PART I

Theory

1

The Principle of Common Concern of Humankind

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International law is the art of creating normativity out of reality.

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1.1 Introduction

Collective action problems occurring in the process of globalisation are mainly caused by a lack of appropriate and effective global institutions able to ensure the sustainable production of global public goods.[2] States are inherently preoccupied with the pursuit of their own interests defined by domestic political processes.[3] Global society is left without swift and adequate solutions to its most grave problems. International cooperation frequently fails in such configurations as countries and governments

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[1] 'Foundations of International Law', lecture, University of Cambridge (autumn 2003), cited in N. Stürchler, *The Threat of Use of Force in International Law* (Cambridge: Cambridge University Press, 2007), p. 125.

[2] This chapter partly draws and builds on T. Cottier, P. Aerni, B. Karapınar, S. Matteotti, J. de Sépibus and A. Shingal, 'The Principle of Common Concern and Climate Change', *Archiv des Völkerrechts*, 52 (2014), 293–324. All URLs cited were accessed between August and October 2018.

[3] E. Brousseau *et al.* (eds.), *Global Environmental Commons: Analytical and Political Challenges in Building Governance Mechanisms* (Oxford: Oxford University Press, 2012); E. Brousseau, T. Dedeurwaerdere and B. Siebenhüner, Cambridge, MA: MIT Press, 2012); E. Brousseau *et al.* (eds.), *Reflexive Governance for Global Public Goods* (Cambridge, MA: MIT Press, 2012); I. Kaul 'Rethinking Public Goods and Global Public Goods', ibid. at 37–54; I. Kaul 'Global Public Goods: Explaining Their Underprovision', *Journal of International Economic Law*, 15 (2012), 729–50.

are not able and willing to define long-term goals to the detriment of short-term advantages.[4] The United Nations and other international organisations, given their present structure, are not in a position to offset such priorities. The same holds true for regional and even domestic law. The European Union is not sufficiently empowered and equipped to effectively contain vested interests; and within nations, powerful local interests tend to undermine the pursuit of global public goods by central government – or the other way round. This is particularly evident in, but not limited to, the problem of global warming and climate change. Despite strong empirical evidence and scientific studies provided by the United Nations Intergovernmental Panel on Climate Change (IPCC) in an unprecedented scientific effort and coordination,[5] most countries fall short of taking up the challenge in an effective and efficient manner due to sectoral vested interests in the energy sector and elsewhere. There clearly is a need to strengthen mutual commitments in addressing these issues.

The 1992 United Nations Framework Convention on Climate Change (UNFCCC) recognised in its preamble that the adverse effects of climate change amount to a common concern of humankind.[6] This statement is not further qualified. It would seem limited to a factual observation of the obvious, as all humans, present and future, are affected by climatic changes one way or the other. But it also recognises the claim that climate change is partly human-made and thus a responsibility to be taken seriously.

In the field of climate change, the statement of common concern of humankind in the UNFCCC supported, and perhaps triggered, an initial commitment to cooperate in climate change mitigation and adaptation, taking into account the shared but differentiated responsibility of industrialised and developing countries alike. This led to the 1997 Kyoto Protocol, which defined broad goals for reducing carbon emissions.[7] The initial commitment period of the Kyoto Protocol expired in 2012, and subsequent negotiations have had limited success. They have failed

[4] See N. Krisch, 'The Decay of Consent: International Law in an Age of Global Public Goods', *American Journal of International Law*, 108 (2014), 1–40.
[5] www.ipcc.ch (accessed 28 Aug. 2018).
[6] United Nations Framework Convention on Climate Change, 9 May 1992, 31 ILM 849, 851, https://unfccc.int/resource/docs/convkp/conveng.pdf.
[7] D. Bodansky, 'The History of the Global Climate Regime', in U. Luterbacher and D. Sprinz (eds.), *International Relations and Global Climate Change* (Cambridge, MA: MIT Press, 2001), pp. 23–40.

to bring about more precise terms and commitments beyond the target of limiting average increases of global temperature to no more than 2 °C (today 1.5°C) by the end of this century[8] – a goal perhaps already unachievable, even with aggressive mitigation measures.[9] Subsequently, the Conferences of Copenhagen, Cancún, Durban and Doha failed to make substantial progress except for long-term political commitments. Despite the acknowledgement of climate change as a common concern, this acknowledgement could not be in any distinct way successfully implemented to address the evident collective action problem.

The 2015 Paris Agreement reiterated climate change as a common concern.[10] It brought about progress as it extended responsibilities to all nations. This was a major political achievement. Moreover, its adoption and entry into force provide strong signals to the private sector, encouraging long-term investment in renewable energy and sustainable construction policies on local levels. Whatever the commitment of governments, sustainability has become an important consideration in business and finance. Yet, and despite reiterated acknowledgement of climate change as a common concern of humankind, the agreement still falls short of prescribing more precise obligations at abatement. The model adopted essentially leaves the matter to unilateral commitment, and it has remained controversial to what extent such commitments amount to obligations under international law. Moreover, the United States announced on 1 June 2017 its intention to withdraw from the 2015 Paris Agreement by 2020, substantially undermining on the federal level the effort to address collective action problems in a successful manner.[11]

[8] UNEP, 'The Emissions Gap Report: Are the Copenhagen Accord Pledges Sufficient to Limit Global Warming to 2 °C or 1.5 °C?', *United Nations Environmental Programme* (2010). In 2018, the IPCC issued a report calling for a maximum of 1.5 °C, IPPC, *Global Warming of 1.5* °C, http://report.ipcc.ch/sr15/pdf/sr15_spm_final.pdf.

[9] V. Ramanathan and Y. Xu, 'The Copenhagen Accord for Limiting Global Warming: Criteria, Constraints, and Available Avenues', *Proceedings of the National Academy of Sciences*, 107 (2010), 8055–62.

[10] UNTS 1760, p. 79, https://unfccc.int/process/conferences/pastconferences/paris-climate-change-conference-november-2015/paris-agreement (containing all six official languages of the text). See text accompanying *infra* n. 46.

[11] 'Trump Administration Delivers Notice U.S. Intends to Withdraw from Paris Climate Deal', *Politico*, 4 Aug. 2017; www.politico.com/story/2017/08/04/trump-notice-withdraw-from-paris-climate-deal-241331 (accessed 28 Aug. 2018). The Biden Administration rejoined the Paris Accord in January 2021. 'Biden returns US to Paris climate accord hours after becoming president', *The Guardian*, 20 Jan. 2021; https://www.theguardian.com/environment/2021/jan/20/paris-climate-accord-joe-biden-returns-us.

Under the 1992 United Nations Convention on Biodiversity (CBD), the recognition and commitment to common concern of humankind led to the adoption of national policies on preserving biodiversity, and also to the Bonn Guidelines on access and benefit sharing, which resulted in the Nagoya Protocol on Access to Genetic Resources.[12] As with climate change mitigation, efforts at combating the loss of biodiversity have not yet yielded the expected results. Erosion continues despite the political endorsement of common concern, and benefit sharing is still in its infancy.

The 2001 international Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) equally recognises genetic resources as a common concern of humankind.[13] It developed a sophisticated system of plant conservation, registration and open exchange for a list of crops. The treaty currently applies to only 64 crops and forages, while the majority of crops have been left under the permanent sovereignty of states over natural resources, at their free disposition in terms of trade and conservation.[14]

Finally, the Convention for the Safeguarding of the Intangible Cultural Heritage of 17 October 2003 invokes the will and common concern to safeguard intangible cultural heritage.[15] It focuses on international cooperation to bring about transparency and in the identification of the heritage of intangible cultural goods. The convention includes an

[12] Convention on Biological Diversity, UNTS vol. 1760 p. 79; 31 ILM 818, 822 (see www.cbd.int/convention); Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilisation to the Convention on Biological Diversity, opened for signature 2 Feb. 2011, XXVII.8.b UNTC (not yet in force), www.cbd.int/abs/text/default.shtml; Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of Their Utilisation, COP Dec VI/24, Item A, 6th mtg, UNEP Doc. UNEP/CBD/COP/6/20 (7–19 Apr. 2002), www.cbd.int/doc/decisions/COP-06-dec-en.pdf.

[13] "Cognizant that plant genetic resources for food and agriculture are a common concern of all countries, in that all countries depend very largely on plant genetic resources for food and agriculture that originated elsewhere;" www.fao.org/plant-treaty/overview/texts-treaty/en.

[14] See M. Halewood, I. Isabel, Lépez Noreiga and S. Louafi (eds.), *Crop Genetic Resources as a Global Commons* (Abingdon, UK: Routledge, 2013) (interestingly not addressing the notion of common concern despite reference to it in the preamble of the treaty).

[15] 'Being aware of the universal will and the common concern to safeguard the intangible cultural heritage of humanity', http://portal.unesco.org/en/ev.php-URL_ID=17716&URL_DO=DO_TOPIC&URL_SECTION=201.html.

international fund through which activities in Member States are supported. Common concern is not used in an operational manner in the convention and does not entail a normative dimension.

The reasons for such failures and very limited success in addressing common concerns by means of international cooperation are manifold. Most of them are well known.[16] Some are of an economic nature and some are political, but a prime culprit certainly relates to the predominant basic concepts of the Westphalian system of coexistence, which are firmly centred on permanent sovereignty of the nation state over natural resources, as well as on the principle of territoriality. These inherent reasons prompt fierce competition among domestic industries on the world market, free-riding and mercantilist and protectionist beggar-thy-neighbour policies. They render governments largely unwilling to lose competitive advantages by adopting measures of climate change mitigation or effective protection of biodiversity which could affect the level playing field. International cooperation has been largely successful in areas of mutual interest and reciprocity which amounts to a fundamental tenet of contractual international law and perhaps, at the end of the day, of all law successfully addressing human interaction.[17] Law is mainly successful and voluntarily complied with where it is based upon mutual interest, on give and take of benefits and advantages in a balanced manner.

On such foundations based upon mutual interests and reciprocity, the General Agreement on Tariffs and Trade (GATT) evolved in a comprehensive system of multilateral agreements within which countries are able to pursue and defend their interests, including a strong, albeit lately challenged, system of judicial dispute settlement in the WTO.[18] The law of the sea provided the foundations for the successful evolution of case law on maritime boundary delimitation led by the International Court of

[16] For climate change mitigation, see D. C. Esty and A. L. I Moffa, 'Why Climate Change Collective Action Has Failed and What Needs to Be Done within and without the Trade Regime', *Journal of International Economic Law*, 15 (2012), 777–9; for conservation through use of plant genetic resources, see Halewood *et al.*, *supra* n. 14, pp. 16–17.

[17] B. Simma, *Das Reziprozitätselement im Zustandekommen völkerrechtlicher Verträge. Gedanken zu einem Bauprinzip der internationalen Rechtsbeziehungen* (Berlin: Dunker & Humblodt, 1972).

[18] See generally P. van den Bossche and W. Zdouc, *The Law and Policy of the World Trade Organization* (4th ed., Cambridge: Cambridge University Press, 2017).

Justice.[19] The law of investment protection, enshrined in hundreds of bilateral investment protection agreements produced a substantial body of case law. Finally, the process of nuclear disarmament was able, for a long time, to reduce the risk of warfare.[20] All these areas are strongly based upon the pursuit of national interests and political reciprocity which can best be pursued by way of international cooperation and commitments, rather than unilateral action. Other than environmental law, these areas did not call upon common concern of humankind, but are rooted in traditional realism, the pursuit of national interests based upon reciprocity.

In areas such as climate change, protection of biodiversity, marine pollution, genetic resources and cultural diversity, the essential element of reciprocity in terms of interests and benefits is lacking. Other than in trade and market access rights or international investment, benefits are not directly mutual; obligations incurred are essentially one-sided. Benefits produced are not limited to states incurring obligations but are to the advantage of all humankind in creating and enhancing global public goods. They are not necessarily reciprocated by commitments taken by others. Equally, reciprocity is largely lacking in untapped areas of common concern, such as migration, human rights or monetary and financial stability or food security. Home countries of migrants are not genuinely interested in cooperating with host countries. Human rights policies abroad benefit the people, but do not directly create reciprocal advantages for the state incurring obligations. Traditional monetary and financial policies, including banking regulations, are conducted unilaterally in the pursuit of national or federal EU interests. They do not depend upon reciprocity, and international cooperation traditionally has been limited among central banks.[21] Food security is perceived and conceptualised as a matter of national interest and not in terms of reciprocal advantages. All this in return incentivises unilateral policies of free riding, attitudes of wait and see and leaving burdens to others, while seeking to enhance individual competitiveness in international coexistence.

[19] See generally T. Cottier, *Equitable Principles of Maritime Boundary Delimitation: The Quest for Distributive Justice in International Law* (Cambridge: Cambridge University Press, 2015).

[20] R. Greenspan Bell and M. Ziegler (eds.), *Building International Climate Cooperation. Lessons from the Weapons and Trade Regimes for Achieving International Climate Goals* (Washington, DC: World Resources Institute, 2012).

[21] See Chapter 7 in this volume.

One is therefore – perhaps too readily – tempted to put the idea and concept of common concern of humankind aside as a piece of wishful thinking. Yet, the world today faces unprecedented problems which no longer can be framed in terms of short-term national interests and reciprocity in a traditional manner and way. Conventional wisdom in international law and relations and statism simply do not produce critical results. Today's and future collective action problems in a highly integrated and interdependent world call for new foundations in defining rights and obligations in key areas riddled with unresolved major problems which are able to address long-term interests in a reciprocal manner. They need to secure that all countries alike are engaged in making contributions and commitments to their mutual benefit, commensurate with their levels of social and economic development and powers they may exert. Efforts to this effect are made by stressing the importance of community interests in the theory of international law, by framing constitutionalisation of international law and by focusing on global governance and public trusteeship. These ambitious efforts at restructuring international law and relations in a comprehensive manner, stressing the need for cooperation, are general and partly elusive, while common concern of humankind builds upon the existing framework with effects limited to, and focused upon, particular areas identified in a process of claims and responses in international relations.

Common concern of humankind thus bears the potential to be further developed beyond a political commitment to international obligations of cooperation within the United Nations and other international organisations, going beyond the legal disciplines of Article 56 of the United Nations Charter. A new principle of Common Concern of Humankind (CCH) may serve as a foundation to define, legitimise and assess domestic measures addressing shared problems of humankind.[22] It may offer guidance in revisiting the doctrine of cooperation, compliance and extraterritorial effects of domestic law and duties to act. It may thus help to improve compliance with international obligations incurred. It may help to revisit and reshape traditional precepts of national sovereignty.

[22] Henceforth, upper case will be used to depict Common Concern as a doctrine and emerging principle, other than descriptions of common concern of humankind used so far in international instruments and most of the literature in lower case.

In this context, the extension of emissions trading to all civil air traffic to and from the European Union under the umbrella of the UNFCCC is an encouraging example in point. The imposition of the measure was highly controversial, but was successful in eventually bringing governments to the negotiating table within the International Civil Aviation Organization (ICAO). While justified by the Court of Justice of the European Union (CJEU) in terms of extraterritorial application,[23] a future legal principle of Common Concern may further contribute to justifying, clarifying and defining the scope and the limitations of such actions in addressing climate change mitigation as a matter of international law. It may assist in compliance, defining the law of sanctions and countermeasures addressing free riding and failure to act in support of addressing collective action problems in the pursuit of creating global public goods.

While climate change is the most prominent example, the potential of a future principle of CCH is equally suitable to address and structure other major global problems. It bears the potential to address collective action and governance problems in a wide variation of different fields, for example the field of marine pollution, the enforcement of protection of human rights, the fields of migration, monetary and financial stability, and grossly uneven distributions of wealth and income in the context of investment protection and international trade. Within projects funded mainly by the Swiss National Science Foundations and the Swiss State Secretariat for the Economy (SECO), six PhD projects are dedicated to exploring such wider recourse and are discussed in subsequent chapters of this book. Other areas yet untapped here relate to food security, cyberspace, information technology and big data which no longer can be addressed and regulated within the bounds of nation states.

This chapter briefly explores the historical foundations of common concern of humankind. It expounds, as a doctrine, its potential to emerge as a principle of international law, shaping rights and obligations in international cooperation, domestic commitments, possibilities and limits of extraterritorial effect and its impact on the law of sanctions and countermeasures in seeking compliance with international obligations incurred. It expounds the process of the principle of Common Concern, defines thresholds and addresses the relationship to other and

[23] C-366/10, *Air Transport Association of America and others* v. *Secretary of State for Energy and Climate Change*, judgment of 21 Dec. 2011.