3E COMMISSION

HARM PREVENTION RULES APPLICABLE TO THE GLOBAL COMMONS

RÈGLES DE PRÉVENTION DES DOMMAGES APPLICABLES AUX ESPACES NE RELEVANT PAS DES JURIDICTIONS NATIONALES

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INTERIM REPORT

Key Themes and Scope of Work Program (6 February 2023)

INTRODUCTION

The harm prevention rule is the central rule of international environmental law. In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice (ICJ) confirmed

> *The existence of the general obligation of States to ensure that activities within their jurisdiction or control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.*
> *L'obligation générale qu'ont les Etats de veiller à ce que les activités exercées dans les limites de leur juridiction ou sous leur contrôle respectent l'environnement dans d'autres Etats ou dans des zones ne relevant d'aucune juridiction nationale fait maintenant partie du corps de règles du droit international de l'environnement.*[1]

According to the ICJ, the duty to prevent transboundary environmental harm flows from "the due diligence required of a State in its territory."[2] The resultant obligation encompasses not only the prevention of harm to the environment of another State, but also to the environment of areas beyond national jurisdiction.

The existence of States' harm prevention obligation in relation to areas beyond national jurisdiction has found repeated affirmation in the jurisprudence of international courts.[3] However, aside from *in abstracto* endorsements of the rule in UN General Assembly resolutions or treaty preambles,[4] there is little concrete State practice around this aspect of the harm prevention rule. States have tended to tackle harm prevention relating to areas beyond State jurisdiction and global

[1] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 [*Legality of Nuclear Weapons*], at 242 (para. 29). The ICJ subsequently re-affirmed this conclusion in *The Gabčíkovo-Nagymaros Project (Hungary/ Slovakia)* (Judgment) [1997] ICJ Rep 7 [*Gabčíkovo-Nagymaros*], at 41 (para. 53); *Pulp Mills on the River Uruguay (Argentina/ Uruguay)* (Judgment) [2010] ICJ Rep 14 [*Pulp Mills*], at 78 (para. 193); *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica/ Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua/ Costa Rica)* (Judgment) [2015] ICJ Rep 665 [*Certain Activities*], at 706 (para. 104) (focusing on transboundary harm).

[2] *Pulp Mills*, *ibid*., at 55-56 (para. 101).

[3] See *supra*, note 1. See also, e.g., *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, ITLOS Case No. 17 (Advisory Opinion of 1 February 2011) [*Responsibilities with Respect to Activities in the Area*].

[4] See e.g. United Nations, *Report of the United Nations Conference on the Human Environment* (5- 16 June 1972) UN Doc A/ CONF.48/ 14/ Rev.1, 3, ch 1, Stockholm Declaration on the Human Environment, Principle 21 [Stockholm Declaration]; United Nations, *Report of the United Nations Conference on Environment and Development* (UN 1993) vol I, annex I, Rio Declaration on Environment and Development, Principle 2 [Rio Declaration]. For an overview on the affirmation of the principle in treaty preambles, see Malgosia Fitzmaurice, "Legitimacy of International Environmental Law — The Sovereign States Overwhelmed by Obligations: Responsibility to React to Problems Beyond National Jurisdiction?" (2017) 77/2 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 339, at 342.

I.S.B.N. 978-2-233-01042-1

environmental concerns through treaty-based regimes.[5] As for efforts to codify or progressively develop general international law, the International Law Commission's (ILC) 2001 Draft Articles on Prevention of Transboundary Harm of Hazardous Activities ("2001 Draft Articles") are limited to "harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border."[6] Consequently, the Draft Articles do not apply to harm caused to the high seas, or other areas beyond State jurisdiction or control.[7] By contrast, the ILC's Draft Guidelines on the Protection of the Atmosphere ("2021 Draft Guidelines") address both aspects of the harm prevention obligation, distinguishing between transboundary air pollution ("atmospheric pollution") and global concerns like ozone depletion and climate change ("atmospheric degradation").[8]

The Third Commission of the *Institut* (hereafter "the Commission") considers that its mandate usefully complements the work undertaken by the ILC. By focusing on the "Global Commons," the Commission can elaborate on the aspect of the harm prevention rule left unaddressed by the ILC's 2001 Draft Articles. The Commission's work is also wider in scope than the ILC's 2021 Draft Guidelines, which are limited to the protection of the atmosphere. Much remains unsettled in relation to States' general harm prevention obligations regarding the "Global Commons." [9] It is in respect of the latter aspect of the harm prevention rule, therefore, that the Commission is positioned to make a significant contribution.

As underscored during the *Institut*'s deliberations at The Hague in 2019, the world faces a series of urgent global environmental crises. These appear only to have been exacerbated since then, as documented, for example, by the work of the Intergovernmental Panel on Climate Change.[10] The growing sense of urgency of the climate crisis, and the search for legal responses to it, is demonstrated by the recent initiatives concerning advisory opinions from the ICJ and the International

[5] For the most recent effort, see UN General Assembly, *Further revised draft text of an agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction*, A/CONF.232/2023 (5 March 2023), Annex [BBNJ Draft].

[6] See ILC, Draft Articles on Prevention of Transboundary Harm of Hazardous Activities, in *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, UN Doc. A/CN.4/SER.A/2001/Add. 1 (Article 2(c)).

[7] However, the Articles do apply to "injurious impacts on ships or platforms of other States on the high seas;" see *ibid*., at 153 (Commentary on Article 2, para. (9)).

[8] International Law Commission (ILC), Draft Guidelines on the Protection of the Atmosphere, with Commentaries thereto, in *Report on the Work of its Seventy-second Session* (26 April–4 June and 5 July–6 August 2021), UN Doc. A/76/10 (2021), Guideline 1 (b) and (c), and commentary at 20 and 21-23, paras. 5 and 12.

[9] See also ILC, *ibid*., Commentary on Guideline 3, at 28, para. 8 (noting, with respect to "global atmospheric degradation" that "the existence of this obligation in customary international law is still somewhat unsettled").

[10] See e.g. Priyadarshi R. Shukla, et al., eds., *Climate Change 2022 Mitigation of Climate Change: Working Group III Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (2022); Hans-Otto Pörtner, et al., eds., *Climate Change 2022: Impacts, Adaptation and Vulnerability – Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (2022).

I.S.B.N. 978-2-233-01042-1

Tribunal for the Law of the Sea (ITLOS), respectively.[11] Therefore, in order to facilitate work towards a resolution for consideration by the *Institut* at its 2025 session, the Commission opted to define its topic in relatively tight fashion and focus on what is already accepted as an obligation under general international law, i.e. the obligation to prevent harm to the environment of areas beyond national jurisdiction, but which remains underspecified.

This Interim Report is organized around the terms contained in the title that sketches out the Commission's mandate. It is intended to provide all Members of the *Institut* with a sense of the scope of, and rationale for, the Commission's work program. The Interim Report does not purport to offer an in-depth consideration of the many issues that a final report will ultimately need to address.

A diagram outlining the main elements of the Commission's work program is included in an Appendix I to this report. The Questionnaire circulated to Commission members in April 2021 to help define the scope of the Commission's work is included in Appendix II. A timeline of the Commission's work to date is provided in an Appendix III.

1. THE CONCEPTS OF "GLOBAL COMMONS"/ "ESPACES NE RELEVANT PAS DES JURIDICTIONS NATIONALES"

The Commission engaged in extensive deliberations around the concept of "Global Commons" that appears in the English title of its mandate. The French wording of the mandate focuses on "espaces ne relevant pas des juridictions nationales," which aligns with the terminology found in international instruments,[12] the phrasing employed by the ICJ in its articulation of "the general obligation of States to ensure that activities within their jurisdiction or control respect the environment of other States or of *areas beyond national control*" (emphasis added),[13] and the *Institut*'s 2005 resolution on "Obligations *erga omnes* in international law," which referred to "obligations relating to the environment of

[11] See the text of the draft resolution requesting an Advisory Opinion from the ICJ, submitted by a core group of 18 countries led by Vanuatu, and co-sponsored by approximately another 100 countries, UN Doc. A/77/L.58, 1 March 2023; for the request for an Advisory Opinion from ITLOS, see Press Release ITLOS/Press 327, 12 December 2022, www.itlos.org.

[12] See Stockholm Declaration, Principle 21, *supra* note 4; Rio Declaration, Principle 2, *supra* note 4; and treaty preambles discussed by Fitzmaurice, *supra* note 4. See also the United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, entered into force on 16 November 1994; UN Doc. A/CONF.62/122 (UNCLOS); 1833 UNTS 3; 21 ILM 1261 (1982), Article 194 (using aligned, albeit more specific, phrasing and referring to "areas where they exercise sovereign rights in accordance with this Convention").

[13] *Legality of Nuclear Weapons*, *supra* note 1; *Gabčíkovo-Nagymaros*, *supra* note 1; *Pulp Mills*, *supra* note 1; *Certain Activities*, *supra* note 1. In view of the fact that the ICJ, in the French texts of its decisions on the rule, refers to "zones ne relevant d'aucune juridiction nationale," the Commission considers the phrase "areas beyond national control" to be equivalent to "areas beyond national jurisdiction." This conclusion is supported by the phrasing most commonly employed in international instruments, and the fact that the ICJ, in *Legality of Nuclear Weapons*, at 242 (para. 27) had quoted the relevant passage of Principle 21 of the Stockholm Declaration, *supra* note 4, and Principle 2 of the Rio Declaration, *supra* note 4. In this Interim Report, the Commission therefore uses the phrase "areas beyond national jurisdiction."

I.S.B.N. 978-2-233-01042-1

common spaces."[14] The notion of "Global Commons" is more open-ended than these formulations and not a legal term of art. For example, while areas beyond national jurisdiction by definition will be "Commons,"[15] not all "Commons" are necessarily "areas" in the strictly geographical sense.[16]

The Commission considers that the notion of "Global Commons" serves to highlight the need to avoid undue compartmentalization of the global environment and to be mindful of natural systems that straddle jurisdictional categories. For example, the climate system is "an interactive system consisting of five major components: the atmosphere, the hydrosphere, the cryosphere, the land surface and the biosphere."[17] The ILC, in the context of its work on the 2021 Draft Guidelines, averts to the 1982 World Charter for Nature, which "recognizes that humankind is part of nature and life depends on the uninterrupted functioning of natural systems which ensure the supply of energy and nutrients."[18] The ILC goes on to note that the "atmosphere, as an envelope of gases surrounding the Earth, is dynamic and fluctuating, with gases constantly moving without regard to territorial boundaries," so that the atmosphere "is invisible, intangible and non-separable."[19] For the purposes of outlining rules related to the protection of the atmosphere, therefore, the ILC deemed it important to focus on the atmosphere as a natural system,[20] rather than on jurisdictional concepts, such as "airspace."[21]

In the present context, the salient jurisdictional concept is that of areas beyond national jurisdiction, invoked in the French wording of the Commission's mandate and contained in the ICJ's aforementioned articulation of the harm prevention rule as "[l]'obligation générale qu'ont les Etats de veiller à ce que les activités exercées dans les limites de leur juridiction ou sous leur contrôle respectent l'environnement

[14] Institut de Droit international (IDI), *Annuaire de l'Institut de Droit international* (Krakow, 2005), (on Obligations and rights *erga omnes* in international law) (préamble).
[15] See e.g. Report of the World Commission on Environment and Development, UN Doc. A/42/427 (4 August 1987), at 258 (referring to "the global commons" as "those parts of the planet that fall outside national jurisdiction" – "the oceans, outer space and Antarctica").
[16] See e.g. Surabhi Ranganathan, "Global Commons," (2016) 27 *EJIL* 693 ("spaces beyond national jurisdictions, essential resources and concerns such as biodiversity conservation and climate change"). Following Elinor Ostrom's Nobel Prize-winning *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge: Cambridge University Press, 1990) commons, understood as "common pool resources," might even include "intangibles," like "the Internet, software codes and human genes." See Samuel Cogolati and Jan Wouters, eds., *The Commons and a New Global Governance* (Cheltenham: Edward Elgar, 2018), at 4.
[17] A.P.M. Baede, et al., "The Climate System: An Overview," in John Houghton et al., eds., *Climate Change 2001: Scientific Basis* (Cambridge: Cambridge University Press/Intergovernmental Panel on Climate Change, 2001) at 87. The 1992 UN Framework Convention on Climate Change (UNFCCC), 1771 UNTS 107, at Article 1(3), defines "climate system" as "the totality of the atmosphere, hydrosphere, biosphere and geosphere and their interactions."
[18] Word Charter for Nature, A/RES/37/7, 28 October 1982. ILC, *supra* note 8, Commentary on the Preamble, at 15, para. 1.
[19] *Ibid*., Commentary on Guideline 2, at 25, para. 9.
[20] The ILC uses the term "natural resource." See *ibid*, Preamble ("*Acknowledging* that the atmosphere is a natural resource, with a limited assimilation capacity, essential for sustaining life on Earth, human health and welfare, and aquatic and terrestrial ecosystems").
[21] See *ibid*., Commentary on Guideline 2, at 25, para. 8 (noting that "The atmosphere and airspace are two different concepts, which should be distinguished").

I.S.B.N. 978-2-233-01042-1

dans d'autres Etats ou dans des zones ne relevant d'aucune juridiction nationale."[22] This formulation aligns with the most common articulation of the rule, focused on "areas beyond national jurisdiction," such as in Principle 21 of the *Stockholm Declaration* and Principle 2 of the *Rio Declaration*,[23] which in turn have been reaffirmed in numerous treaty preambles.[24]

While the Commission considers that its work ought to be anchored in this generally accepted articulation of the harm prevention rule, it also deems it important to devote attention to the prevention of harm to global natural systems.[25]

In the Commission's view, such a more holistic approach is in line with existing general international law. After all, the harm prevention rule stipulates not an obligation to respect "areas" beyond national jurisdiction, but in essence an obligation to respect the "*environment*" of such areas, including their natural systems. Furthermore, it stands to reason that the harm prevention rule recognizes the indivisibility of the environment by articulating an overarching "general obligation" to "respect the *environment*," be it "of other States or of areas beyond national control."[26]

The Commission will need to assess whether a definition of the term "environment" is required for the purposes of its work. The term as such has remained largely undefined in international law,[27] although there are some definitions of harm to the environment from which a definition of "environment" might be extrapolated.[28] The Commission's work to date is premised on understanding the term "environment" as encompassing the Earth's water, air, land and all biological forms, as well as the relationships between them.[29] Here reference may also be made to the description of the term environment by

[22] *Legality of Nuclear Weapons*, *supra* note 1; *Gabčíkovo-Nagymaros*, *supra* note 1; *Pulp Mills*, *supra* note 1; *Certain Activities*, *supra* note 1.

[23] Stockholm Declaration, *supra* note 4, Principle 21; Rio Declaration, *supra* note 4, Principle 2. In the course of its work, the Commission will consider in greater detail the import, if any, of different formulations of the harm prevention rule as far as its application to the Global Commons is concerned. Principle 21 of *Stockholm Declaration* and Principle 2 of the *Rio Declaration*, for example, refer to the "environment … of areas beyond *the limits of* national jurisdiction" (emphasis added). See also *supra* note 13.

[24] See Fitzmaurice, *supra* note 4.

[25] The term "natural" is used here not in the sense of "[un]affected by humans," but in the sense of "existing in nature; … not artificial or manufactured." On the complexities of terminology, see D.L. Johnson, et al., "Meanings of Environmental Terms," (1997) 26 *Journal of Environmental Quality* 581-589, at 582.

[26] See text accompanying *supra* note 1 (emphasis added).

[27] See Daniel Bodansky, *The Art and Craft of International Environmental Law* (Cambridge: Harvard University Press, 2010), at 10.

[28] See e.g. the 1976 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, 1108 UNTS 151, Article II (defining "environmental modification techniques" as "any technique for changing - through the deliberate manipulation of natural processes - the dynamics, composition or structure of the earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space"). See also Alan Boyle and Catherine Redgwell, *Birnie, Boyle and Redgwell's International Law and the Environment*, 4th ed. (Oxford: Oxford University Press, 2021), at 6-7.

[29] Compare Bodansky, *supra* note 27 (pointing to the definition provided in European Community, Council Directive of 21 December 1978 (79/117/EEC), Article 2(10), 1979 O.J., L. 33/36). See also Johnson, et al. *supra* note 25.

I.S.B.N. 978-2-233-01042-1

the ICJ in its Advisory Opinion on *Nuclear Weapons* that immediately precedes its articulation of the harm prevention rule. The Court observes that the "environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn."[30]

Notwithstanding this more holistic approach adopted by the Commission, the distinction between areas under State jurisdiction and those that lie beyond is important, since it is pivotal in determining who might be able to invoke the harm prevention rule. Indeed, in the context of the Commission's work program, one key question is who can invoke the rule in relation to harm to the environment of areas beyond national jurisdiction. This is an issue to which this report returns below, and one where the Commission's work stands to supplement the ILC's 2021 Draft Guidelines, which do not engage this dimension of the harm prevention rule.[31]

To summarize:

In keeping with the French formulation of its mandate, the Commission conceives its inquiry into "harm prevention rules applicable to the Global Commons" as revolving around States' "general obligation to respect the environment … of areas beyond national jurisdiction."

This understanding of the Commission's mandate is animated by the desire to complement and supplement existing work, and hence to focus on the aspect of the widely accepted formulation of the harm prevention rule that has not been covered by earlier codification and progressive development efforts and that remains underdeveloped in international law and practice: the obligation to protect the environment of areas beyond national jurisdiction.

The Commission's approach to its mandate is premised on the view, elaborated above, that the harm prevention rule's focus on respect for "the environment" encompasses "Global Commons," understood for present purposes as "areas beyond national jurisdiction" as well as certain global natural systems (e.g. the climate system or ocean circulation systems).[32]

For greater clarity:

- Natural resources and natural systems that are subject to the jurisdiction of individual States (e.g. located within State territory) are *not* included in the Commission's mandate, even when those resources are components of global systems (e.g. biological diversity) or have global relevance (e.g. forests as

[30] *Legality of Nuclear Weapons*, *supra* note 1.
[31] ILC, *supra* note 8, Commentary on Guideline 3, at 17, para. 5 (observing that "the draft guideline is without prejudice to whether or not the obligation to protect the atmosphere is an *erga omnes* obligation in the sense of article 48 of the articles on responsibility of States for internationally wrongful acts, a matter on which there are different views").
[32] Accordingly, when the phrase "Global Commons" is used in this report, it is understood to mean "the environment of areas beyond national jurisdiction," including salient natural systems. See generally Nico Schrijver, "Managing the global commons: common good or common sink?" (2016) 7 *Third World Quarterly* 1252-1267, at 1253.

I.S.B.N. 978-2-233-01042-1

carbon sinks).[33] The Commission is mindful that States have consistently resisted efforts to conceptualize resources located within their territories or jurisdiction as legally "common."[34]

- Likewise, "transboundary environmental harm" as defined by the ILC in its 2001 Draft Articles,[35] including long-range harm, such as sea level rise resulting from greenhouse gas emissions, is *not* within the scope of the Commission's work. This type of harm is covered by the harm prevention rule, of course, but it involves harm in areas under State jurisdiction or control, rather than harm to the environment in areas beyond national jurisdiction. To illustrate through examples revolving around climate change, an individual State may be able to invoke the harm prevention rule with respect to its exposure to the risk of sea level rise due to greenhouse emissions originating from other States, wherever located. The rules pertaining to the prevention of this type of long-range transboundary harm have been considered by the ILC in its 2001 Draft Articles and, with respect to transboundary air pollution, in its 2021 Draft Guidelines. By contrast, the present Commission's mandate is concerned with the elucidation of the general rules pertaining to the prevention of harm to the climate system as such, or resultant harm to the High Seas, or to other areas and natural systems beyond national jurisdiction.

The task of the Commission will be to elucidate the harm prevention obligation's parameters and application, with a view to clarifying, and potentially elaborating on, a rule that is firmly established as "part of the corpus of international law relating to the environment."[36] To these ends, the Commission will focus on addressing the ambiguities beneath the surface of this rule. Consequently,

- One key contribution of this work, as already noted, will be to clarify the extent to which natural systems are — or ought to be — captured by the rule.
- Similarly, the Commission's work will elucidate to what extent the obligation to prevent harm to the environment of areas beyond national jurisdiction entails restrictions on activities that impact resources or ecosystems located within individual States. For example, destruction of a rain forest at such a scale that it significantly affects the global climate system,[37] or biological diversity,[38]

[33] In other words, such resources do not fall within the mandate, notwithstanding the fact that they may be considered "Global Commons" in a broader sense. See e.g. Global Commons Alliance, "The Global Commons," at https://globalcommonsalliance.org/global-commons/ ("The Global Commons are the resources we all need to survive, thrive and prosper. These resources … include the ocean and freshwater, the climate and biodiversity, and forests and wetlands …").

[34] See Jutta Brunnée, "Common Areas, Common Heritage and Common Concern," in Daniel Bodansky et al., *Oxford Handbook of International Environmental Law*, 1st ed. (Oxford: Oxford University Press, 2007) 550; Nico Schrijver and Vid Prislan, "From *Mare Liberum* to the Global Commons: Building on the Grotian Heritage," (2009) 30 *Grotiana* 168; M.C.W. Pinto, "The Common Heritage of Mankind: Then and Now", in Hague Academy, *Recueil des cours*, Vol. 361 (2013), 1.

[35] See ILC, *supra* note 6, Article 2(c) ("harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border").

[36] *Pulp Mills*, *supra* note 1.

[37] On the term "climate system," see *supra* note 17 and accompanying text.

[38] See e.g. marine biological diversity of areas beyond national jurisdiction, BBNJ Draft, *supra*, note 5.

I.S.B.N. 978-2-233-01042-1

arguably would be within the ambit of the Commission's work, notwithstanding the fact that the rain forest itself is not within the terms of its mandate.

- In the process, the Commission will delineate what constitutes harm for the purposes of its mandate, will specify what triggers the obligation to prevent harm to the environment of areas beyond national jurisdiction (see below under 2 and 3), and flesh out what the attendant standard of due diligence requires of States (see below under 3).[39]
- Similarly, in keeping with its mandate to examine applicable "harm prevention *rules*" (emphasis added), the Commission will elucidate the interlocking substantive and the procedural aspects of harm prevention (see below under 4).
- Another major contribution will be to clarify the nature of the harm prevention rule when applied to harm to the environment of areas beyond national jurisdiction. Specifically, do the salient obligations operate *erga omnes* (see below under 5)? If the obligations do have *erga omnes* effect, what are the legal implications?

In short, the Commission's work aims to clarify what the harm prevention rule and related duties require of States, and to offer conceptual and empirical support for a robust reading of these rules. The Commission hopes to enhance the potential for its work to have a genuine impact by hewing quite closely to the widely accepted formulations of the rule, such that future State or judicial practice might coalesce around the "Global Commons" protection contemplated by the harm prevention rule.[40] That approach will allow the Commission to suggest expansive readings where appropriate, or flag related developments that might fill the gaps of the more narrowly construed rule.

2. THE CONCEPT OF "HARM"

The ICJ articulated the harm prevention rule as a duty to "respect the environment of other States or of areas beyond national control."[41] In the *Pulp Mills* case, the ICJ noted that this "principle of prevention, as a customary rule, has its origins in the due diligence required of a State in its territory" and that a "State is thus obliged to take all means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State."[42] While the Court, given the facts at issue in the *Pulp Mills* case, limited its statements to inter-State environmental harm, it went on to reference its previous decisions, which had established that the obligation was "part of the corpus of international law relating

[39] According to the ICJ, the "principle of prevention, as a customary rule, has its origins in the due diligence required of a State in its territory." See *Pulp Mills*, *supra* note 1, at 55-56 (paras. 111-115).
[40] Note that this Interim Report will on occasion use the term "Global Commons" as a shorthand for the environment of areas beyond national jurisdiction, including natural systems.
[41] See *Legality of Nuclear Weapons*, *supra* note 1; *Gabčíkovo-Nagymaros*, *supra* note 1; *Pulp Mills*, *supra* note 1; *Certain Activities*, *supra* note 1.
[42] *Pulp Mills*, *ibid*., at 55-56 (paras. 111-115).

I.S.B.N. 978-2-233-01042-1

to the environment."[43] In those judgments, as noted above, the Court referred to an obligation vis-à-vis the environment both in other States and in areas beyond national control.

It seems safe to conclude, therefore, that the obligation to "respect the environment" entails an obligation to prevent significant environmental harm,[44] which obligation extends to the environment of areas beyond national jurisdiction, including natural systems.

The ILC's 2001 Draft Articles define "harm" as encompassing "harm caused to persons, property or the environment."[45] However, the Draft Articles are limited in their application to "harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border."[46] In such a transboundary context, it is appropriate to focus on a range of harmful effects. By contrast, this Commission's focus is on the prevention of harm to the environment of areas beyond national jurisdiction. The Commission considers it apposite, therefore, to focus its work on harm to the environment itself. Such a narrower definition would be in line with the ICJ's focus on a duty to "respect the *environment*" and on "significant damage to the *environment*" (emphases added).[47]

This narrower optic is also in line with the focus on *prevention* of harm to the environment of areas beyond national jurisdiction. That is, while it ought to explore how compliance with this primary rule can be ensured and by whom (see the consideration of the *erga omnes* dimension below under 5), the Commission's focus is not on compensation for harm. Concentrating the Commission's work on delineating the duties pertaining to the prevention of harm to the environment itself would seem to be sufficient, therefore.

It remains to be clarified what constitutes "harm to the environment," and what constitutes "significant" harm.

While a definition of the term "environment" remains elusive within international law, various agreements have defined environmental harm in the context of their particular issues or areas of focus. For example, the 1982 Law of the Sea Convention is concerned, *inter alia*, with "such deleterious effects as harm to living resources and marine life."[48] In turn, the UN Framework Convention on Climate Change (UNFCCC) defines the "[a]dverse effects of climate change" as "changes in the physical environment or biota resulting from climate change that,"

[43] *Ibid.*
[44] See also ILC, *supra* note 6, at 148 (observing that the ICJ "confirmed" the duty to prevent transboundary harm as articulated in Principle 2 of the Rio Declaration).
[45] See *ibid.* (Article 2(b)).
[46] *Ibid.* (Article 2(c)).
[47] See *supra* notes 41 and 42 and accompanying text. See also Leslie-Anne Duvic-Paoli, *The Prevention Principle in International Environmental Law* (Cambridge: Cambridge University Press, 2018), at 240 (noting that "prevention in the context of areas beyond national jurisdiction does not seek to avoid external infringements on national sovereignty but rather aims to protect the environment *per se*").
[48] See UNCLOS, *supra* note 12, Article 1(4).

I.S.B.N. 978-2-233-01042-1

inter alia, "have significant deleterious effects on the composition, resilience or productivity of … ecosystems."[49]

Against the backdrop of these treaty-specific definitions of environmental harm and building on the provisional definition of "environment" provided above,[50] the Commission proposes to focus its work on harm to the Earth's water, air, land and all biological forms, as well as the relationships between them. For the purposes of its work, the Commission considers the terms "harm" and "damage" to be interchangeable.

With respect to the notion of "significant" harm, the Commission intends to build on the definitions outlined in the ILC's 2001 Draft Articles. The ILC, in the Commentary to the Draft Articles, explains that "significant" denotes "real detrimental effect" that is "more than 'detectable,' but" not necessarily "serious" or "substantial" and that "[s]uch detrimental effects must be susceptible of being measured by factual and objective standards."[51] The Commission considers that this understanding of "significant" is transferable to its work on harm to the "Global Commons."[52]

A further important point follows from the Commission's focus on the *prevention* of significant harm to the environment: the obligations to be explored by the Commission do not presuppose causation of actual harm (and the Commission, therefore, does not intend to examine questions of harm causation). Rather, significant environmental harm serves as reference point for the relevant preventive duties (e.g. requirements of due diligence, specific procedural requirements), as well as for the trigger of these duties, which is *risk* of harm (see under 3 on "Prevention" and 4 on "Rules Applicable").[53]

The Commission's proposed narrow approach – focusing on (risk of) significant harm to the environment itself as a reference point for the relevant duties – would nonetheless provide a foundation for subsequent efforts by others to explore secondary obligations and a wider range of harms. Similarly, it would not preclude consideration of harm that, as a result of harm to the commons, is caused in areas under the jurisdiction of States, including harm to persons or property. However, the Commission considers that the latter type of situation is beyond the scope of

[49] See UNFCCC, *supra* note 17, Article 1(1). Some agreements take a much more nuanced approach to defining harm. For example, the 1991 Protocol on Environmental Protection to the Antarctic Treaty, reflecting the fragility of the Antarctic environment, is concerned, *inter alia*, with "adverse effects on climate and weather patterns," "significant adverse effects on air or water quality," "significant changes in the atmospheric, terrestrial (including aquatic), glacial or marine environments," "detrimental changes in the distribution, abundance or productivity of species or populations of species of fauna and flora," "further jeopardy to endangered or threatened species or populations of such species," and "degradation of, or substantial risk to, areas of biological … or wilderness significance." See Protocol on Environmental Protection to the Antarctic Treaty, reprinted in 30 ILM (1991) 1461, at Article 3(2)(b)(i)-(vi).

[50] See *supra* note 29 and accompanying text.

[51] See ILC, *supra* note 6, at 152, para. 4.

[52] On the term "Global Commons," see *supra* note 40.

[53] See also ILC, *supra* note 6, at 148 (Noting that prevention is concerned with "activities which pose a significant risk of transboundary harm" and that "[p]revention in this sense, as a procedure or as a duty, deals with the phase prior to the situation where significant harm or damage might actually occur").

I.S.B.N. 978-2-233-01042-1

its mandate, since it constitutes an application of the transboundary branch of the harm prevention rule, even if mediated through impact on a "Global Commons."[54]

To summarize:

For the purposes of its mandate, the Commission conceives of "harm" as denoting "significant harm to the environment of areas beyond national jurisdiction, including natural systems."

3. THE CONCEPT OF (HARM) "PREVENTION"

In keeping with the mandate's focus on harm prevention, the Commission's work is focused on primary rules, bearing in mind that secondary rules are relevant to the extent that the Commission explores the *erga omnes* nature of the rule (e.g. questions around who would be entitled to invoke a State's breach of the obligation to prevent harm to the "Global Commons" – see below under 5).

While the ILC's 2001 Draft Articles provide a useful starting point for the Commission's work, their relevance is limited by their focus on inter-State harm. That limited focus underscores the importance of the Commission's topic, seeing as its mandate begins where the ILC project on transboundary harm ended. At the same time, the transboundary harm focus of the 2001 Draft Articles highlights the need to carefully consider to what extent the ILC's proposals in that context are transferable or adaptable to the context of areas beyond national jurisdiction.

As already noted, the ICJ considered that the "principle of prevention, as a customary rule, has its origins in the due diligence required of a State in its territory."[55] A "State is thus obliged to take all means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State."[56] The ILC similarly conceives of harm prevention as anchored in the requirements of due diligence. According to the ILC's 2001 Draft Articles, States "shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof."[57]

One of the key contributions of the Commission, then, will be to shed light, and potentially elaborate, on the requirements of due diligence as they relate to the prevention of significant harm to the environment of areas beyond national jurisdiction. In this work, in addition to the ILC's 2001 Draft Articles, the Commission will be able to build on early work of the *Institut*,[58] on work of the

[54] For example: a state suffers loss of territory from sea level rise as a result of greenhouse gas emissions by other states, which emissions contribute to global warming and thus sea level rise. Note in this context that the ILC's *Harm Prevention Articles* define transboundary harm as including harm caused in the territory of another state, "whether or not the States concerned share a common border." See ILC, *supra* note 6, at 151-152, Article 2 (c).
[55] See *supra* note 2 and accompanying text.
[56] *Pulp Mills*, *supra* note 1, at 55-56 (paras. 111-115).
[57] ILC, *supra* note 6, at 153 (Article 3).
[58] IDI, *Annuaire de l'Institut de Droit international* 1 (1877), 139-140 (on the duties of neutral states); *Annuaire de l'Institut de Droit international* 18 (1900), 227 (on obligations of third states in civil wars).

I.S.B.N. 978-2-233-01042-1

International Law Association,[59] on decisions of international courts and tribunals,[60] and on an extensive academic literature.[61]

An important aspect of the Commission's work on due diligence will be attention to the contextual nature of the due diligence standard, which may vary depending on the circumstances of the obligated State,[62] and may evolve depending on the magnitude of risk and potential damage,[63] available knowledge or technology. Generally speaking, the greater the risk and the more serious the potential harm, the more stringent the requirements of due diligence.[64]

In exploring the heightened requirements of due diligence in the face of a risk of serious harm, the Commission will need to consider the relationship between the concepts of due diligence, prevention and precaution. For example, in its Advisory Opinion on *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, the Seabed Chamber of the International Tribunal on the Law of the Sea (ITLOS) opined that "the precautionary approach is also an integral part of the general obligation of due diligence."[65] In exploring the role of the precautionary approach in the context of States' obligation to exercise due diligence in the prevention of harm, the Commission will have the opportunity to examine and specify the trigger of this due diligence obligation – the *risk* of environmental harm.[66] This dimension of the Commission's work is of considerable importance, given the different formulations of the harm prevention rule. For example, unlike the ILC's 2001 Draft Articles,[67] the Stockholm and Rio Declarations contain phrasing that does not refer to "risk," and does not specify the requisite level of harm (e.g. "significant").[68]

To summarize:

For the purposes of the Commission's work, "prevention" means States' primary obligations to exercise due diligence in view of a risk of harm to the environment of areas beyond national jurisdiction, including natural systems.

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[59] International Law Association (ILA), Study Group on Due Diligence in International Law, *First Report* (7 March 2014) and *Second Report* (15 July 2016).
[60] See e.g. *Corfu Channel* (UK v Albania), [1949] ICJ Rep 4 [*Corfu Channel*]; *Pulp Mills*, *supra* note 1; *Certain Activities*, *supra* note 13; *Responsibilities with Respect to Activities in the Area*, *supra* note 3.
[61] See e.g. Samantha Besson, *La Due Diligence en Droit International* in Hague Academy*, Collected Courses / Recueil des Cours* Vol. 409, 157 (2020); Heike Krieger et al., eds., *Due Diligence in the International Legal Order* (Oxford: Oxford University Press, 2020).
[62] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, [2007] ICJ Rep 43 [*Crime of Genocide*], at 221, para. 430 (emphasizing that due diligence "calls for an assessment *in concreto*" and may vary depending on the circumstances of the obligated state and its capacity to influence the salient acts or event).
[63] See *Responsibilities with Respect to Activities in the Area*, *supra* note 3, at para. 117.
[64] See ILC, *supra* note 6, at 154-155.
[65] See *Responsibilities with Respect to Activities in the Area*, *supra* note 3, at para. 131.
[66] See text accompanying *supra* note 53.
[67] See *supra* note 6.
[68] Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration, respectively, speak of states' "responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment." See *supra* note 4.

I.S.B.N. 978-2-233-01042-1

4. THE CONCEPT OF "RULES APPLICABLE"

Given its focus on States' harm prevention obligation under general international law, the Commission's work will engage treaty-based international law only to the extent relevant to elucidating general international law.

The Commission understands the "rules applicable" referenced in its mandate to encompass the existing rules of general international law pertaining to environmental harm prevention, including relevant procedural rules.[69] While emerging rules and principles, or "soft law," will be germane to the Commission's work, the Commission will seek to distinguish between *lex lata* and *lex ferenda* to the extent possible.

The salient procedural rules include the obligations to notify or consult other States in situations where activities under a State's jurisdiction might result in significant transboundary harm to the environment, the obligation to undertake an environmental impact assessment (EIA) where there is a risk of such harm, and the duty to cooperate.[70] These obligations are established in general international law,[71] as the ICJ most recently confirmed is also the case for the obligation to undertake an EIA.[72]

The dominant view in the literature appears to be that these procedural obligations each exist independently under international law, while at same time being relevant to assessing whether a State has met its obligation to exercise due diligence in the prevention of environmental harm.[73] As noted, the ICJ too considers the procedural obligations to be part of general international law, but its recent decisions suggest that the Court views them as flowing from the due diligence required of States in their territory.[74] At the same time, the Court does not appear to consider the violation of a procedural obligation on its own (i.e. without resultant environmental harm) to constitute a violation of the harm prevention rule.[75]

In light of these ambiguities, the Commission considers that it should strive to illuminate the relationship between the salient procedural rules, the harm prevention rule, and due diligence.[76] For example, if the harm prevention

[69] See generally Jutta Brunnée, "Procedure and Substance in International Environmental Law", in Hague Academy, *Collected Courses / Recueil des cours*, Vol. 405 (2020).
[70] See e.g. ILC, *supra* note 6, at 163-167 (Articles 4, 7, 8, 9, 12).
[71] See Boyle and Redgwell, *supra* note 28, at 153-4.
[72] See *Pulp Mills*, *supra* note 1, at 83 (para. 204). In *Certain Activities*, *supra* note 1, at 706 (para. 204), the ICJ confirmed that the EIA obligation applies not only to industrial activities, as in *Pulp Mills*, but "generally to proposed activities which may have a significant adverse impact in a transboundary context."
[73] See e.g. Ilias Plakokefalos, "Prevention Obligations in International Environmental Law," (2012) 23 *Yearbook of International Environmental Law* 3, at 5.
[74] See *Pulp Mills*, *supra* note 1, at 56, 8-83 (paras. 102, 204); *Certain Activities*, *supra* note 1, at 706-707 (para. 104), and 724 (para. 168).
[75] In *Pulp Mills*, *supra* note 1, at 70 (para. 158), the ICJ found a breach of "procedural obligations to inform, notify and negotiate," but in "turning to the question of the compliance … with substantive obligations" concluded that no breach of the latter had occurred. In *Certain Activities*, *supra* note 1, at 720-721, 723 (paras. 153-156, 162) and at 731-732, 734, 736-737 (paras. 196, 207, 213, 216-217) the Court found that Costa Rica had failed to undertake a required EIA but, since no transboundary harm had resulted, did not find a violation of its substantive obligation.
[76] See also *Pulp Mills*, *supra* note 1, joint dissenting opinion Al-Khasawneh and Simma, at 120 (Sec. III) (para. 26).

I.S.B.N. 978-2-233-01042-1

obligation flows from the due diligence required of States in the face of risk, which in turn demands that States take certain substantive (e.g. enactment and implementation of appropriate laws and policies) and procedural (e.g. EIA) steps, would the harm prevention obligation be violated by the failure to take the appropriate steps, regardless of whether or not actual harm results?[77]

Another question, specific to the Commission's focus on the environment of areas beyond national jurisdiction, requires attention. Whereas the existence of procedural obligations in the context of transboundary harm prevention is firmly established in general international law, the scope and operation of such obligations in relation to the environment of areas beyond national jurisdiction is much less certain. Do States have obligations under general international law to notify, consult or conduct an EIA when activities under their jurisdiction risk harming the environment of areas beyond national jurisdiction?[78] Leaving aside treaty-based regimes,[79] is there enough practice to support the conclusion that the procedural obligations commonly applicable in the transboundary context also obtain in the context of areas beyond national jurisdiction? Assuming the answer is yes, are these obligations owed *erga omnes*, such that, for example, all States would have to be notified or consulted when activities pose a risk of harm to the environment of areas beyond national jurisdiction? Might the procedural obligation to conduct an EIA be of a stronger nature when it relates to proposed activities potentially adversely affecting the "Global Commons" than the obligation to notify or consult third States." In other words, is there a reason to differentiate among the procedural obligations emanating from the due diligence obligation? Or would the salient obligation be a broader obligation to cooperate?[80] If so, does the duty to cooperate flow from the requirement of due diligence in harm prevention, or is it a "parallel obligation"?[81] In the Commission's view, there is considerable room for its work to provide clarification in relation to these questions.

To summarize:

For the purposes of the Commission's work, "rules applicable" means the substantive and procedural rules of general international law relating to the prevention of harm to the environment in areas beyond national jurisdiction.

[77] See e.g. Duvic-Paoli, *supra* note 47, at 336-339; Yann Kerbrat, « Obligations procédurales et obligations de fond en droit international des dommages transfrontières » in Ioannis Prezas, dir., *Substance et procédure en droit international public: dialectique et influences croisées* (Paris: Editions Pedone, 2016), at 7; Alexander Proelß, "Prinzipien des Internationalen Umweltrechts," in Alexander Proelß, ed., *Internationales Umweltrecht*, 2. Auflage (Berlin/Boston: De Gruyter, 2022) 103, at 118-120.

[78] In *Certain Activities*, *supra* note 1, at 706 (para. 204), the ICJ confirmed only that the EIA obligation applies "to proposed activities which may have a significant adverse impact *in a transboundary context*" (emphasis added).

[79] See, e.g., the BBNJ Draft, *supra* note 5, Part IV, which includes extremely detailed provisions on EIA.

[80] See e.g. Neil Craik, "The Duty to Cooperate in International Environmental Law: Constraining State Discretion through Due Respect," (2019) 30 *Yearbook of International Environmental Law* 22-44, at 23 (speaking of a duty "to take the interests of other states and the global community seriously"). A further question is whether, in the context of the duty to cooperate, due diligence requires the institutionalization of harm prevention efforts. In the context of treaty-based regimes, this approach underpins, for example, the BBNJ Draft, *supra* note 5, Article 6.

[81] Craik, *ibid*., at 38. And, again, the question arises whether, in the context of the duty to cooperate, due diligence requires the institutionalization of harm prevention efforts. See *supra* note 80.

I.S.B.N. 978-2-233-01042-1

5. THE NATURE OF HARM PREVENTION RULES APPLICABLE TO THE GLOBAL COMMONS

As noted at various points in this Interim Report, States are obligated under general international law to ensure that activities under their jurisdiction or control respect the environment of areas beyond national jurisdiction. The Commission takes this proposition to be uncontroversial. However, it entails a number of follow-on questions that remain unsettled, notably the question whether States' obligation to prevent harm to the environment of areas beyond national jurisdiction is owed *erga omnes*. A spectrum of views exists in the literature and international practice.

Some commentators consider that specific environmental protection obligations, such as those relating to the high seas, may be owed *erga omnes*.[82] The ITLOS Seabed Chamber, in its Advisory Opinion on *Responsibilities with Respect to Activities in the Area*, confirmed the "*erga omnes* character of the obligations relating to the preservation of the environment of the High Seas and the Area."[83] By contrast, the ILC's commentary to the preamble of its 2021 Draft Guidelines specifically indicates that the preambular reference to atmospheric pollution and atmospheric degradation as "a common concern of humankind" serves to identify "a problem that requires cooperation from the entire international community, while at the same time … its inclusion does not create, as such, rights and obligations, and, in particular, … it does not entail *erga omnes* obligations in the context of the draft guidelines."[84]

Other commentators suggest more broadly that obligations to protect the global environment "may have an *erga omnes* character."[85] This view aligns with the resolution on "Obligations and rights *erga omnes* in international law" that the *Institut* adopted at its Krakow Session in 2005.[86] According to the preamble to this resolution, there exists "wide consensus" that a number of rules, including "obligations relating to the environment of common spaces," constitute examples of obligations reflecting "fundamental values of the international community."[87]

Building on the Krakow Resolution, the Commission's working hypothesis is that States' general obligation to prevent harm to the "Global Commons" is owed *erga omnes*. It considers that the debates around the nature of this obligation provide an opportunity for the Commission to contribute to the clarification and development of general international law. The question whether procedural

[82] See Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford: Oxford University Press, 1997), at 154-163. See also Duvic-Paoli, *supra* note 47, at 321-323 (arguing that *all* environmental harm prevention is owed *erga omnes*); and Proelß, *supra* note 77, at 29 (noting that customary norms will "frequently" have *erga omnes* character, but allowing that it can be difficult to make the determination in individual cases).
[83] See *Responsibilities with Respect to Activities in the Area*, *supra* note 3, at 59 (para. 180).
[84] See ILC, *supra* note 8, at 15-16.
[85] See Boyle and Redgwell, *supra* note 28, at 145, 243.
[86] IDI, *supra* note 14.
[87] *Ibid*., preamble.

I.S.B.N. 978-2-233-01042-1

obligations obtain in relation to the "Global Commons," and whether they too have *erga omnes* effect, was highlighted in the preceding section and offers a further opportunity for this Commission to assist the clarification of international law. Suffice it to add for present purposes that the ITLOS Seabed Chamber noted with respect to the duty to undertake an EIA that the ICJ's reasoning in *Pulp Mills* "in a transboundary context may also apply to activities with an impact on the environment in an area beyond the limits of national jurisdiction."[88]

A closely related question on which the Commission can offer clarification concerns the legal implications of an *erga omnes* obligation to prevent harm to the environment of areas beyond national jurisdiction. The starting point for this inquiry is the ICJ's observation that "all States can be held to have a legal interest" in compliance with an *erga omnes* obligation.[89] The *Institut*'s 2005 Krakow Resolution pushes this proposition somewhat further when it stipulates that an obligation *erga omnes* is "an obligation under general international law that a State owes in any given case to the international community, … so that a breach of that obligation *enables all States to take action*" (emphasis added).[90] Given this Commission's decision to focus exclusively on the prevention of harm to the "Global Commons," thus excluding questions regarding consequential harm to individual States from the scope of its work,[91] it will be concerned strictly with clarifying the entitlement of States other than injured States to invoke their interest in compliance with obligations owed to the international community.[92]

In this context, the Commission will want to illuminate the question whether all States would have standing to bring a case to the ICJ or other international judicial body concerning compliance with the obligation to prevent harm to the environment of areas beyond national jurisdiction.[93]

Views appear to be divided as to whether and under what circumstances standing follows from the *erga omnes* nature of the obligation. For example, in the context of the obligations *erga omnes partes* under the Genocide Convention, the ICJ's July 22, 2022 judgment on the preliminary objections in the case *The Gambia v. Myanmar* rejects the proposition that a distinction ought to be drawn between the right to invoke State responsibility under general international law and standing before the Court. The Court concludes that "[r]esponsibility for the alleged breach of an obligation *erga omnes partes* under the Genocide Convention may be

[88] *Responsibilities with Respect to Activities in the Area*, *supra* note 3, at 45 (para. 148).
[89] *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, [1970] ICJ Rep. 3, at 32 (para. 33) [*Barcelona Traction*].
[90] IDI, *supra* note 14, Article 1(a).
[91] See *supra* note 34 and accompanying text. On the question whether obligations emanating from harm prevention apply to actors other than States, the Commission's focus is on States, while not precluding the articulation of principles that might be relevant to other actors, notably international organizations, and not denying or neglecting that State responsibility may be incurred for activities of non-State entities, such as business corporations, in areas and with respect to natural systems beyond national jurisdiction.
[92] See ILC, Draft Articles for Responsibility of States for Internationally Wrongful Acts, in *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, UN Doc. A/CN.4/SER.A/2001/Add.1, 26 at 126, Art. 48.
[93] See here IDI, *supra* note 14, Article 3.

I.S.B.N. 978-2-233-01042-1

invoked [by "any State party"] through … proceedings before the Court."[94] However, a Dissenting Opinion argues for a more nuanced approach,[95] pointing *inter alia* to the Court's consistent distinction between substantive norms and procedural rules,[96] and to the fact that the Court, in *Barcelona Traction*,[97] refrained from indicating whether *erga omnes* obligations, "either on the basis of treaty provisions or customary international law, would by themselves provide standing for any State to institute proceedings against any other State before the Court for the protection of the common interest."[98] While the literature appears to be more inclined towards the view expressed by the Court in *The Gambia v. Myanmar*, there is no clear consensus.[99]

The Commission will in any case want to consider the question of standing very carefully, including whether and what conclusions can be extrapolated from the judicial treatment of standing in the context of obligations *erga omnes partes* for standing in the context of an obligation under general international law. Similarly, the Commission will want to assess whether and what conclusions can be extrapolated from standing in the context of the prohibition of genocide (or torture) for standing in the context of the obligation to prevent harm to the environment of areas beyond national jurisdiction.[100] Furthermore, the Commission will also consider to what extent the growing awareness among States of the global urgency of certain environmental problems, e.g. with respect to climate change and loss of biological diversity, impact on the scope and nature of the obligations *erga omnes* under review in its work.

Finally, another set of key issues for the Commission to consider revolves around precisely what kinds of "action," to invoke the term employed by the *Institut* in its Krakow Resolution,[101] States can take when others fail to meet their obligation to prevent harm to the "Global Commons." The Commission is inclined to limit itself to concluding that, in such a situation, States can demand that the responsible State meet its preventive duties.[102] The *Institut*'s Krakow Resolution stipulates that, beyond cessation of an internationally wrongful act, States can demand reparation "in the interest of the State, entity or individual which is specially affected by the

[94] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Judgment of 22 July 2022, at 36 (para. 108). Available at https://www.icj-cij.org/public/files/case-related/178/178-20220722-JUD-01-00-EN.pdf (accessed July 23, 2022).
[95] *The Gambia v. Myanmar*, Dissenting Opinion of Judge Xue. Available at https://www.icj-cij.org/public/files/case-related/178/178-20220722-JUD-01-01-EN.pdf (accessed July 23, 2022).
[96] *Ibid*., at 12 (para. 38).
[97] *Barcelona Traction*, *supra* note 89.
[98] *The Gambia v. Myanmar*, Dissenting Opinion of Judge Xue, *supra* note 95, at 10 (para. 33).
[99] For a recent analysis see Priya Urs, "Obligations *erga omnes* and the question of standing before the International Court of Justice," (2021) 34 *Leiden Journal of International Law* 505-525.
[100] In this context, the Commission will want to consider the *Nuclear Tests (Australia v France)*, Judgment of 20 December 1974, ICJ Reports 1974, 253 (including the different views expressed on the notion of an *actio popularis* in international law) and the more recent *Whaling in the Antarctic (Australia v Japan; New Zealand intervening), Judgment*, 2014 ICJ Reports 226.
[101] See *supra* note 90 and accompanying text.
[102] See also IDI, *supra* note 14, Article 2(a) (on the cessation of the internationally wrongful act).

I.S.B.N. 978-2-233-01042-1

breach."[103] However, as noted earlier, this Commission will engage with secondary rules only to the extent that they speak to who would be entitled to seek compliance with the obligation to prevent harm to the "Global Commons."[104] That question seems to the Commission to be inextricably linked to its consideration of the obligation's *erga omnes* nature. By contrast, the legal consequences of a State's failure to comply with its (secondary) obligation (to cease the violation of its harm prevention obligation) seem to the Commission to be appropriately left to separate consideration. Accordingly, the Commission's work will not extend to potential remedies or countermeasures.

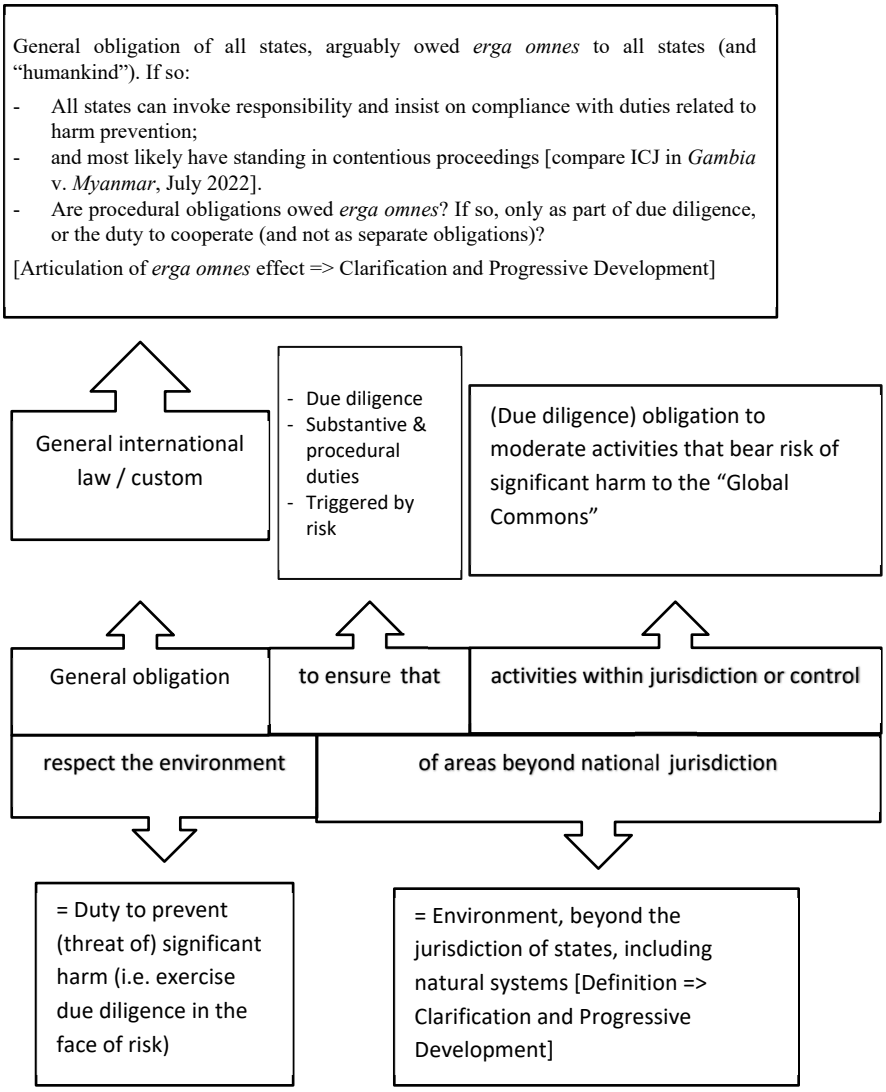
To summarize:

The Commission will focus its efforts on: clarifying the *erga omnes* nature of the substantive obligation of States to prevent harm to the environment of areas beyond national jurisdiction (including natural systems), clarifying whether and to what extent procedural obligations related to the prevention of harm to the environmental of areas beyond national jurisdiction have effect *erga omnes*, and clarifying who is legally entitled to demand that States meet their harm prevention obligations related to the environment of areas beyond national jurisdiction.

[103] *Ibid.*, Article 2(b).
[104] See *supra*, Sections 1 and 2 of this Interim Report.

I.S.B.N. 978-2-233-01042-1

APPENDIX I.
HARM PREVENTION RULES APPLICABLE TO THE GLOBAL COMMONS [ELEMENTS OF THE 3RD COMMISSION MANDATE]



I.S.B.N. 978-2-233-01042-1

APPENDIX II.

QUESTIONNAIRE SENT TO THE MEMBERS OF THE COMMISSION ON 28 APRIL 2021

The Co-Rapporteurs' inclination is to define the topic in relatively tight fashion, for two main reasons. First, the Commission's efforts may be most beneficially devoted to what is already accepted as an obligation under general international law (i.e. the obligation to prevent harm to the environment of areas beyond national jurisdiction), but remains underspecified. Second, as underscored during the *Institut*'s deliberations at The Hague, the world is faced with a series of urgent global environmental crises. It would therefore be highly desirable for the Commission to produce a resolution as soon as possible, which in turn calls for a somewhat pragmatic approach.

In this spirit, the two Rapporteurs would like to consult Members on a number of issues relating to the Commission's mandate and work. We sought to stick as closely as possible to the formulation of the mandate adopted at The Hague, so as to examine the implications emanating from it for the scope and focus of our work in relation to *Harm Prevention Rules Applicable to the Global Commons*:

***1. The Concept of Global Commons*:** The notion of 'global commons' is not a legal term of art, although it is often understood to relate to the areas beyond the limits of national jurisdiction (see also the French wording of the mandate). Notably, as the ICJ has confirmed, the harm prevention rule applies to "areas beyond state jurisdiction."

a. Is the legal meaning of the 'global commons' term used in our mandate limited to areas in the geographic sense, and hence only includes 'commons' that are 'places' (see ILC Draft Articles) or 'areas' (high seas; deep seabed; Antarctica; the atmosphere)?

b. Or do States' harm prevention obligations also extend to Earth systems, such as the climate system or ocean circulation systems?

c. What about resources that are located within state jurisdiction but are of global relevance (e.g. biological diversity; rainforest ecosystems)? Do you agree that (exploitable) natural resources within a State or shared between two or more States (shared or transboundary resources) would not fall within the remit of our Commission?

d. Assuming you agree, such that our focus would not be directly on harm to such resources, could it nonetheless enter our discussions? For example, if activities within a State were to degrade natural resources located in its territory in a manner that risks causing harm to a global commons, might they be subject to harm prevention rules that *are* within the scope of our mandate?

I.S.B.N. 978-2-233-01042-1

***2. The Concept of Harm*:** The harm prevention rule as formulated by the ICJ speaks of States' duty to "respect the environment of other States or of areas beyond national jurisdiction." In turn, the ILC Draft Articles define 'harm' as encompassing "harm caused to persons, property or the environment" (Article 2(b). Our mandate speaks of harm prevention rules "applicable to the global commons."

a. Please comment on your understanding of the concept of harm in our mandate. Should it be understood as relating specifically to harm 'to the global commons' as such?

b. If so, should our focus be exclusively on harm to the natural environment / ecological systems? Or should our focus extend to consequences of such harm, for example economic losses?

***3. The Concept of Prevention*:** The wording of our mandate suggests that our Commission's work should focus on primary rather than secondary rules, i.e. proactive duties to forestall harm rather than compensatory duties that flow from breaches of such duties.

a. Do you agree with that proposition?

b. To what extent should our Commission's concept of prevention build on the ILC Draft Articles on Harm Prevention?

c. Harm prevention is closely associated with due diligence. Should the Commission attempt to detail the relevant requirements of due diligence in relation to the prevention of harm to the global commons?

d. To what extent should the Commission consider the relationship between harm prevention and adjacent concepts, like the precautionary approach and sustainable use?

***4. The Meaning of Rules Applicable*:** We are inclined to understand this phrase as referring to general international law, inviting us to leave aside treaty-based international law, except to the extent that it is relevant to elucidating general international law or trends in its development.

a. Do you agree with that proposition?

b. Should our work focus on the application of the harm prevention rule as set out in the introductory section?

i. If you believe that our work should focus primarily on the general harm prevention rule, do you agree that it should encompass related procedural rules (e.g. notification, consultation, environmental impact assessment)?

ii. If you believe that our work should extend beyond the harm prevention rule proper (and related procedural rules), which other rules should it address?

iii. What role should emerging rules and principles or "soft law" play in our work?

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***5. The Nature of Harm Prevention Rules Applicable to the Global Commons*:** As indicated in our introductory comments, States are obligated under general international law to ensure that activities under their jurisdiction or control respect the environment of areas beyond national jurisdiction. This proposition, which we take to be uncontroversial, gives rise to a number of related issues that remain unsettled.

a. Do the harm prevention rules relating to the global commons constitute obligations *erga omnes*?

Ib. f so, should our work include consideration of the question to whom such obligations might be owed?

c. In your view, are the obligations emanating from harm prevention rules only incumbent upon States, or also on other entities, for example business enterprises and/or regional integration organisations? If so, on what grounds?

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APPENDIX III.
TIMELINE OF THE THIRD COMMISSION'S WORK

- Questionnaire on elements and scope of the Commission's mandate circulated to members in April 2021;
- Commission members' responses received and compiled by Rapporteurs;
- Update message to Commission members on the progress of work in August 2021;
- Compilation of Responses to the Questionnaire and Note on the elements and scope of the Commission's work, based on the responses to the Questionnaire, circulated to Commission members in August 2022;
- Comments on the Note received by the Rapporteurs and incorporated into the agenda for a Commission meeting (online) on November 12, 2022;
- Interim Report on the Commission's on the elements and scope of the Commission's work drafted by Rapporteurs, incorporating the input received during the November 12 meeting and in writing;
- Interim Report circulated to Commission members in February 2023 and submitted to the *Institut* to be published as Interim Report in *Annuaire* vol. 83, 81st Session, 2023;
- Meeting of the Commission in April/May 2023 to discuss Interim Report and preparation of the Angers meeting of the *Institut* [pending];
- Commission meeting and plenary discussion of the Interim Report at the Angers meeting of the *Institut* in August 2023 [pending].

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