

COMMON CONCERN OF HUMANITY

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Alexandre Kiss believed deeply in the interdependence of all persons and in the dependence of humanity on nature and its processes. In his lifetime, and partly through his work, he saw these beliefs spread and environmental protection emerge as a fundamental value of society. He concluded that, like other fundamental values in a society, environmental protection must be recognized as a common concern, and ensured through law, especially superior norms of constitutional or international law. While he was skeptical of the concept of *jus cogens* as it has been expanded by writers,¹ he accepted the need for recognition of fundamental substantive rules to protect the global environment in the common interest. This paper explores briefly the origin, recognition, and legal consequences of the notion of a “common concern of humanity.”

1. Why and What is a Common Concern?

The phrase common concern of humanity is rich in implications. As an international law term, it is notable, first for what it does not include, which is a reference to states. It is rather humanity as a whole, the multitude of individuals whose concerns are at issue.² Justice Weeramantry, in his separate opinion in the *Gabcikovo/Nagymaros* case,³ speculated that “we have entered an era of international law in which international law subserves not only the interests of individual States, but looks beyond them and their parochial concerns to the greater interests of humanity and planetary welfare...

¹ See, e.g. EVA KORNICKER UHLMANN: State Community Interests, *Jus Cogens* and Protection of the Global Environment: Developing Criteria for Peremptory Norms. 11 *Geo. Int'l Env't'l L. Rev.* 101 (1998)

² Contrast the definition of *jus cogens*, as set forth in the Vienna Convention on the Law of Treaties, as a norm recognized and accepted as such by “the international community *of states* as a whole.” Vienna Convention on the Law of Treaties, art. 53 (emphasis added.).

³ Case concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia) 1997 ICJ Rep. 7 (25 Sept.).

International environmental law will need to proceed beyond weighing the rights and obligations of parties within a closed compartment of individual State self-interest, unrelated to the global concerns of humanity as a whole.”⁴ In fact, there are long-standing precedents reflecting the notion of common concerns or a global set of values and interests independent of the interests of states. The entire subject of “humanitarian” law rests on the concept of humans protected as such and not by and because of their nationality. The Martens Clause in the Preamble to the 1907 Hague Convention (IV)⁵ is perhaps the best known early example of this idea, referring to “the laws of humanity, and the dictates of the public conscience” as the sources of principles of the law of nations. The development of human rights law to protect individuals beyond the context of armed conflict, and international criminal law, in which individuals are prosecuted for the most serious crimes against the international community, can also be seen as reflections of some common concerns of humanity.

What makes a concern a “common” one? Alexandre Kiss suggested it was the importance of the values at stake. This idea is also implicit in the Martens Clause and in the ICJ’s recognition that *erga omnes* obligations arise “by their very nature” “in view of the importance of the rights involved.”⁶ Supporting this notion, it is suggested later in this paper that issues of common concern are linked to the recognition of *erga omnes* obligations and the formation of collective compliance institutions and procedures that reinforce the *erga omnes* obligations imposed in the common interest. Indeed, in its advisory opinion on the Legality of the Threat or Use of Nuclear Weapons, the ICJ implicitly recognized the existence of *erga omnes* environmental obligations on the part of states:

[T]he environment is not an abstraction but represents a living space, the quality of life and the very health of human beings, including generations unborn. The existence the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.⁷

Certainly, the importance of an issue may make it a concern, but it does not necessarily make it a “common” one. Instead, it may be suggested that issues of common concern are those that inevitably transcend the boundaries of a single state and require collective action in response; no single state can resolve the problems they pose or receive all the benefits they provide. Harm to a matter of common concern is often widespread and diffuse in origin, making it difficult if not impossible to rely on traditional bilateral notions of state responsibility to enforce international norms. When that harm is mitigated, all or at least large parts of the community benefit.

Common concern is related to, but different from the concepts of commons areas and the common heritage of mankind. International law has long recognized that

⁴ Id. Separate opinion of Vice-President Weeramantry, at 115.

⁵ Convention (No. IV) Respecting the Laws and Customs of War on Land, with Annex of Regulations (The Hague, Oct 5. 18, 1907), 36 Stat. 2277 (1911).

⁶ Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Second Phase, 1970 ICJ Resp. 3, para. 33.

⁷ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion [1996] ICJ Rep. 226 at para. 29.

there are common areas, like the high seas, Antarctica and outer space, which lie outside national boundaries, are not reducible to national or private appropriation, and where coherent and comprehensive regulation must be international. International law also recognizes certain resources, such as those on or under the deep seabed, as belonging to the common heritage of mankind by virtue of their location in commons areas.

Common concerns are different because they are not spatial, belonging to a specific area, but can occur within or outside sovereign territory. The 1972 World Heritage Convention uses the term heritage in referring to cultural and natural resources, but treats them as a common concern, not as common heritage. The preamble declares that certain natural areas or sites should be “preserved as part of the world heritage of mankind as a whole” but the Convention is primarily concerned with ensuring the duty of “the international community as a whole to participate in the protection of ...natural heritage of outstanding universal value”⁸ within the territory of states parties.

Environmental issues are common ones because they often cannot be managed effectively by national or regional efforts; moreover, environmental benefits and burdens are shared by all persons. The climate, the stratospheric ozone layer, the oceans, and indeed the entire physical world form an interdependent ecological system, much of which can only be protected at the global level, making it a common concern for all humanity. The modalities of protection and preservation are formulated in law and policy and enforced by national and international institutions.

2. Recognition of the Common Concern

During the second half of the twentieth century, states aimed to create a universal political organization to maintain international peace and security and improve the well-being of all humanity. This ambitious effort could only proceed by defining domains of common concern. The international recognition of human rights and fundamental freedoms constituted a first step of paramount importance in developing the concept of an international community built upon the fundamental values of humanity. Similarly, knowledge that the biosphere is the only known place in the universe where life is possible led to the emergence of protection of the human environment as a common concern of humanity.

The term “common interest” appeared early in international treaties concerning the exploitation of shared natural resources. The International Convention for the Regulation of Whaling (Washington, Dec. 2, 1946) recognized in its preamble the “*interest of the world* in safeguarding for future generations the great natural resources represented by the whale stocks” and that it is in the common interest to achieve the optimum level of whale stocks as rapidly as possible. Soon thereafter states began to recognize that it was in their common interest to take conservation measures to protect exploited fish stocks. The 1952 Tokyo Convention for the High

⁸ Preamble, Convention for the Protection of the World Cultural and Natural Heritage (UNESCO 1972). See FRANCESCO FRANCONI: Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity. 25 *Mich. J. Int'l L.* 1209 (2004).

Seas Fisheries of the North Pacific Ocean (May 9, 1952) expressed the conviction of the parties that it would best serve the “common interest of mankind,” as well as the interests of the contracting parties, to ensure the maximum sustained productivity of the fishery resources of the North Pacific Ocean.

Further international recognition of the environment as a “common concern of humanity” came with conclusion of the 1959 Antarctic Treaty (Washington, Dec. 1, 1959). Its preamble affirms that “it is in the interest of all mankind that Antarctica shall continue forever to be used exclusively for peaceful purposes.” Article IX authorizes the adoption of measures for the preservation and conservation of living resources in Antarctica “in furtherance of the principles and objectives of the Treaty.” The Antarctic Treaty system further developed with adoption of the Canberra Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) which made express reference to the “interest of all mankind to preserve the waters surrounding the Antarctic continent for peaceful purposes only.”⁹ The most recent addition to the Antarctic Treaty system, the 1991 Madrid Protocol on Environmental Protection to the Antarctic Treaty¹⁰ achieved full recognition of the common interest. Its preamble expresses the conviction that the development of a comprehensive regime for the protection of the Antarctic environment and dependent and associated ecosystems is in the interest of mankind as a whole and for this purpose it denominates Antarctica a nature reserve, devoted to peace and science.¹¹

Such evolution must be seen as reflecting awareness of the general depletion of natural resources and of the threats to the environment, awareness that is increasing the pressure to adopt broad measures in the interest of present and future generations. Even before the 1972 Stockholm Conference, the 1968 African Convention on the Conservation of Nature and Natural Resources had expressed the desire of the contracting states to undertake individual and joint action for the conservation, utilization and development of natural resources by establishing and maintaining their rational utilization for the present and future welfare of mankind.¹² With the words “future welfare” the temporal dimension of the common interest of humanity has appeared.

Other international environmental treaties similarly recognize the common concern of mankind. The 1979 Bonn Convention on the Conservation of Migratory Species of Wild Animals recognizes in its preamble that “wild animals in their innumerable forms are an irreplaceable part of the earth’s natural system which must be conserved for the good of mankind ...[E]ach generation of man holds the

⁹ May 20, 1980, preamble, 19 I.L.M. 837 (1980). See also DANIEL VIGNES: Protection of the Antarctic Marine Fauna and Flora. The Canberra Convention and the Commission Set up by It. In *International Law for Antarctica*. (eds. F. FRANCONI–T. SCOVAZZI) 1996, 159.

¹⁰ Oct. 4, 1991, 30 I.L.M. 1461 (1991). See also, LAURA PINESCHI: The Madrid Protocol on the Protection of the Antarctic Environment and its Effectiveness. In FRANCONI–SCOVAZZI op.cit. 261.

¹¹ See also the UN General Assembly Resolution on the Question of Antarctica, Dec. 6, 1991, G.A. Res 46/41, UN GAOR, 46th Sess. Supp. No 49 at 83, UN Doc. A/46/49 (1992) which implicitly expresses that Antarctica constitutes a common concern for all the states.

¹² Algiers, Sept. 15, 1968, 1001 U.N.T.S. 3.

resources of the earth for future generations and has an obligation to ensure that this legacy is conserved and, where utilized, is used wisely.”¹³ The Convention on the Conservation of European Wildlife and Natural Habitats, adopted several months after the Bonn Convention joins the concepts of general interest and future humanity by recognizing that wild flora and fauna constitute a natural heritage that “needs to be handed on to future generations.”¹⁴ Similarly, the World Charter for Nature states that the preservation of the species and of the ecosystems should be ensured “for the benefit of present and future generations.”¹⁵ The World Charter opened the door for the 1992 Convention on Biological Diversity which explicitly proclaims the principle of common concern of humanity¹⁶ by stating “the importance of biological diversity for evolution and for maintaining life sustaining systems in the biosphere,” and by “affirming that the conservation of biological diversity is a common concern of humankind...” The Framework Convention on Climate Change similarly affirms in the first paragraph of its preamble that “change in the Earth’s climate and its adverse effects are a common concern of humankind.”

The formulations of the last two instruments are significant. It is neither biological diversity nor the climate in isolation that are common concerns. It is rather the conservation of biological resources and climate change and adverse effects therefrom that are a common concern. The theme of sovereignty and sovereign rights remains important to both conventions, but the language suggests recognition that international cooperation is necessary to address loss of biodiversity and climate change.

The inclusion of smaller areas in the common concern is seen in the Paris Convention for the Protection of the Marine Environment of the North-East Atlantic, adopted several months after the Convention on Biological Diversity. It recognizes that “the marine environment and the fauna and flora which it supports are of vital importance to all nations.”¹⁷ More recently, the UN Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa referred to “the urgent concern of the international community, including states and international organizations, about the adverse impacts of desertification and drought,” although only some parts of the world are directly concerned.¹⁸

3. The Legal Implications of Recognizing the Environment as a Common Concern of Humanity

The notion of common concern leads to the creation of a legal system whose rules impose duties on society as a whole and on each individual member of the community. Almost all national constitutions proclaim fundamental human rights and freedoms

¹³ June 23, 1979, 19 I.L.M. 15 (1980)

¹⁴ Bern, Sept. 19, 1979, E.T.S. 104, EMuT 979: 70.

¹⁵ Oct. 28, 1982, Res. 37/7, UN Doc. A/37/51.

¹⁶ See on the replacement of the concept of “common heritage of mankind” by “common concern”: N. SCHRIJVER: *Sovereignty over Natural Resources, Balancing Rights and Duties*. 246, 389 (1997).

¹⁷ September 22, 1992, 32 I.L.M. 1069 (1993).

¹⁸ Paris, June 17, 1994, 33 I.L.M. 1328 (1994).

and require the government to respect and ensure those rights. Increasingly, similar provisions are included to secure environmental protection. National regulatory systems are built upon this foundation. Again, common interest may be contrasted with common ownership.

National legal systems and international law have long recognized common ownership of or equitable interests in shared resources. The concept of *res communis* is a form of common ownership that precludes individual appropriation but allows common use of a resource. It contrasts with *res nullius*, which most systems extends to wild animals and plants. *Res nullius* belong to no one and can be freely used and appropriated when taken or captured; it is the absence of a common interest. The concept of common heritage of mankind, which emerged in the 1960s, is distinct from both earlier concepts, in part because inclusion of the word “heritage,” connotes a temporal aspect in the communal safeguarding of areas or resources incapable of national appropriation. Based on this concept, special legal regimes have been created for the deep seabed¹⁹ and the Moon.

The nature of the common heritage is a form of trust, whose principal aims include restricting use to peaceful purposes, rational utilization in a spirit of conservation, good management or wise use, and transmission to future generations. Benefits derived from the common heritage may be shared through equitable allocation of revenues, but this is not the essential feature of the concept. Benefit-sharing can also mean sharing scientific knowledge acquired in common heritage areas like Antarctica.

In contrast, the common concern, *l'intérôt général*, is a general concept which does not connote specific rules and obligations, but establishes the general basis for the concerned community to act. The conventions cited imply a global responsibility to conserve disappearing or diminishing wild fauna and flora, ecosystems, and natural resources in general in danger. Language to this effect can be found in the Oct. 30, 1980 resolution of the UN General Assembly on the draft World Charter for Nature, which asserts the “supreme importance of protecting natural systems, maintaining the balance and quality of nature and conserving natural resources, in the interests of present and future generations.”²⁰

The right and duty of the international community to act in matters of common concern must be balanced with respect for national sovereignty. States retain sovereignty subject to the requirements of international law developed to ensure the common interest. Other domains of international law, including trade and diplomatic relations, are instrumental to achieving this common interest of humanity. They do not constitute in themselves the ultimate goals of international society but are means to improve the moral and economic well-being of humanity as a whole. The terms of the United Nations Charter indicate that international peace and security must be coupled with

¹⁹ See: UN, Division for Ocean Affairs and the Law of the Sea, *The Law of the Sea, Concept of the Common Heritage of Mankind* (1996).

²⁰ G.A.Res. 35/7 on the Draft World Charter for Nature, UN GAOR, 35th Sess., Supp.No 48 at 15, UN Doc. A/35/7, Nov. 5, 1980, 20 I.L.M. 462 (1981).

economic and social advancement of all peoples and individuals in order to ensure overall advancement of humanity. Respect for human rights, economic development and environmental protection have been unified in the concept of sustainable development as a common concern of humanity.

One avenue to explore is the link between common concern and *erga omnes* obligations. Both concepts relate to matters which touch the interests of people throughout the world. It may very well be that one of the consequences of denoting a subject a common concern of humanity is that it gives rise to *erga omnes* obligations that may be pursued by any party. At the same time, it must be recognized that traditional dispute settlement mechanisms are unlikely to be utilized to enforce such obligations. States rarely use them to pursue their own interests, and it may be idealistic to assume they will litigate in the broad public interest. Instead, cooperation in law-making has been coupled with innovative compliance mechanisms, as discussed further below.

The various treaties that refer to common interest have much in common. They do not establish explicit rules of conduct, but do limit states' freedom of action, even when other states rights are not directly implicated. Certain environmental harm is identified as of concern to all, widening the scope of *erga omnes* obligations and imposing a duty to cooperate, a duty that has shown itself to be enforceable. In the *Mox Plant Case* (Ireland v. United Kingdom), the International Tribunal on the Law of the Sea, in its order on provisional measures issued Dec. 3, 2001, *reprinted* 41 ILM 405 (2002), opined that the duty to cooperate is a fundamental principle in general international law, as well as one contained in the relevant treaty provisions, and that rights may arise therefrom which the Tribunal may protect. The ITLOS provisional order mandated that the parties cooperate to exchange further information about the environmental consequences of the proposed project and devise measures to prevent harm resulting from proceeding with the project.

In general, institutional and procedural arrangements are required to implement the duty to cooperate on matters of common concern. And indeed, various treaty regimes today reflect the specific requirement to cooperate and take action. The treaty regimes establish principles, norms, and procedures which evolve over time to ensure collective action and can be considered the institutional dimension of the common concern of humanity. They ensure that scientific knowledge, the views of non-governmental organizations and the business sector, and other technical bodies are taken into account. The participatory and transparent processes that exist in the best of the treaty regimes enhance legitimacy and the possibility of adopting effective responses to common concerns. The norm-creating process is supplemented by innovative compliance mechanisms and dispute settlement procedures. As Jutta Brunnee has described it "cooperative facilitation of compliance is the primary objective of the majority of existing compliance procedures."²¹ This is certainly clear in the Montreal Protocol procedures.

²¹ JUTTA BRUNNEE: Common Areas, Common Heritage, and Common Concern. In *Handbook of International Environmental Law*. (eds. BODANSKY-BRUNNEE-HEY) 2007, 550 at 571.

Conclusions

The emergence of environmental protection as a common interest of humanity has altered the traditional role of state sovereignty, what Louis Henkin calls the “s-word”. At the very least, agreement that a topic is a common concern of humanity must mean that it is no longer in the reserved domain and under the exclusive domestic jurisdiction of states. By definition, a common concern requires international action and necessitates new forms of law-making, compliance techniques and enforcement. Other consequences include the importance of participation by non-state actors and management of environmental resources at all levels of governance. As international law continues to struggle with collective action in the face of the s-word, treaty regimes provide examples of practical action in the common interest to further those fundamental values that Alexandre Kiss held so dear.