion, Justice Weeramantry went even further and highlighted the need for continuous cooperation through procedural mechanisms such as 'monitoring and exchange of information'.<sup>42</sup>

In the *Pulp Mills* case the ICJ linked the duty to cooperate with the substantive and procedural rules under the Argentine-Uruguayan treaty (1975 Statute), determining therefrom that the 'Parties have a legal obligation ... to continue their co-operation through CARU [the joint body] and to enable it to devise the necessary means to promote the equitable utilization of the river, while protecting its environment'.<sup>43</sup> Judge

34 Wouters 'Dynamic cooperation' (n 14).

35 UN Resolution on the Human Right to Water and Sanitation (n 18).

36 UN Resolution on transboundary aquifers <http://www.un.org/en/ga/sixth/66/TransAquifer.html>.

37 Convention on Wetlands of International Importance especially as Waterfowl Habitat (RAMSAR) text as amended [http://www.ramsar.org/cda/en/ramsar-documents-texts-convention-on/main/ramsar/1-31-38%5E20671\\_4000\\_0\\_](http://www.ramsar.org/cda/en/ramsar-documents-texts-convention-on/main/ramsar/1-31-38%5E20671_4000_0_).

38 UN Convention on Biological Diversity (UN CBD) <http://www.cbd.int/convention/text/>.

39 See UNFCCC [http://unfccc.int/essential\\_background/convention/background/items/1349.php](http://unfccc.int/essential_background/convention/background/items/1349.php).

40 UN Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification [http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtmsg\\_no=XXVII-](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtmsg_no=XXVII-).

41 *Gabikovo-Nagyymaros Project Hungary-Slovakia* (1998) 37 ILM 162 (ICJ 25 September 1997) 21.

42 <http://www.icj-cij.org/docket/files/92/7383.pdf>. Judge Weeramantry decided: 'A continuous monitoring of the scheme for its environmental impacts will accord with the principles outlined, and be a part of that operational régime. Indeed, the 1977 Treaty, with its contemplated régime of joint operation and joint supervision, had itself a built-in régime of continuous joint environmental monitoring'.

43 The Court adds that 'both Parties have the obligation to enable CARU, as the joint machinery created by the 1975 Statute, to exercise on a continuous basis the powers conferred on it by the 1975 Statute, including its function of monitoring the quality of the waters of the river and of assessing the impact of the operation of the Orion (Botnia) mill on the aquatic environment'. *Argentina v Uruguay Case Concerning Pulp Mills on the River Uruguay* ICJ General List 135 (2010) <http://www.icj-cij.org/docket/files/135/15877.pdf> at para 266.

29 Brown Weiss 'The coming water crisis' (n 16) 153–68 at 165.

30 *Case Concerning North Sea Continental Shelf (Germany v Netherlands)* Judgment of 20 February 1969 [1969] ICJ Rep 3.

31 Jörg Kammerhofer 'Uncertainty in the formal sources of international law: customary international law and some of its problems' (2004) 15 *European Journal of International Law* 523–53.

32 Bodansky provides a detailed overview of how new norms emerge in the field of international environmental law; see Daniel Bodansky *The Art and Craft of International Environmental Law* (Harvard University Press 2010) 86. For a current treatment of this topic see John Burrit McArthur 'International environmental law: can it overcome its weaknesses to create an effective remedy for global warming?' (2013) 10 *Santa Clara J Int'l L* 253 <http://digitalcommons.law.scu.edu/scujil/vol10/iss2/9>.

33 *The North Sea Cases* [1969] ICJ Reports 3 (Dissenting opinion Judge Lachs); D Magraw, L Hawke 'Sustainable development' in D Bodansky, J Brunnée and E Hey (eds) *The Oxford Handbook of International Environmental Law* (Oxford University Press Oxford 2007).

Greenwood, filing a separate opinion in this case, examined the duty to cooperate under the treaty regime and noted the importance of the treaty's procedural rules in advancing cooperation: 'The characterization of these provisions as procedural should not be taken as in any way minimizing their importance. On the contrary they are an important feature of the system for ensuring the optimum and rational utilization of the resources of the river through co-operation between the parties'.<sup>44</sup> He argues that preparatory works that do not run contrary to the purposes of the treaty are permissible, and that action such as 'engaging in preliminary steps such as clearing vegetation from a proposed site, levelling the land or preparing foundations is unlikely in itself to have any adverse impact on navigation, the régime of the river or the quality of its waters and, if it does not do so, then I cannot see how it would run counter to the purpose of this part of the Statute'.<sup>45</sup>

Citing the *North Sea* case, Judge Greenwood commented on the duty to negotiate stated at para 16:

the duty to negotiate in good faith, as paragraphs 145 and 146 of the Judgment point out, is firmly rooted in general international law. While that duty does not amount to a requirement that the negotiations lead to any particular outcome, it does require that the parties to the negotiations must conduct themselves in such a way that the negotiations are meaningful'

He continued that by agreeing with paragraph 147 of the judgment that:

there would be no point to the co-operation mechanism provided for by Articles 7 to 12 of the 1975 Statute if the party initiating the planned activity were to authorize or implement it without waiting for that mechanism to be brought to a conclusion. Indeed, if that were the case, the consultations and negotiations between the parties would no longer have any purpose.

However, Judge Greenwood did not agree with the Court's decision that the preparatory actions undertaken by Uruguay breached its duty to negotiate in good faith under the treaty.<sup>46</sup> He explored the details of procedural obligations under the treaty, commented on the burden of proof and closed by stating: 'The

Parties have a *duty to co-operate* to ensure that that machinery continues to work well in the future' (para 29) (emphasis added).

The global community has also shown its support for the duty to cooperate in the peaceful management of the world's water resources, indicated through a series of UN and other initiatives, including the UN Resolution on the International Year of Water Cooperation.<sup>47</sup> Together these examples from treaty and state practice, and judicial decisions support the existence of a duty to cooperate in the management of the world's water resources. This duty to cooperate is integral to the hydro-commons model that we propose here.<sup>48</sup>

### The *erga omnes* challenge

The veneration of state sovereignty and the backward-looking notion of customary rules have combined to marginalise the idea of universal obligations. Further, the proliferation of new norms, especially without due rigour may result in the 'troublesome de-conventionalization of conventional rules', and a 'relativization of normativity' that 'may eventually disable international law from fulfilling what have always been its proper functions'.<sup>49</sup> Despite this cautionary warning, it is clear that, under certain conditions, new norms, even peremptory norms can emerge, as and when appropriate and in accordance with the rigours of norm-creation under international law.

In fact, international law has a long tradition of recognising *erga omnes* obligations<sup>50</sup> and the fascination with the topic continues fervently.<sup>51</sup> While these norms are often discussed together with peremptory rules of *jus cogens*,<sup>52</sup> the two notions are clearly distinctive. As Zemanek puts it:

The most advanced type of this kind of obligation derives from peremptory norms of international law (*jus cogens*). They differ from ordinary *erga omnes* obligations insofar as they do not protect common values or interests of a random group of states but the basic values on which the international community as a whole is built. Thus, all

47 UN Resolution 65/154 International Year of Water Cooperation (2013) UN Doc A/RES/65/154 (11 February 2011).

48 Wouters 'Dynamic cooperation' (n 14).

49 Prosper Weil 'Towards relative normativity in international law?' (1983) 77 *AJIL* 413, 436–39.

50 For a brief summary see 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 Fastenrath (n 2) 226.

51 C Tams, A Asteriti '*Erga omnes*' in Evans and Koutrakis (n 3) 6.

52 Vienna Convention on the Law of Treaties (VCLT) (23 May 1969) 1155 UNTS 331 (1969) 8 *International Legal Materials* 679. Article 53 of the VCLT provides: 'A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'. The Commentary to this provision explains: 'the Commission concluded that in codifying the law of treaties it must start from the basis that today there are certain rules from which states are not competent to derogate at all by a treaty arrangement, and which may be changed only by another rule of the same character' (1966) 2 *Yearbook of the International Law Commission* 247.

44 *ibid*. See Separate Opinion of Judge Greenwood 214 para 9. Judge Greenwood did not agree with the Court's conclusion, in paragraphs 143 to 150 of the judgment, that Uruguay violated its obligations under the statute by the steps which it took to authorise work on the two mills before the end of the third negotiation stage of the procedure in arts 7 to 12. He provides interesting and helpful guidance on what preparatory measures a state might undertake whilst still in compliance with procedural rules and the duty to cooperate.

45 *ibid* 216 para 14. Judge Greenwood continues: 'Of course, the party which takes such preliminary steps runs the risk that they may prove to have been wasted if the proposed works are not, in the end, carried out, but that does not mean that the taking of those steps is itself a violation of the Statute'.

46 *ibid* para 16: 'In my opinion, a party can engage in good faith in negotiations which are meaningful while still taking preparatory steps to ensure that it is ready to proceed with the works if the negotiations result in agreement that they may be carried out, or if no agreement is reached within the prescribed period. To take such steps is not, in itself, contrary to the duty to negotiate in good faith. Only if the negotiating record as a whole shows that the party concerned did not intend to engage in meaningful negotiations would the Court be justified in concluding that that duty had been breached'.

peremptory norms create obligations *erga omnes*, but not all *erga omnes* obligations derive from peremptory norms.<sup>53</sup>

Obligations *erga omnes* continue to be studied today, and are no longer 'purely theoretical' but now of increased relevance in contemporary society.<sup>54</sup> Crawford explored this topic during his tenure as Special Rapporteur to the International Law Commission (ILC) on the study of rules of state responsibility,<sup>55</sup> his survey traced the development of the notion of 'communitarian' norms and identified its origins more than 50 years ago in Sir Humphrey Waldock's 1962 Hague Academy lectures relating to the establishment of the Permanent Court of Justice in 1921.<sup>56</sup>

The most cited passage on obligations *erga omnes* comes from the ICJ decision in *Barcelona Traction*, where it 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*'.<sup>57</sup> The Court referred to examples such as 'the outlawing of acts of aggression, and of genocide, and also ... the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination'.<sup>58</sup> While this view attracted the unanimous support of all of the judges,<sup>59</sup>

the concept provoked considerable legal discourse,<sup>60</sup> which has served to distil its essential elements, discussed in more detail below.<sup>61</sup>

Obligations *erga omnes* are referred to by the ILC in its Draft Articles on State Responsibility, which codify and progressively develop the law in this field. Notably the concept finds expression in the commentary to the very first provision of the draft, which sets out the primary rule that: 'Every internationally wrongful act of a state entails the international responsibility of that state'.<sup>62</sup> State responsibility can arise in a number of situations: '... from breaches of bilateral obligations, or of obligations owed to some states, or to the international community as a whole. It can involve relatively minor infringements as well as the most serious breaches of obligations under peremptory norms of general international law' (emphasis added).<sup>63</sup> In explanatory commentary the ILC states: '... increasingly it has been recognised that some wrongful acts engage the responsibility of the state concerned towards several or many states or even towards the international community as a whole' (emphasis added). The ILC then goes on to elaborate this in more detail in Parts II and III of the ILC Draft.

*Erga omnes* obligations may be invoked by a non-injured state: 'In keeping with the broad range of international obligations covered by the articles, it is necessary to recognise that a broader range of states may have a legal interest in invoking responsibility and ensuring compliance with the obligation in question.' Indeed, in certain situations, all states may have such an interest, even though none of them is individually or specially affected by the breach as recognised

53 K Zemanek 'New trends in the enforcement of *erga omnes* obligations' in J A Frowein, R Wolfrum (eds) (2000) *Max Planck Yearbook of United Nations Law* 1–52 at 6. Tams and Asteriti agree, stressing that: 'there are sound reasons, both conceptual and pragmatic, to maintain the distinction between obligations *erga omnes* and norms of *jus cogens*. Notably, whereas *jus cogens* norms are characterised by their elevated hierarchical status, obligations *erga omnes* can well operate on an "ordinary" hierarchical level. Whereas *jus cogens* status affects the validity of conflicting norms, *erga omnes* status affects the position of third states vis-à-vis the obligation. *Jus cogens* and obligations *erga omnes* – at least in their current "incarnation" – thus may have entered the international legal discourse almost simultaneously, but follow different rationales'. See C Tams, A Asteriti '*Erga omnes*' in Evans and Koutrakis (n 3) 6.

54 Tams and Asteriti cite this quotation from Hugh Thirlway in his 1989 article; see C Tams and A Asteriti '*Erga omnes*' in Evans and Koutrakis (n 3) 2 at n 7.

55 The ILC adopted Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries at its fifty-third session (2001) 2(2) *Yearbook of the International Law Commission* 31 [http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf). The UN took note of the Draft in UN Resolution 1391 (28 January 2002) UN Doc A/RES/56/83. For a summary history of the ILC's work on this topic see [http://untreaty.un.org/ilc/summaries/9\\_6.htm](http://untreaty.un.org/ilc/summaries/9_6.htm). The matter remains under consideration by the UN Legal Sixth Committee and is on its 2013 agenda.

56 Crawford 'Responsibility for breaches' (n 50) in Fastenrath (n 2) 226. Waldock was referring to the scope of acceptance under the PCIJ's compulsory jurisdiction provision.

57 *Case Concerning Barcelona Traction, Light & Power Company Limited (Belgium v Spain)* [1970] ICJ Rep 3, 32 at para 33.

58 *ibid* para 34.

59 Noted by M Ragazzi 'The concept of international obligations *erga omnes*: their moral foundation and criteria of identification in light of two Japanese contributions' in Guy S Goodwin-Gill, Stefan Talmon (eds) *The Reality of International Law: Essays in Honour of Ian Brownlie* (Clarendon Press Oxford 1999) 455–77; Oxford Scholarship Online (January 2010) 11.

60 E J Criddle, E Fox-Decent 'A fiduciary theory of *jus cogens*' (2009) 34 *The Yale Journal of International Law* 331, 344–45; see also *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ 15, 23 (28 May). See also Weil (n 49) 413.

61 C Tomuschat, J M Thouvenin (eds) *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Brill Publishers 2006); Karl Zemanek 'New trends' (n 53) in Frowein and Wolfrum (n 53) 1–52; Christian J Tams *Enforcing Obligations Erga Omnes in International Law* (Cambridge Books Online 2010); C J Tams 'Individual states as guardians of community interests' in Fastenrath (n 2) 379, 385; Ragazzi 'The concept' (n 59); Michael Byers 'Conceptualising the relationship between *jus cogens* and *erga omnes* rules' (1997) 66 *Nordic Journal of International Law* 211–39; Olivia Lopes Pegna 'Counter-claims and obligations *erga omnes* before the International Court of Justice' (1998) 9 *European Journal of International Law* 724–36; André de Hoogh *Obligations Erga Omnes and International Crimes: a Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States* (Martinus Nijhoff Publishers Dordrecht 1996).

62 ILC Articles on Responsibility of States for Internationally Wrongful Acts, adopted in the Report of the International Law Commission on the work of its fifty-third session in its Commentary to Article 1 at 33 explains: 'Opinions have also differed on the question whether the legal relations arising from the occurrence of an internationally wrongful act were essentially bilateral, i.e. concerned only the relations of the responsible state and the injured state *inter se*. Increasingly it has been recognized that some wrongful acts engage the responsibility of the state concerned towards several or many states or even towards the international community as a whole'.

63 Chapter III of Part II of the ILC Draft Articles (n 55) deals with the special situation which arises in case of a serious breach of an obligation arising under a peremptory norm of general international law, and specifies certain legal consequences of such breaches, both for the responsible state and for other states.

under Article 48.<sup>64</sup> Rapporteur Crawford covers the background to the ILC's adoption of this provision, noting also that the Commission took a similar approach under Article 52 of its Draft Articles on Responsibility of International Organisations, albeit with functional restrictions.<sup>65</sup>

Article 48 of the ILC Articles on State Responsibility progressively develops the law in this field, permitting claims of state responsibility by a state other than an injured state and thereby recognising the legal standing by all states where an obligation *erga omnes* is breached.<sup>66</sup> Interestingly, the provision does not use this precise terminology, referring instead to obligations owed to 'the international community as a whole'.<sup>67</sup> The ILC Commentary explains that '... the articles avoid use of the term "obligations *erga omnes*", which conveys less information than the Court's reference to the international community as a whole and has sometimes been confused with obligations owed to all the parties to a treaty'.<sup>68</sup> Brown-Weiss, referring to Article 48(1)(b) as the 'most interesting and presumably still controversial part of Article 48', predicts that this category of obligations is likely to grow, especially in the areas of human rights and environmental protection.<sup>69</sup> She suggests that the term 'international community as a whole' broadens the reach of the rules in this field considerably since it 'now comprises important actors other than states'.<sup>70</sup>

The Commission's approach, under its Articles on State Responsibility and the Draft Articles on Responsibility of International Organisations, 'gives teeth to communitarian norms with the potential to serve a corrective tool for compliance with norms in the interest of all, for example, in the areas of the protection of human rights, of environmental law, and arms control'.<sup>71</sup>

64 ILC Articles on Responsibility of States for Internationally Wrongful Acts (n 62) Commentary 116. Crawford provides a summary of the development of Chapter III of Part II, which was at one time entitled 'serious breaches of obligations to the international community as a whole' and intended as a 'framework for the progressive development within a narrow compass, of a concept which is or ought to be broadly acceptable'; Crawford 'Responsibility for breaches' (n 50) 234.

65 Crawford 'Responsibility for breaches' (n 50) in Fastenrath (n 2) 232; see also UN Doc A/CN.4/L.725, 3–4.

66 Article 48, entitled 'Invocation of responsibility by a State other than an injured State' provides as follows:

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if: (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) the obligation breached is owed to the international community as a whole.
2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State: (a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and (b) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.
3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

67 ILC Articles on Responsibility of States for Internationally Wrongful Acts (n 62) art 48.1(b) at 127.

68 *ibid* Commentary 127. The commentary refers to the *Barcelona Traction* case, 'taking up the essence' of its statement on obligations *erga omnes*.

69 E Brown Weiss 'Invoking state responsibility in the twenty-first century' (2002) 96 *AJIL* 798, 804.

70 *ibid* 804.

71 Crawford 'Responsibilities for breaches' (n 50) 240.

However, it appears that the likelihood of an opening of the floodgates for these types of claims is low, with the ILC reiterating a cautious and limited approach to the elaboration of new obligations *erga omnes*, aligned to the guidelines set out in *Barcelona Traction*.<sup>72</sup> Nonetheless, recent scholarship on this topic suggests that 'the *erga omnes* concept has had an impact on the legal rules governing the implementation of responsibility. Influenced by the *erga omnes* concept, contemporary international practice has embraced different forms of "public interest enforcement" in response to breaches of fundamental obligations of international law'.<sup>73</sup>

In examining more closely what qualifies as an obligation *erga omnes*, Ragazzi, in his extensive study on this topic, observed:

The dictum in the *Barcelona Traction* case identifies two characteristic features of obligations *erga omnes*. The first one is *universality*, in the sense that obligations *erga omnes* are binding on all states without exception. The second one is *solidarity*, in the sense that every state is deemed to have a legal interest in their protection. Of these two characteristic elements, the second one (solidarity) is linked with wider issues of enforcement and legal standing in international law'.<sup>74</sup> (emphasis added)

Ragazzi explores a series of possible issue areas that might be candidates for the emergence of obligations *erga omnes* – human rights, development law and environmental law,<sup>75</sup> evaluating each of these through an analytical template, devised from his research on the topic and comprising five elements: (i) narrowly defined obligations; (ii) negative obligations; (iii) obligations or duties; (iv) derived from rules of general international law belonging to *jus cogens* norms and contained in widely endorsed treaties; (v) obligations aligned with political objectives, which reflect moral values.<sup>76</sup> There are other approaches,<sup>77</sup> and while

72 ILC Articles on Responsibility of States for Internationally Wrongful Acts (n 62) Commentary 127. See also the ILC Report of the Study Group 'Fragmentation of international law: difficulties arising from the diversification and expansion of international law' (13 April 2006) UN Doc A/CN.4/L.682 193 para 380 and para 409, where it discusses obligations *erga omnes*; and Institut de Droit International 'Obligations *erga omnes* in international law' IDI Resolution adopted at the Krakow Session 2005 (Rapporteur G Gaja).

73 Tams and Asteriti suggest that this impact has been akin to a 'fine-tuning' rather than rewriting the laws of state responsibility; see C Tams, A Asteriti 'Erga omnes' in Evans and Koutrakis (n 3) 16, 27. See also Jutta Brunnée 'International law and collective concerns: reflection on the responsibility to protect' in T Ndiaye, R Wolfrum (eds) *Liber Amicorum Judge Thomas A. Mensah* (Brill Publishers 2007) 35–51 states at 49 that: 'The responsibility to protect merely builds upon the balance already struck by international law through the concept of *erga omnes* effect. In turn, in doing so, it reinforces the foundation of primary norms with *erga omnes* effect upon which the operation of the attendant State responsibility rules depends'.

74 M Ragazzi 'The concept' (n 59) 17. Ragazzi continues: 'The first one (universality), which has been unduly neglected in the international literature (at least in the specific context of obligations *erga omnes*), raises complex theoretical problems. In particular, it appears difficult to reconcile this element with the structure of international society, which is composed of independent entities giving rise, as a rule, to legal relations on a consensual basis'.

75 Ragazzi 'The concept' (n 59) 132–62.

76 *ibid* 133–34.

77 Byers (n 61) at 233 states: 'The creation of an *erga omnes* rule is, therefore, a two-step process involving: firstly, the creation of a rule; and secondly, the creation of additional bilateralised rights and

Ragazzi acknowledges that the criteria he puts forward are not prescriptive, they are helpful in exploring our premise that there now emerges an obligation *erga omnes* regarding the cooperative management of the world's water resources.

#### THE DUTY TO COOPERATE IN THE PEACEFUL MANAGEMENT OF THE WORLD'S WATER RESOURCES: TOWARDS A LAW OF THE HYDRO-COMMONS

We must have a world that recognizes and responds to the millions and millions who for too long have remained hidden within aggregate statistics that mask the reality of life without safe drinking-water and sanitation: children, women, people with disabilities and those living in remote areas and urban slums. The post-2015 agenda must not move forward without clear objectives towards the elimination of discrimination and inequalities in access to water, sanitation and hygiene.<sup>78</sup>

Given the global nature of water resources and its unique and essential importance to life on earth, we consider that the rules governing the use of this precious resource to be of concern to the international community as a whole. We also believe that its cooperative management at all levels is in the interest of all states, especially in our contemporary setting where close to half of the earth's population and a significant portion of the world's ecosystems will suffer serious adverse effects in the short and medium term as a result of increased demand and poor management.<sup>79</sup> From this perspective this duty encompasses the three areas identified by scholars writing in this field – human rights, development law and environmental law. In fact, the cooperative management of the world's water resources lies at the very intersection of these three areas – every state has an identifiable interest in every other state taking into account the human rights, right to development and the health of the environment in its use of water resources.

As UN Secretary General Ban Ki-moon recently asserted: 'Human rights and the environment are not only inter-related, they are also interdependent. A healthy environment is fundamentally important to the enjoyment of human rights, and the exercise of human rights is necessary for a healthy environment'.<sup>80</sup> In this light, we

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obligations which confer standing, in the event of any violation, on any of the States subject to that rule. It may be possible for these two steps to occur simultaneously'. For a different view see Claudia Annacker 'The legal regime of *erga omnes* obligations in international law' (1994) 46 *Austrian JPIIL* 131.

78 'UN calls on countries to ensure access to water and sanitation in development agenda' (21 February 2013) <http://www.un.org/apps/news/story.asp?NewsID=44196&Cr=water+and+sanitation&Cr1=#.USejgWfDvYE>.

79 Benvenisti 'Sovereigns as trustees of humanity' (n 9). Benvenisti argues that sovereignty should be reconceptualised in light of contemporary changes to society, which has resulted in a more integrated world. He proposes that sovereignty be considered more akin to a trusteeship, not only to a state's own citizens but towards humanity as a whole, with concomitant minimal normative and procedural 'other-regarding' obligations.

80 Ban Ki-moon 'At UN forum, Ban calls on countries to invest in environmental policies to spur growth' (19 February 2013) <http://www.un.org/apps/news/story.asp?NewsID=44172&Cr=environment&Cr1=human+rights#.USeiWfDvYF>.

assert that: 'Every state, by virtue of its membership in the international community, has a legal interest in the protection of certain basic rights and the fulfilment of certain essential obligations with respect to the management of the world's water resources',<sup>81</sup> and, more specifically, the right (and duty) to the cooperative peaceful management of its water resources to ensure water for all.

Ragazzi (and many commentators in this field) arrives at a similar conclusion, but cautions that:

... it is important to stress that reliance on the moral foundation of obligations *erga omnes* does not, of itself, open the door to an easy multiplication of obligations *erga omnes*. On the contrary, this test and the other tentative criteria of identification of obligations *erga omnes* would seem to reflect the International Court's degree of selectivity of these obligations, and confirm that additional candidates should not be multiplied freely but identified rigorously.<sup>82</sup>

Let us review the emerging obligation *erga omnes* through the prism of the five criteria set forth by Ragazzi. Is the duty to cooperate in the management of the globe's water resources 'narrowly defined'? Does it qualify as a 'negative obligation'? We believe that both of these tests can easily be met. The emerging rule that we propose can be readily cast in the negative: 'states shall not use their waters in ways that do not take into account the interests of others'. If we wish to align this more closely with the security provisions of Chapter VII of the UN Charter, the rule could be cast as: 'states shall not use their transboundary water resources in any way that might constitute a threat to peace or an act of aggression'. Perhaps, this is a preferred formulation, given the Ragazzi test. However, we prefer to state the rule in a positive sense since we consider that affirmative duties are necessary to afford riparian states the protections inherent in well established negative duties.

Reflecting more broadly across the five elements of Ragazzi's test, and through the condition of 'universality', we would argue that our proposal meets these requirements, for many of the reasons set forth in this article and developed more fully in the next section. Regarding the 'solidarity' condition, this can also be met through the community-of-interests approach referred to repeatedly in international water law, discussed in more detail below.<sup>83</sup> We endorse Ragazzi's observation of the close alignment between obligations *erga omnes* and norms of *jus cogens*, relevant in the water resources field (especially from

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81 ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts (n 55) 33.

82 Ragazzi 'The concept' (n 59) p 477.

83 The notion of solidarity was found to be prevalent in scholarship in international environmental law. Timoshenko notes: 'The majority of scholars relate this point to the category of "solidarity", "collective", or even "peoples" rights. Like other solidarity rights, the right to a favourable environment has both individual and collective dimensions. ... The collective aspect means the obligation of states and other social actors to regard all human interests as superior to national or individual interests and to participate via international cooperation in resolving global environmental problems'. See A S Timoshenko 'Ecological security: response to global challenges' in Brown Weiss *Environmental Change and International Law* (n 15) 331.



the human rights perspective, not discussed fully here) although conceptually they are distinct. The next section explores all of this in more detail.

Our argument is grounded in the evolutionary theory of international law, which is illustrated by the development of international environmental law and international development law, international human rights law and the emerging global consensus around the critical importance of water.<sup>84</sup> The sustainable use of our natural resource patrimony is now an urgent global imperative as the continuing project of curbing external and internal aggression.<sup>85</sup> We begin below with a survey demonstrating support for the evolution of the law in this field and then proceed to explore more fully the cornerstone aspects of obligations *erga omnes*, the requirements of 'universality' and 'solidarity'. We finish by examining how the rules of state responsibility apply to this new rule and why this rule is so important in contemporary times.

#### Theories of evolution: global cooperation

Theories of evolution abound and provide hope for understanding how we might go forward in the future. Only 50 years ago Friedman observed the emergence of cooperation as a new development in international law, displacing the prevalence of coexistence as the central tenet of the law of nations.<sup>86</sup> Today noted scientists urge us to embrace cooperation as essential for addressing the 'emerging environmental crisis'.<sup>87</sup> Science, policy and legal discourse now interweave in their universal support for global cooperation, with an emergent increasingly aligned and shared understanding now coalescing in a significant body of scholarship,<sup>88</sup> policy documents and grey literature.<sup>89</sup>

Clearly, international law is capable of evolving to meet new challenges, however slow and uneven the trajectory. States have lost their dominance as the central actors in international legal relations, with humankind and ecosystems emerging as primary focal points, with their individual representatives, human persons and nature writ large. The recognition of a common interest of states in the global environment provides the foundation for emerging obligations *erga*

*omnes* in this field.<sup>90</sup> This approach is hardly new; scholars have been positing this view for decades.<sup>91</sup> The field of international environmental law provides a useful model for our study on water because it has rapidly redefined the concept of national interest and sovereignty by placing new limits on exercises of traditional sovereign prerogatives when the legitimate interests of other states are compromised.<sup>92</sup>

The International Court of Justice has recognised the rules that support the protection of the environment. In the 1996 Advisory Opinion on the *Nuclear Weapons* case, the Court stated:

... [t]he existence of the general obligation of states to ensure that activities within their jurisdiction and control respect the environment of other states of areas beyond national control is now part of the corpus of international law relating to the environment. ... 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.<sup>93</sup>

The Court continued this discourse in the 1997 *Gabíkovo-Nagyymaros* case, referring there to respect for the environment, 'not only for states but also for the whole of mankind'.<sup>94</sup> A UNEP study reinforced this approach, as one of many examples in the UN sector.<sup>95</sup>

Traditionally, national interest has driven sovereignty claims, but increasingly we recognise that states have common interests in the global environment, shared at a level of inter-dependency that is beyond the national domain, extending the reach of *locus standi*. The fulcrum for cooperation has shifted from national sovereignties to global communities. And while many transboundary water arrangements are based on bilateral agreements, this can be 'a barrier in the way of stronger

84 U Beyerlin 'Different types of norms in international environmental law, policies, principles and rules' in D Bodansky and others (n 33) 425–48. Beyerlin explores environmental 'twilight' norms, referring to 19 principles identified and examined in the Report of the Expert Group Meeting on Identification of Principles of International Law for Sustainable Development (Geneva September 1995) UN Doc UNEP/IEL/WS/3/2 (1996).

85 Anthony D Barnosky 'Approaching a state shift in earth's biosphere' (2012) 486 *Nature* 52.

86 W Friedmann *The Changing Structure of International Law* (Stevens & Sons London 1964).

87 M Nowak, R Highfield *Super Cooperators* (Canongate 2011) 277–78.

88 Notable among these is Elinor Ostrom's work on how we manage common pool resources, which used shared waters in many of her case studies; see E Ostrom 'Green from the grassroots' Project Syndicate (12 June 2012) <http://www.project-syndicate.org/commentary/green-from-the-grassroots>. In order to make an institution resilient, its regulation has to be easily adjustable and the members of the institution need to be knowledgeable about change and how to adapt to it.

89 As only one recent example, see the vast literature launched and shared at the Stockholm Water Week, and the plethora of meetings on the topic <http://water-liisd.org/water-update/>.

90 Brown Weiss *Environmental Change and International Law* (n 15) 18: 'The recognition of a common interest of States in the global environment may lead to international rules which are considered *erga omnes* applicable to all states and enforceable by all States'. Ragazzi 'The concept' (n 59) at 156 explores a number of possibilities, stating: 'The very nature of the human environment as a holistic entity, and the relationship between its protection and the enhancement of the basic values of the international community, make environmental law an obvious area to explore ...'.

91 See Brown Weiss *Environmental Change and International Law* (n 15) 18: 'The recognition of a common interest of States in the global environment may lead to international rules which are considered *erga omnes* applicable to all states and enforceable by all States'.

92 *ibid* 19, where she asserts that: 'In international environmental law, we are redefining the concept of national interest. National interest has traditionally meant the identification of interests of one country that are distinct from or even contrary to those of another'. See also Beyerlin (n 84) 439–46; A S Timoshenko 'Ecological security: response to global challenges' (n 83) in Brown Weiss *Environmental Change and International Law* (n 15) 323: 'Primacy of international law requires recognizing the supremacy of values common to all mankind over all other values and interests, including giving the highest priority to human survival through the protection of the natural environment'.

93 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 24 para 29.

94 *Gabíkovo-Nagyymaros* [1997] ICJ Rep 41 para 53.

95 UNEP Report of Meeting of Group of Legal Experts to examine the concept of the 'common concern of mankind in relation to global environmental issues' (20–22 March 1991) <http://www.juridicas.unam.mx/publica/librev/rev/iidh/cont/13/doc/doc29.pdf>. See also discussion in Brown Weiss 'The coming water crisis' (n 16) 164, which observes: 'The UNEP experts' report stressed that the concept was not meant to be a substitute for the concept of the common heritage of mankind and should 'not infringe on the sovereign rights of states'.

solidarity in international law'.<sup>96</sup> In this context, *erga omnes* rules represent the antithesis of bilateralism.<sup>97</sup> In fact, despite the prominence of bilateralism in transboundary water treaties, most of the world's water is truly global, transcending national borders through goods and services moved around the world.

The emerging international law norm of sustainable development is also a useful precedent. The idea of sustainable development emerged in the 1980s as a way to bridge the north-south gap.<sup>98</sup> While the term remains contested and inchoate to this day, it is embraced by the global community, and qualifies the sovereign right to determine the rate and character of development. At a minimum, sustainable use requires that attention be given to the internal and external social costs of development, taking into account a range of interests. In the transboundary water sector, the UNWC reflects a similar approach, providing that international watercourses shall be used 'with a view to obtaining [their] optimal and sustainable utilization' and the primary rule of equitable and reasonable use, conditional upon a duty to protect the watercourse.<sup>99</sup> This informs the community of interests connected to the peaceful management of shared fresh waters.<sup>100</sup>

Brownlie suggested that the dispersed nature of pollution justified novel approaches, recommending 'a liberal approach to *locus standi*' issues, such that all states would have standing to claim against pollution that affects the common environment.<sup>101</sup> It is a view shared by the International Court; Judge Simma in his separate opinion in the *Congo-Uganda* case noted the 'community of interests' underlying the alleged breaches of international humanitarian and human rights law, finding that Uganda had standing to bring its claims relating to rights of non-nationals.<sup>102</sup> While

obligations *erga omnes* broaden the reach of legal standing, Tams claims that 'states prefer other ways of defending community interests'.<sup>103</sup> He observes that international law has evolved significantly in this respect and has 'accommodated community interests to a considerable extent'<sup>104</sup> and encourages international lawyers to approach the task of 'operationalising' community interests, 'confidently ... pragmatically ... holistically ... and creatively'.<sup>105</sup> We agree.

In 2012, the international community convened in Rio (following considerable preparatory meetings and work) at the largest global meeting to deal with environmental concerns. The UN resolution calling for this summit described the meeting's objectives: 'to secure renewed political commitment for sustainable development, assessing the progress to date and the remaining gaps in the implementation of the outcomes of the major summits on sustainable development and addressing new and emerging challenges'; the focus included two main themes, discussed and refined during the preparatory process: (a) a green economy in the context of sustainable development and poverty eradication; and (b) the institutional framework for sustainable development'.<sup>106</sup>

Rio+20 in its main outcome document, 'The Future We Want', endorsed by UN resolution, sets out the agenda for future action in this field.<sup>107</sup> The document reiterates support for the rule of law and the fundamental tenets of the Charter and provides: 'We recognise that water is at the core of sustainable development as it is closely linked to a number of key global challenges. We therefore reiterate the importance of integrating water into sustainable development, and underline the critical importance of water and sanitation within the three dimensions of sustainable development' (para 119).<sup>108</sup> This builds on Agenda 21, adopted two decades

96 Bruno Simma 'Bilateralism and community interest in the law of state responsibility' in Yoram Dinstein (ed) *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Martinus Nijhoff Publishers Dordrecht 1989) 821, 822–23. For a contrary view see Prosper Weil (n 49) 432.

97 Byers (n 61) 232.

98 Principle 3, 1992 Rio Declaration, which adopted the Brundtland Commission's definition of sustainable development and applied it to the exploitation of all natural resources including water: 'The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations'. Chapter 18 set out specific targets for equitable and sustainable water management and, since Rio, the promotion of sustainable water development and use has been a major objective of the United Nations.

99 Optimal utilisation was opposed by Iraq and Syria because it would privilege Turkey's large upstream projects, but the language was retained after the qualification that the interests of the water course states must be taken into account. See A Tanzi, M Arcari *The United Nations Convention of the Law of International Watercourses* (Kluwer Law International The Hague 2001) 103–108.

100 McCaffrey suggests that the 'the concept of community of interest can function not only as a theoretical basis of the law of international watercourses but also as a principle that informs concrete obligations of riparian states, such as that of equitable utilisation'; S C McCaffrey *The Law of International Watercourses* (2nd edn Oxford University Press Oxford 2007) 150. See also Lucius Calfish 'Règles générales du droit des cours d'eau internationaux' (1989–VII) (1992) 219 *Recueil des Cours* 59–61.

101 Ragazzi 'The concept' (n 59) 157, citing Ian Brownlie 'A survey of international customary rules of environmental protection' *Nat Resources Journal* 13 (1973) 179.

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

referred to in C J Tams 'Individual states as guardians of community interests' (n 61) in Fastenrath (n 2) 379–405, 386. See also the Institut de Droit International (IDI) 'Resolution on Rights and Obligations *Erga Omnes*' (2006) 71(II) *Annuaire de l'Institut de droit international* 286.

103 *ibid* 386, 388. Tams (n 61) asserts that the concept 'essentially clarifies that even in the absence of an express clause recognizing standing, all States can institute proceedings protecting fundamental community values'. He adds later: 'What is important to note is that international law does not prevent them from going to court, but has accommodated the idea of public interest litigation to a considerable extent'.

104 *ibid* 399.

105 *ibid* 405. Tams (n 61) at 391 identifies that the right of an individual guardian of the international community is set forth in the IDI resolution on *erga omnes*, expressed in its art 5: 'Should a widely acknowledged grave breach of an *erga omnes* obligation occur, all the States to which the obligation is owed ... are entitled to take non-forcible counter-measures under conditions analogous to those applying to a State specially affected by the breach' (footnote reference omitted).

106 UN Resolution A/RES/64/236 agendas fails to grapple with growing economic, social and environmental challenges linked directly to conflicts-of-use over waters that cross sovereign national borders' <http://css.escwa.org.lb/GARes/64-236.pdf>. UN Sec General Report.

107 UN Resolution 66/288 'The Future We Want' (11 September 2012) <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/476/10/PDF/N1147610.pdf?OpenElement>.

108 UN Water statement for Rio+20 'Water in a green economy': a statement by UN-Water for the UN Conference on Sustainable Development 2012 (Rio+20 Summit); para (8) states: 'Water challenges are a global concern and international action and cooperation at all level are required to accommodate them within the green economy.'

earlier, which noted: 'Transboundary water resources and their use are of great importance to riparian states'. One of the concerns was the 'new greening of global environmental In this connection, cooperation among those states may be desirable in conformity with existing agreements and/or other relevant arrangements, taking into account the interests of all riparian states concerned'.<sup>109</sup>

Treaties have been the primary vehicle to implement these broad policy goals. The growing support for the 1997 UNWC, the opening of the UN ECE TWC for universal endorsement, the adoption of the 2010 UN Resolution on the Right to Water and Sanitation<sup>110</sup> and the conclusion of regional treaties provide the framework for forging operational cooperation in this field.<sup>111</sup> However, challenges remain and these require new thinking in international water law, especially in three areas: (i) within the corpus of the body of law that applies in this area; (ii) within the environmental context, under the emerging green agenda linked to international environmental governance;<sup>112</sup> and (iii) within international law, more generally, as the foundation for the duty to cooperate and its implementation in practice. Pondering the future, let us look first at the past: some 20 years ago Edith Brown Weiss asserted: '[g]iven the astonishing developments of the past 20 years, what then awaits us in the future?'<sup>113</sup> Now is the time to ask the same question for the forthcoming 20 years.

### Universality

Ragazzi considers the test of 'universality' (ie obligations *erga omnes* are binding on all states without exception) to be the most troublesome at a conceptual level given the strong role of state sovereignty. His work offers some guidance in this respect in his conclusion that 'international obligations *erga omnes* have a moral foundation'.<sup>114</sup> The peaceful and co-

operative management of the world's shared international water resources squares firmly with this proposition, and is fully aligned with the fundamental principles espoused in the UN Charter.<sup>115</sup> The UN has consistently worked to fulfil the post-Second World War aspirations contained in the UN Charter, to promote regional peace and cooperation and advance the fundamental freedoms of all (UN Charter Article 1). A considerable series of UN resolutions, declarations, reports and UN field-based activities move in this direction, despite some limited resistance from nations who assert national sovereign interests and claims.<sup>116</sup> The UN General Assembly Resolution 2625 on the Principles of the Friendly Relations and Cooperation among States<sup>117</sup> begins with the duty to cooperate,<sup>118</sup> and recognises the need for joint and several actions towards achieving this obligation, based on the principles of sovereign equality and non-intervention.<sup>119</sup>

In recent efforts to reform the UN, former Secretary-General Kofi Annan, in his report 'In Larger Freedom',<sup>120</sup> summarises the UN approach: 'In a world of interconnected threats and challenges, it is in each country's self-interest that all of them are addressed effectively. Hence, the cause of larger freedom can only be

115 Concluded in 1945, the Charter begins: 'We the peoples of the United Nations' and lists its fundamental purposes:

1. To maintain international peace and security, to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.

116 Wouters 'Dynamic cooperation' (n 14).

117 UN General Assembly Resolution 2625 (XXV) Declaration on Principles of International Law Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/348/90/IMG/NR034890.pdf?OpenElement>.

118 UNGA Resolution 2625 para (a) provides: 'States shall co-operate with other States in the maintenance of international peace and security'.

119 UNGA Resolution 2625 para (c) provides: 'States shall conduct their international relations in the economic, social, cultural, technical and trade fields in accordance with the principles of sovereign equality and non-intervention'; para (d) provides: 'States Members of the United Nations have the duty to take joint and separate action in co-operation with the United Nations in accordance with the relevant provisions of the Charter. States should co-operate in the economic, social and cultural fields as well as in the field of science and technology and for the promotion of international cultural and educational progress. States should co-operate in the promotion of economic growth throughout the world, especially that of the developing countries'.

120 See K Annan *In Larger Freedom: Towards Development, Security and Human Rights for All* UN Doc A/59/2005 (2005); see also United Nations *A More Secure World: Our Shared Responsibility* Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change (2004) Doc A/59/565 at 77.

As recognized by the UN General Assembly Resolution 65/154 on the International Year of Water Cooperation 2013, there is an urgent need to develop appropriate water management frameworks and knowledge sharing networks for sound cooperation' <http://www.uncsd2012.org/rio20/content/documents/303UN-water%20Rio20%20Statement%201%20NOV.2011.pdf>.

109 Agenda 21: A Programme for Action for Sustainable Development (13 June 1992) Rio de Janeiro, Brazil in Report of the United Nations Conference on Environment and Development, Annex II, UN Doc A/Conf.151/26 vol II (1992).

110 UN Resolution on Right to Water and Sanitation UNGA Res 64/294 (adopted 3 August 2010) UN Doc A/RES/64/294.

111 P Wouters, R Moynihan 'International law and water security' in A Rieu-Clarke, F Loures (eds) *The UN Watercourses Convention in Force: Strengthening International Law for Transboundary Water Management* (Routledge Abingdon 2013); Bjørn-Oliver Magsig 'Overcoming state-centrism in international water law: "regional common concern" as the normative foundation of water security' (2011) 3 *Göttingen Journal of International Law* 317–44.

112 Jacob Park, Ken Conca and Matthias Finger (eds) *The Crisis of Global Environmental Governance: Towards a New Political Economy of Sustainability* (Routledge Abingdon 2008); J Gupta, L Lebel 'Access and allocation in earth system governance: water and climate change compared' (2010) 10 *International Environmental Agreements: Politics, Law and Economics* 377–95; United Nations Environment Programme 'The greening of water law: managing freshwater resources for people and the environment' (2010).

113 Brown Weiss *Environmental Change and International Law* (n 83).

114 Ragazzi 'The concept' (n 59).

advanced by broad, deep and sustained global co-operation among states. *Such cooperation is possible if every country's policies take into account not only the needs of its own citizens but also the needs of others.* This kind of cooperation not only advances everyone's interests but also recognizes our common humanity' (emphasis added).<sup>121</sup> The fact that the level of cooperation may vary from basin to basin does not undermine the universality of the general obligation.

The recent adoption of the UN Resolution on the Right to Water and Sanitation<sup>122</sup> and the UN declaration of 2013 as the International Year of Water Cooperation signal the global community of interests in the co-operative management of the world's shared water resources.<sup>123</sup>

While the rules of customary law in this field are universally acknowledged, reflected and progressively developed under the UNWC and UN ECE TWC, in practice we have seen the limitations with an approach predicated on rules of custom alone. We have also observed the challenges of litigation on matters related to international waters. It is also apparent that things have changed since the adoption of the only global instrument in this field, the UN Watercourses Convention, especially with respect to the interconnectivity of global water issues. Benvenisti, in his growing body of scholarship in this field, asserts that: 'Collective action in the utilisation of transboundary resources can, in principle, provide optimal and sustainable results. A bleak future of wars over control of water resources is not an unavoidable tragedy in our new millennium. Despite ominous predictions of global warming and population explosion, the problem in most cases is not insufficient supplies, but regulating the conflicting demands'.<sup>124</sup> The peaceful management of the world's shared water resources carries with it moral imperatives for the benefit of mankind and the world's ecosystems.<sup>125</sup>

### Solidarity

Solidarity in this context refers to the notion that every state is deemed to have a legal interest in the protection of obligations *erga omnes*. International society is cast as a 'legal community'<sup>126</sup> concerned with the protection and preservation of a healthy environment<sup>127</sup>

as an overarching norm, shared legal values that 'are considered to be the goal of the community' and which 'it is the duty of all members to realise'.<sup>128</sup> Numerous commentators have explored the idea of the international community,<sup>129</sup> including notions of collective action<sup>130</sup> and have advanced theories of 'hydro-solidarity' within this context.<sup>131</sup> At the foundation is the common consent of all nations to be bound by the rules of international law. One noted authority observes:

It is, however, in accord with practical realities to see the basis of international law in the existence of an international community the common consent of whose members is that there shall be a body of rules of law – international law – to govern their conduct as members of that community. In this sense 'common consent' could be said to be the basis of international law as a legal system. That common consent is reinforced by there being an increasing number of matters (such as international civil aviation, the use of international rivers, and questions of pollution) of which some rules are a real necessity and which can only be satisfactorily regulated by internationally valid rules.<sup>132</sup>

The Permanent Court of International Justice introduced the 'community-of-interests' notion in the *River Oder* case,<sup>133</sup> which has found support in decisions of the International Court of Justice, such as the *Danube* case, discussed above. The PCIJ decision explained:

When consideration is given to the manner in which states have regarded the concrete situations arising out of the fact that a single waterway traverses or separates the territory of more than one state, and the possibility of fulfilling the requirements of justice and the considerations of utility which this fact places in relief, it is at once seen that a solution of the problem has been sought not in the idea of a right of passage in favour of upstream states, but in that of a community of interest of riparian states. This community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian states in the use of the whole course of the river and the exclusion of any preferential privilege of any riparian state in relation to others.<sup>134</sup>

121 Annan *In Larger Freedom* (n 120) at 6 para 18.

122 UN Resolution on the Human Right to Water and Sanitation (n 18).

123 UN Resolution 65/154 International Year of Water Cooperation (2013) UN Doc A/RES/65/154 (11 February 2011) [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/65/154](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/65/154).

124 Benvenisti *Shared Freshwater* (n 16) (Cambridge University Press Cambridge 2002) 21. Benvenisti examines the substantive and institutional aspects: 'what ought to be the law to govern shared fresh water' and 'why the protracted efforts to codify the law failed to reduce its ambiguities' (p xi). See also J Brunnée, S J Toope 'Environmental security and freshwater resources: a case for international ecosystem law' (1994) 5 *Yearbook of International Environmental Law* 41.

125 A view shared by Brown Weiss in 'The coming water crisis' (n 16).

126 H Mosler 'The international society as a legal community' (1974 IV) 140 *RdC* 1 at 33.

127 A A Cañado Trindade 'The contribution of international human rights law to environmental protection, with special reference to global environmental change' in Brown Weiss *Environmental Change and International Law* (n 15) 192–246.

128 Cited in Byers (n 61) 213.

129 G Handl 'Environmental protection and development in third world countries: common destiny – common responsibility' (1988) 20 *NJYJLP* 603–27; R J Dupuy 'Humanity and the environment' (1991) 20 *Colorado Journal of International Environmental Law and Policy* 202. For challenges on the notion see P Weil (n 49) 425 who was concerned over 'a tendency to vague personification of the international community', which he argues, in the final analysis, is comprised of states, not necessarily all states, but 'all the essential components of the international community', which he discerns from studying the work of the ILC on state responsibility.

130 Benvenisti and Hirsch *The Impact of International Law* (n 12); Eyal Benvenisti 'Collective action in the utilization of shared freshwater' (n 16) 384–415.

131 P Wouters, S Vinogradov and B Magsig 'Water security, hydro-solidarity, and international law' (n 16) 97–134; Wouters and Ziganshina 'Tackling the global water crisis' (n 16) 175–229; see also E Vlachos 'Practicing hydro-diplomacy in the 21st century' (1998) 111 *Water Resources Update* 76–82.

132 Sir Robert Jennings, Sir Arthur Watts *Oppenheim's International Law Vol I Peace* (9th edn Longman Burnt Hill 1992) Introduction and Part 1 at 14 para 5.

133 *Territorial Jurisdiction of the International Commission of the River Oder* Judgment No 16 (1929) PCIJ Series A No 23 at 27.

134 *ibid*.

The PCIJ noted that:

[i]n the present case, it is enough to go back to the general principles of international river law to find that, if the right of upstream states to free access to the sea has, as Poland maintains, played a considerable part in the formation of river law, the basic concept which dominates this area of law is that of a community of interests of riparian states which in itself leads to a common legal right. ... This concept is found already in the Act of the Congress of Vienna of June 9th, 1815 and it has inspired subsequent instruments. Such a community of interests, however, extends to the whole navigable course of the river and does not stop at the last political frontier. As for the Treaty of Versailles, it has only enlarged the community of riparian states to cover all users of a river, riparians or not, thus making it completely international.<sup>135</sup>

In the *Gabikovo-Nagyymaros* case, which referred with approval to the *River Oder* case, the ICJ highlighted that the duty to cooperate was shown through the 'joint regime' that was to be in place as part of the fulfillment of its procedural obligations: 'the Project was to have taken the form of an integrated joint project with the two contracting parties on an equal footing in respect of the financing, construction and operation of the works. Its single and indivisible nature was to have been realized through the Joint Contractual Plan which complemented the Treaty'.<sup>136</sup> Justice Weeramantry in a separate opinion in the *Gabikovo-Nagyymaros* case highlighted the need for such continuous cooperation through monitoring and exchange of information.<sup>137</sup>

In the recent *Pulp Mills* decision (on the merits) the ICJ found that Uruguay had breached its treaty-based (1975 Statute) procedural obligations to cooperate with Argentina and the Administrative Commission of the River Uruguay (CARU) during the development of plans to construct pulp mills on the Uruguay river.<sup>138</sup> The Court pointed out that 'the 1975 Statute places the Parties under a duty to co-operate with each other, on the terms therein set out, to ensure the achievement of its object and purpose', this obligation to cooperate encompassing ongoing monitoring of an industrial facility such as the Orion (Botnia) mill (para 281). The ICJ found also that '[t]he Parties have a legal obligation ... to continue their co-operation through CARU and to enable it to devise the necessary means to promote the equitable utilization of the river, while protecting its environment' (para 266).<sup>139</sup> Part of the procedural

duties included conducting an environmental impact assessment: 'The Court notes that for the purposes of complying with their obligations under Article 41 of the 1975 Statute and under general international law, the Parties are obliged, when planning activities which may be liable to cause transboundary harm, to carry out an environmental impact assessment, the content of which must be determined by each state within its domestic legislation or in the authorization process for the planned activity (paras 204–205). The Court observes that an environmental impact assessment should include, at a minimum, '[a] description of practical alternatives'.<sup>140</sup> The Court did not find any breach of substantive duties under the treaty.

In the *Case Concerning the Land, Island and Maritime Frontier Dispute* there was considerable reference to the community-of-interests notion by all parties, as Honduras, El Salvador and Nicaragua argued about the application of that principle to their dispute over the Gulf of Fonseca.<sup>141</sup> The International Court of Justice expounded on the concept of coownership (*condominio*) where 'the waters of the Gulf have remained undivided and in a state of community which entails a condominium or co-ownership'. The Court sought to find similarities to the concept of 'community of interests' or of interest, raised by Honduras by stating that 'it seems odd to postulate such a community as an argument against a condominium which is almost an ideal embodiment of the community of interest requirements of equality of user, common legal rights and the 'exclusion of any preferential privilege'.<sup>142</sup>

However, legal scholars continue to push the bounds of international law. As only one example from a considerable literature on this topic, Higgins asserts:

International law is not rules. It is a normative system. All organized groups and structures require a system of normative conduct – that is to say, conduct which is regarded by each actor, and by the group as a whole, as being obligatory, and for which violation carries a price. The role of law is to provide an operational system for securing values that we all desire – security, freedom, the provision of sufficient material goods. It is not, as is commonly supposed, only about resolving disputes. If a legal system works well, then disputes are in large part avoided.<sup>143</sup>

135 *ibid.*

136 *Gabikovo-Nagyymaros Project Hungary-Slovakia* [1997] ICJ (25 September 1997) (1998) 37 *ILM* 162 at 21.

137 Weeramantry stated: 'A continuous monitoring of the scheme for its environmental impacts will accord with the principles outlined, and be a part of that operational régime. Indeed, the 1977 Treaty, with its contemplated régime of joint operation and joint supervision, had itself a built-in régime of continuous joint environmental monitoring'. <http://www.icj-cij.org/docket/files/92/7383.pdf>.

138 *Argentina v Uruguay Case Concerning Pulp Mills on the River Uruguay* (n 43) <http://www.icj-cij.org/docket/files/135/15873.pdf>. See G R Moncayo, M Moncayo von Hase 'The International Court of Justice and the environment: the recent *Paper Mills* case' in Fastenrath (n 2) 1024–39.

139 The Court adds that: 'both Parties have the obligation to enable CARU, as the joint machinery created by the 1975 Statute, to exercise on a continuous basis the powers conferred on it by the 1975 Statute,

including its function of monitoring the quality of the waters of the river and of assessing the impact of the operation of the Orion (Botnia) mill on the aquatic environment'; see *Argentina v Uruguay Case Concerning Pulp Mills on the River Uruguay* (n 43) <http://www.icj-cij.org/docket/files/135/15877.pdf>.

140 ICJ Press Release <http://www.icj-cij.org/docket/files/135/15873.pdf>. The Court observed that EIA: 'has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource' (paras 203, 204).

141 ICJ *Case Concerning the Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* Summary of the Judgment of 13 July 2009.

142 ICJ Summary of judgment 11 September 1992 425.

143 R Higgins *Problems and Process: International Law and How We Use It* (Oxford University Press Oxford 1995) 1.

The rules of state responsibility move in this same direction.<sup>144</sup> Collective action is often more efficient, effective and fairer to all concerned.<sup>145</sup> Just one example includes the principle of common but differentiated responsibilities advanced under a number of economic and environmental conventions.<sup>146</sup> This standard allows developing countries the flexibility to define the extent and means of compliance with international obligations.<sup>147</sup> Another instance of this is under the Convention on Biological Diversity, which qualifies the compliance duties, including the preference for *in situ* or *ex situ* conservation, by the statement that they are to be implemented 'as far as possible and appropriate'<sup>148</sup> and allows countries to take their 'particular conditions and capabilities into account' in developing national programmes.<sup>149</sup> This has allowed countries to participate in the project of environmental protection and illustrates a cooperation enhancing principle. In the human rights field Jutta Brunée, following her examination of relevant practice, concludes that there is a 'normative evolution towards a better balance between sovereignty and collective concerns'.<sup>150</sup> This is reflected also in the recent R2P initiative by the UN.

#### THE THIRD WAVE OF NORMATIVITY IN INTERNATIONAL WATER LAW: THE EMERGENCE OF AN OBLIGATION *ERGA OMNES*

The good news is that today ... community interest is permeating the body of international law much more thoroughly than ever before.<sup>151</sup>

We are witnessing the emergence of a new obligation *erga omnes* binding on states, in the self-interest of each and all across the global community. International, regional, national and local water insecurity raise the potential for conflict; this threat, coupled with the convergence of treaty practice,<sup>152</sup> state practice and global policy consensus on the critical importance of

144 See Orrego Vicuña 'State responsibility' in Brown Weiss *Environmental Change and International Law* (n 15) 102–32. Orrego Vicuña suggests that state responsibility has expanded to include new obligations for states that recognises environmental harm as damage in itself sufficient to invoke liability and identifies also a movement towards the idea that any state may bring an action to enforce an *erga omnes* obligation owed to the international community at large.

145 P S Rao 'The concept of "international community" in international law and the developing countries' in Fastenrath (n 2) 326–38.

146 The history of the principle and the different rationales are discussed in Lavanya Rajamani *Differential Treatment in International Environmental Law* (Oxford University Press Oxford 2006) 129–32; Duncan French 'Developing states and the environment' (2000) 49 *International Comparative Law Quarterly* 35; and Christopher D Stone 'Common but differentiated responsibilities in international law' (2004) 98 *American Journal of International Law* 276.

147 See D McGraw 'Legal treatment of developing countries, contextual and absolute norms' (1990) 1 *CJIEL* 69.

148 Convention on Biological Diversity (CBD) art 8(a).

149 *ibid* art 6.

150 Brunnée 'International law and collective concerns' (n 73) 36.

151 B Simma 'From bilateralism to community interest' (n 2) 234. See also Tams's summary on the current state of play on this topic, where he concludes: '... the big conceptual debate about the role of community of interests in international law has been won'; C Tams 'Individual states as guardians' (n 61) 405.

152 Convention on the Law of the Non-navigational Uses of International Watercourses GA Res 51/229 (21 May 1997) [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/res/51/229](http://www.un.org/ga/search/view_doc.asp?symbol=A/res/51/229); UN Resolution

water, precludes states from using their water resources in ways that are not in the interests of the global community and the world ecosystems: 'The world deserves better answers at a time when we have the knowledge and ability to make better choices for the future'.<sup>153</sup> Or as one Chinese litigator says: "Environmental protection is directly related to each of our lives and we have no time to lose now".<sup>154</sup>

This third wave of global water law development with new norms that address the securitisation of water, a phenomenon now crossing the globe, is reflected not only in transboundary disputes but in inequalities in development, including respect for human rights and the need to meet basic livelihoods in a world challenged by financial meltdown and regional instability.<sup>155</sup> Water can, and must, be a catalyst for peace and security and a vehicle that advances the fundamental freedoms of all, recognised by the global community in its universal endorsement of the UN Millennium Development Goals.<sup>156</sup>

As corollaries to the obligation *erga omnes* rule that we propose here, we add the following duties as a subset of this overarching rule, cast as negative prohibitions according to the Ragazzi formula:

- (1) No state has a right to develop its waters without taking into account the interests of other water-course states.
- (2) The duty to cooperate in the peaceful management of the world's water resources shall not be compromised by any state.
- (3) The human right to water and sanitation shall not be compromised by any state.

We give two examples of how these rules might work. First, unilateral development that violates these rules might be presumed unreasonable and inequitable, with the burden of proof in defending the legality of the action on the state undertaking the unilateral action. Secondly, in contrast to the result in *Pulp and Paper Mills*, the proper remedy for an injured state might be the removal or significant modification of the project. At a minimum, the burden would be on the acting state to demonstrate that such a remedy is not

on Right to Water and Sanitation UNGA Res 64/294 (adopted 3 August 2010) UN Doc A/RES/64/294.

153 A Steiner UN Under-Secretary General, UNEP Director <http://www.grida.no/news/press/4331.aspx>.

154 T Phillips 'Chinese environmentalist beaten after calling on official to swim in polluted creek' *The Daily Telegraph* (27 February 2013) <http://www.telegraph.co.uk/news/worldnews/asia/china/9896761/Chinese-environmentalist-beaten-after-calling-on-official-to-swim-in-polluted-creek.html>.

155 Brown Weiss 'The coming water crisis' (n 16) 163, following her short study concludes that: 'The projections of fresh water scarcity, the increasing depletion of non-rechargeable aquifers, the virtual trade in water and the transboundary land and water acquisitions for food indicate that fresh water is increasingly taking on the characteristics of a transnational resource, which is not limited to a local or regional setting. In this context, water – which is essential for human survival, for food production, and for ecosystems – may be considered to be a "common concern of humankind". The recognition of the availability and use of fresh water as a "common concern of humankind" could provide a basis for future legal instruments, guidelines, and best practices to address the growing range of transnational issues'.

156 UN Millennium Declaration UNGA Res A/55/2 (adopted 18 September 2000) UN Doc A/RES/55/2.

disproportionate to the harm suffered.<sup>157</sup> The harshness of these results can easily be avoided by effective compliance with the duty to cooperate. Such a duty should push states to form the necessary permanent management institutions before undertaking substantial dams, diversions and other projects. The duty to cooperate in the peaceful management of the world's water resources would be everybody's business – a truly 'Larger Freedom'.

Addressing the world's water crisis requires innovation across the board. Global water law is evolving, and should be seen to evolve, in response to this international imperative:<sup>158</sup> 'The goal now must be to build sustainability into the DNA of our globally interconnected society ... to take planetary responsibility ... rather than placing in jeopardy the welfare of future generations'.<sup>159</sup>

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157 Judge Greenwood provides important insights on how to assess the extent of the acting state's actions. See note 44.

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158 Criddle and Fox-Decent 'A fiduciary theory of *Jus cogens*' (n 60) 344–45.

159 E Ostrom 'Green from the grassroots' (n 88).