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Pros and Cons of the Obligation to Conserve Biodiversity as Obligation *Erga Omnes*

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Abstract
There exit certain conflicts between economic development and biological diversity conservation, and States should not use economic development as an excuse to destroy biodiversity at the expense of extinction of species. When certain State causes the destruction of biodiversity, whether indirect affected States can proceed the proceedings based on obligation *erga omnes* before the International Court of Justice is a question worth exploring. If the obligation to conserve biodiversity is within the scope of obligation *erga omnes*, it would undoubtedly strengthen States' responsibilities to conserve biodiversity. However, after analyzing the pros and cons of this issue, a safe conclusion could be drawn that whether or not to regard the obligation to conserve biodiversity as obligation *erga omnes* depends on different perspectives of interests, which needs cautious consideration.

Key Words: Biodiversity Conservation, Obligation *Erga Omnes*, Economic Development, Sovereignty.

Introduction

The sovereign right of a State to exploit its own natural resources is widely accepted as a principle of international law. Article 3 of the Convention on Biological Diversity (hereinafter "the CBD") states clearly that "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies". However, the sovereign right is now associated to cooperation and can no longer be considered as an absolute right of States, but also as a duty (Corfu Channel, 1949 I.C.J.; Aerial Herbicide Spraying, 2010 I.C.J.; Lake Lanoux Arbitration, RIAA, vol.XII). The sovereign State is not entitled to recklessly exploit all of the developmental potential in its territory without paying heed to its obligation to protect the environment (Philippe Sands et al, 2012), especially if there is a threat of species extinction (UNEP/IEL/WS/3/2, 1996).

However, as the needs of economic development, more and more species' lives and habitats have been imposed great threat after a series of human's intervention and destruction. Then it comes to the question that if one State has imposed a great threat to biodiversity conservation,

does there exit the legal foundation for other States to intervene in order to conserve biodiversity? One this issue, two circumstances bestow the State's standing based on Article 42 of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter "ILC Draft Articles on Wrongful Acts"): First, only a State that is injure or whose specific legal right has been violated (Genocide case, 1974 I.C.J.) may invoke the responsibility of the injuring State (South West Africa, Second Phase, 1966 I.C.J.). Second, the States have the standing before the court if the obligation is owed towards the International community as a whole. Therefore, in the following part, this paper will discuss about whether indirect affected States can proceed the proceedings based on obligation *erga omnes* before the International Court of Justice (hereinafter "the I.C.J.") when certain State causes the destruction of biodiversity. There are continuous debates on this issue, and the following content of the paper will demonstrate two sides of this point.

1. Pros to Regard Obligation to Conserve Biodiversity as One of Obligation *Erga Omnes*

The obligations *erga omnes* have been recognized in the *Barcelona Traction* case, which is referred to as the obligations of a State towards the international community as a whole (*Barcelona Traction Case*, 1970 I.C.J.). The obligation to conserve biodiversity is obligation *erga omnes* because it's highly importance.

The protection of wildlife and biodiversity conservation have become issues of worldwide concern and scale (C. De Klemm & C. Shine, 1993). The loss of a species represents a loss to all of humanity. Species shall be considered a world-belonging natural resource, whose extinction would inflict permanent damages in natural patrimony and environmental diversity (IUCN, 2009). Attention to conserve biodiversity has led to the consummation of treaties, the crystallization of norms, and the acceptance of certain general principles. A norm to preserve wildlife has crystallized as a custom as there is sufficient *opinio juri*s evidenced by various treaties and conventions, and state practice as evidenced by national legislation, and actual practice of States.

Especially, cases' decisions have also supported the scope of obligation *erga omnes* should be expanded. In *Gabčíkovo v Nagymaros* Project Case, Judge Weeramantry declared that: "There is substantial evidence to suggest that the general protection of the environment beyond national jurisdiction has been received as obligations *erga omnes*." (Gabcikovo-Nagymaros, 1997 I.C.J.) Promoting biological diversity is an evolving principle of international law that has risen to the level of an obligation *erga omnes*. Over the past decades, new standards have developed which States must consider and give appropriate weight when undertaking activities that have profound effects on the environment (Gabcikovo-Nagymaros, 1997 I.C.J.). In the *Shrimp-Turtle Case* between India, Malaysia, Pakistan and Thailand against the US, the WTO appellate body recognized the existence of a "sufficient nexus" between the endangered population of sea turtles located in Asian Waters and the United States to allow the latter to claim an interest in their conservation (Shrimp-Turtle Case, 1998). In this case, the US was allowed to claim interest beyond their borders.

In sum, the main reason to support to regard conserve biodiversity as obligation *erga omnes* is due to the need to prevent great threat and harm imposed by rampant human economic activities. The scope of obligation *erga omnes* should also change in accordance with the need of protecting environment and biodiversity. Therefore, if one State has violated its obligation to conserve biodiversity, other indirectly affected States can proceed proceedings before the I.C.J. based on obligation *erga omens*.

2. Cons to Regard the Obligation to Conserve Biodiversity as Obligation *Erga Omnes*

Reasons against regarding the obligation to conserve biodiversity as obligation *erga omnes* mainly consider that the jurisprudence doesn't prove its *erga omnes* character, and to conserve biodiversity is not sufficiently important enough to achieve obligation *erga omnes* status.

2.1. No Jurisprudence has Ever Regarded the Obligation to Conserve Biodiversity as Obligation *Erga Omnes,* and the I.C.J. has already Shown its Reservation to Expand the Scope of Obligation *Erga Omnes*

In the 1961 *Bacerona Traction case*, the I.C.J. has recognized five obligations as obligations *erga omnes,* which include the prohibitions of aggression, genocide, slavery, racial discrimination, and the right to self-determination (East Timor, 1995 I.C.J.; Genocide case, 2007 I.C.J.; ILC Commentary on the Draft Articles on Responsibility of States, 2011). Such crimes are also reflected in the Rome Statute under Article 5. When deciding whether an obligation is *erga omnes* in nature, the I.C.J. addressed the issue in a material approach, suggesting that obligations acquire *erga omnes* status because of their heightened importance (Christian J. Tams, 2005). *Erga omnes* rules have been introduced to protect key common interests which are perceived to be fundamental to the world community (M. Byers, 1997), and most rules of substantive *jus cogens* necessarily apply *erga omnes* (Yearbook of the International Law Commission, 1998). The concept of *erga omnes* obligations is further classified by liability arising only from serious breaches of such obligation. A "serious breach" refers to the gravity or intensity of such failure while a "systematic" failure refers to violations carried out in an organized and deliberate way (Marjan Ajevski, 2008). Such classification is intended to increase the effectiveness of response to grave crimes and to prevent abuses in the use of the concept.

So far, no jurisprudence has supported the expansion of the scope of *erga omnes* obligation (Birnie & Boyle, 2002); even the I.C.J. has the opportunity to do so in the 1973 Nuclear Test case (Nuclear Tests Case, 1974). In that case, France planned to conduct nuclear test which would cause massive and extremely serious harm to the global environment, and Australia and New Zealand protested that France should halt its atmospheric nuclear testing in the South Pacific region. A major issue was whether Australia and New Zealand had the right to bring a claim to the I.C.J. on the basis of a violation of an obligation *erga omnes* to the international community to be free from nuclear tests generally. However, even under that circumstance, the I.C.J. never expressly admitted the prevention of the proliferation of nuclear pollution is the obligation *erga omnes*. Unlike incidental or intentional massive pollution to common areas causing clear and imminent damage to the global environment, the exploitation of natural resources by States in most cases is inevitable for the development.

The various pronouncements (East Timor, Dissenting Opinion Judge Skubiszewski; United States Diplomatic and Consular Staff in Tehran, 1980 I.C.J.) convey an impression of how the I.C.J. and its members have interpreted the term 'of fundamental importance'. The same considerations should be relevant in future proceedings involving *erga omnes* claims. In this sense, the conclusion can be reached that the I.C.J. is quite cautious to make use of or expand the concept of *erga omnes* obligations outside the human-rights context.

Besides, Barcelona Traction has also drawn a distinction between States concerned in the outcome of the proceedings, and States having standing to institute them (East Timor, Skubiszewski, dissenting). *Actio popularis* indicates an action brought by a plaintiff before a court in the general interest, without any need to show an individual interest in pursuing its claim (Noam Lubell, 2010). A State has a mere general interest and not legal interest in seeing the compliance of these provisions, which would give rise to *actio popularis*. The I.C.J. has expressly rejected the concept of *actio popularis* in international law (South West Africa, 1966). The obligation *erga omnes* must be taken *cum grano salis,* which otherwise will be chaotic and self-serving, or the wide applicability of *erga omnes* would weaken the concept of itself (Christian J. Tams, 2005). Therefore, a State merely concerned in the fate of species is insufficient to establish a right to standing.

2.2. The Obligation to Conserve Biodiversity is not Sufficiently Important to Achieve the Status of Obligation *Erga Omnes*

The I.C.J. has established a high threshold of obligation *erga omnes.* The most widely

accepted obligation *erga omnes* have the following similar characteristic: they are either the grave crimes listed by the International Law Committee which have posed serious damage to the human being, for example, the prohibition of genocide, slavery, aggression; or it is the obligation that has already protected in the UN Charter, for example, the right to self-determination. The obligation to conserve biodiversity is indeed important, however, it is neither as the grave crimes nor stipulated in UN Charter.

Besides, the environment policy on the situation that there are still many developing States at present is also the factor needed to be taken into account. Article 20 of the CBD clearly demonstrates that "economic and social development and poverty eradication are the first and overriding priorities of developing countries". Therefore, economic development is still the first and overriding priority for these developing countries. If the obligation to conserve biodiversity is an obligation *erga omnes*, the economic interests of developing countries and people's right of development would be severely affected. The I.C.J. can surly expend the scope of obligation *erga omens* in the future, however, at the present time, the obligation to conserve biodiversity is not sufficiently importantly enough to achieve obligation *erga omnes* status and should never be regarded as one of obligation *erga omnes*.

Additionally, all such established *erga omnes* obligations have been deemed as a general rule of international law that is customary in nature (Marjan Ajevski, 2008). Considering that not even a customary norm dictating the conservation of endangered species exists at present, it can't be said that there is a consensus among the international community to include obligations to conserve specific animal species as a fundamental interest. Although mankind has a common interest in the preservation of natural resources like wildlife, it remains unclear whether all States are subject to common obligations for their conservation (P.W. Birnie & A.E. Boyle, 2002).

The principle of sovereignty puts a duty on other states not to intervene in matters within domestic jurisdiction of another State (G. Abi-Saab, 1991). This duty not to intervene implies that the choice of policies of a State does not give other states right to intervene, directly or indirectly, in its domestic affairs (Malcolm N. Shaw, 2008). Since the obligation to conserve biodiversity is not obligation *erga omens*, the sovereign State which doesn't fit the conditions under article 48 of ILC Draft Articles on Wrongful Acts and has no right to interfere with internal matters of other state to exploit its own natural resources. Or else, it will severely interfere with other States' sovereign right.

Conclusion

After analyzing the pros and cons of this issue, a safe conclusion could be drawn that the expansion of scope of obligation *erga omnes* needs cautious thinking after balancing different interests. The importance of conserving biodiversity has gained more and more attention by the international community, and to regard the obligation to conserve biodiversity is obligation *erga omnes* would be one way to enforce States to cause the least incidental effect during the economic development. However, at the same time, the reasons of the cons against to regard the obligation to conserve biodiversity is obligation *erga omnes* are very obvious: to make sure the obligation *erga omnes* give effective response to grave crimes, to prevent abusing the use of the concept, to guarantee the basic economic interest of developing countries, and most importantly, to protect the sovereign right of the State. Whether or not the time to regard the obligation to conserve biodiversity as obligation *erga omnes* has come depends on different perspectives of interests, however, the awareness and efforts of biodiversity conservation is definite the trend which needs more attention in the foreseeable future.

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