The Common Concern of Humankind today is central to efforts to bring about enhanced international cooperation in fields including, but not limited to, climate change. This book explores the expression’s potential as a legal concept and a future legal principle. It sets out the origins of Common Concern, its differences to other common interest legal principles, and expounds the potential normative structure and effects of the principle, applying an approach of carrots and sticks in realising goals defined as a Common Concern. Individual chapters test the principle in different legal fields, including climate technology diffusion, marine plastic pollution, human rights enforcement, economic inequality, migration, and monetary and financial stability. They confirm that basic obligations under the principle of Common Concern of Humankind comprise not only that of international cooperation and duties to negotiate, but also of unilateral duties to act to enhance the potential of public international law to produce appropriate public goods.

Thomas Cottier, former managing director of the World Trade Institute, is Professor Emeritus of European and International Economic Law at the University of Bern and an adjunct professor of law at the University of Ottawa. He has published widely in the field of international economic law, with a particular focus on constitutional theory and general principles of law, trade regulation and intellectual property.

Zaker Ahmad, former student and researcher at the World Trade Institute, received his PhD from the Faculty of Law of the University of Bern. He is an Assistant Professor of law at the University of Chittagong in Bangladesh.
THE PROSPECTS
OF COMMON CONCERN
OF HUMANKIND
IN INTERNATIONAL LAW

Edited by
THOMAS COTTIER
World Trade Institute
In association with
ZAKER AHMAD
World Trade Institute
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PREFACE

International law, as we know it, increasingly fails to deal with contemporary global challenges. Power relations prevail in this multipolar world. Disciplines on climate change under the UNFCCC and the 2015 Paris Accord remain weak; multilateral rules on migration beyond refugee law are virtually non-existent. Combating global pollution in effective ways, in particular of the global commons and protecting biodiversity, has been failing. Developing countries often pay the price and are not sufficiently supported in the process of climate adaptation. The financial crisis and the great recession have brought about a widespread renaissance of nationalism. The same holds true for the global coronavirus (Covid-19) pandemic in 2020, despite the fact that it is recognised as a public health emergency of international concern under WHO international health regulations. Remedies to challenges, if at all, are primarily sought on the level of the nation state or regional integration in Europe, often without much success due to extensive interdependence of value chains in a globalised economy. Trade sanctions are being unilaterally imposed in trade war disrespecting all legal disciplines of the multilateral trading system of the World Trade Organization, much to the detriment of consumers who pay additional and penalising taxes on products. Income disparities continue to increase within societies. Ever since, compliance and enforcement of human rights have remained weak in international law. Central banks, operating without close cooperation and formal integration fail to provide adequate responses in the context of a globalised economy, denying decent returns on hard-won savings.

Against this backdrop, this book examines the potential of the doctrine of Common Concern of Humankind. While it remains extremely difficult to achieve progress in policy and treaty-making, given the predominance of nationalist sentiments, our hope is that the doctrine of Common Concern of Humankind may offer an avenue for progress in further developing the arsenal of legal principles of law and of international law. We argue in this book that a proper legal principle of Common Concern
of Humankind (CCH) may emerge, comparable to the doctrine and principle of sustainability, as a means to address these pressing transnational and transboundary issues and problems. The principle has the potential to reinforce international cooperation, compliance, and enforcement of international law in an increasingly smaller and interdependent world. It can make a difference to multilevel, global or earth governance. The principle offers the possibility to the legal profession and courts of law to gradually develop its contours and to make a difference in addressing pressing global needs in future case law within the existing framework of international law. Common Concern of Humankind will bring about a new perspective and narrative.

Common concern of humankind, while recognised in the fields of climate change and preservation of biodiversity, has not been sufficiently explored in legal theory and practice so far. Its contours have remained unclear beyond the call for enhanced international cooperation in the production of global public goods and community interests. Yet, common concern bears the potential to develop into a legal principle in a process of claims and responses. It is able to enhance cooperation, legitimise, but also limit, extraterritorial state action as an incentive to bring about appropriate responses addressing common and shared problems threatening world peace and stability.

This volume discusses the potential of such a principle, its relationship to global public goods governance, as well as links to the doctrine of multilevel governance and constitutionalisation of law, as public goods need to be produced on appropriate levels of governance. Such linkages offer the basis for new insights into the potential and operation of a legal principle of Common Concern applicable not only in international law, but also in European and national law. The book explores how the legal principle of Common Concern may evolve in a process of claims and responses, how it can be operationalised and its implications for vertical allocation of powers and checks and balances within the system, as well as for installing appropriate incentives for states to engage in enhanced international cooperation and to comply with international obligations incurred. Once recognised for a particular issue and area, the principle triggers obligations and consultation, negotiations and cooperation. It entails obligations to undertake related homework. It is subject to enhanced compliance and duties to act vis-à-vis non-complying entities.

Part I of the volume expounds the history and theoretical and legal implications, conceptualising duties to cooperate in solving shared problems, obligations to undertake homework and implications or
PREFACE

compliance and enforcement. Part II reaches beyond the classical fields of environmental law, in particular climate change, and examines the potential in several and diverse case studies relating to the diffusion and transfer of low-carbon technology, marine plastic pollution, income inequality, the protection of human rights, migration, and monetary and financial stability. These case studies are partly extractions from more extensive PhD research efforts undertaken in these fields. As they are addressed to different communities, they explore the doctrine of Common Concern of Humankind from their respective angle. Diverse as these areas are, they were chosen on purpose to examine to what extent Common Concern of Humankind can deploy normative effects beyond climate change and biodiversity. They show the potential in terms of conceptualising Common Concern of Humankind in international law. They show that the impact of an emerging principle of Common Concern of Humankind will not be uniform and vary from field to field. The emphasis changes. In areas devoid of substantive rules, such as migration or inequality, Common Concern initiates conceptual avenues. In other areas, such as climate change, marine pollution or monetary and financial law, the focus is on homework and compliance. Finally, in mature areas, such as human rights, the principle of Common Concern brings stronger enforcement by its duty to act subject to the principle of proportionality. Part III of the book finally reproduces feedback offered by renowned scholars in the field. Discussions and the published literature by summer 2019 were taken into account in preparing this volume. One key positive development since then has been the multiple requests received from different governments to re-frame protection of atmosphere as a “common concern of humankind”, instead of the previously agreed “pressing concern of the international community as a whole”, in the context of the ongoing work at the International Law Commission. We hope that the book may serve as a source of inspiration and hope for this and future generations.

Thomas Cottier & Zaker Ahmad
ACKNOWLEDGEMENTS

This book is based upon a research project generously funded by the Swiss National Science Foundation (SNF) from 2015 to 2019 in forming a research team and supporting five competitively appointed PhD positions, two of them funded by another SNF envelope and a scholarship of the Swiss State Secretariat for Economic Affairs (SECO), respectively. We all are grateful for entrusting this task to the principal investigator and these and two additional, self-funded contributors. All have been based, or are related to, the family of the World Trade Institute (WTI) of the University of Bern, Switzerland. We thank colleagues at Division I of the SNF, staff and anonymous reviewers of the project for assessing the project and their support. We thank the group of colleagues who attended workshops and advised on particular aspects of the problem, in particular Professor Duncan French (Lincoln, UK), Professor Dr Krista Nadakavukaren Schefer (Lausanne); Professor Cedric Ryngaert and Dr Natalie Dobson (Utrecht), Professor Peter-Tobias Stoll (Göttingen), Dr Oisin Suttle (Maynooth) and Dr Claus Zimmermann (Brussels). We are grateful for their willingness to have their comments published in the final chapters of this book. I am most grateful to Zaker Ahmad for valuable and careful assistance in reviewing chapters and preparing the typescript of the book.

We should like to thank the staff and colleagues at the WTI, for hosting the project and making available the valuable infrastructure of the Institute. We are grateful for support and encouragement to Professors Joseph Francois, Peter van den Bossche and Michael Hahn, to Margrit Vetter, the administrative director, to Markus Obi, financial officer and accountant, to Yvonne Motzer, librarian, and to Dr Doris Oberdabernig for heading the doctoral programme and organising interesting workshops. At the WTI, researchers and PhD students found an appropriate biotope to exchange views, test ideas and providing mutual support in advancing, step by step, the research agenda of this project and forming a small community of like-minded colleagues and friends.
ACKNOWLEDGEMENTS

Other than the lonely business of legal research, this project was truly collaborative and subject to mutual support, review and improvement.

We are grateful to Cambridge University Press and anonymous reviewers for assessing and accepting the manuscript in 2019 and producing it professionally. In particular, we extend our gratitude to Finola O’Sullivan and Robert Judkins for overseeing the progress, to Martin Barr for copy-editing support, and to Maheen Neena for facilitating the publication process.

Thomas Cottier
Bern, February 2021
# Abbreviations

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<tr>
<td>AB</td>
<td>Appellate Body</td>
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<tr>
<td>BCBS</td>
<td>Basel Committee on Banking Supervision</td>
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<td>BIS</td>
<td>Bank for International Settlements</td>
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<tr>
<td>CBD</td>
<td>Convention on Biological Diversity</td>
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<tr>
<td>CBDR</td>
<td>Common but differentiated responsibility</td>
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<tr>
<td>CCH</td>
<td>Common Concern of Humankind</td>
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<tr>
<td>CIRR</td>
<td>Commercial Interest Reference Rates</td>
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<td>CJEU</td>
<td>Court of Justice of the European Union</td>
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<td>COP</td>
<td>Conference of Parties</td>
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<td>CO₂</td>
<td>Carbon dioxide</td>
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<tr>
<td>CPD</td>
<td>International Conference on Population</td>
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<td>CVD</td>
<td>Countervailing duty</td>
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<tr>
<td>DSU</td>
<td>Understanding on Rules and Procedures Governing the Settlement of Disputes</td>
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<td>ECA</td>
<td>Export credit agency</td>
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<td>ECB</td>
<td>European Central Bank</td>
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<tr>
<td>ESCB</td>
<td>European System of Central Banks</td>
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<td>ESF</td>
<td>Exchange Stabilisation Fund</td>
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<td>EST</td>
<td>Environmentally sound technologies</td>
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<td>FDI</td>
<td>Foreign direct investment</td>
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<td>FSB</td>
<td>Financial Stability Board</td>
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<td>GATS</td>
<td>General Agreement on Trade in Services</td>
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<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
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<td>GCM</td>
<td>Global Compact for Safe, Orderly and Regular Migration</td>
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<td>GFC</td>
<td>Global financial crisis</td>
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<td>GFMD</td>
<td>Global Forum on Migration and Development</td>
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<td>GFSN</td>
<td>Global financial safety net</td>
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<td>GHG</td>
<td>Greenhouse gas</td>
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<td>GMG</td>
<td>Global migration group</td>
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<td>GPG</td>
<td>Global public goods</td>
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<td>GVC</td>
<td>Global value chain</td>
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<td>HIₙ</td>
<td>Horizontal inequalities</td>
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<tr>
<th>Abbreviation</th>
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<tr>
<td>ICAO</td>
<td>International Civil Aviation Organization</td>
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<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
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<tr>
<td>ICP</td>
<td>United Nations Open-Ended Consultative Process on Oceans and the Law of the Sea</td>
</tr>
<tr>
<td>ICT</td>
<td>information and communications technology</td>
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<tr>
<td>IFDP</td>
<td>International Finance Discussion Papers</td>
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<td>ILA</td>
<td>International Law Association</td>
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<td>ILC</td>
<td>International Law Commission</td>
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<td>ILO</td>
<td>International Labour Organization</td>
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<td>IMF</td>
<td>International Monetary Fund</td>
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<td>IMS</td>
<td>International Monetary System</td>
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<td>IOM</td>
<td>International Organization for Migration</td>
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<td>IPCC</td>
<td>Intergovernmental Panel on Climate Change</td>
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<td>IUCN</td>
<td>International Union for Conservation of Nature</td>
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<td>LCT</td>
<td>low-carbon technology</td>
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<td>LDC</td>
<td>least-developed country</td>
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<td>MBI</td>
<td>market-based instruments</td>
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<td>MEA</td>
<td>multilateral environmental agreement</td>
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<td>MFN</td>
<td>most-favoured-nation</td>
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<td>NDC</td>
<td>nationally determined contribution</td>
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<td>NPA</td>
<td>non-physical attributes</td>
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<td>NT</td>
<td>national treatment</td>
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<tr>
<td>OECD</td>
<td>Organisation for Economic Co-operation and Development</td>
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<td>ODA</td>
<td>official development assistance</td>
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<td>PPM</td>
<td>process and production measures</td>
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<td>QE</td>
<td>quantitative easing</td>
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<td>R2P</td>
<td>responsibility to protect</td>
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<td>RCP</td>
<td>regional consultative processes on migration</td>
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<td>RFA</td>
<td>regional financing arrangements</td>
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<td>SCM</td>
<td>subsidies and countervailing measures</td>
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<td>SDGs</td>
<td>sustainable development goals</td>
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<tr>
<td>TBT</td>
<td>Agreement on Technical Barriers to Trade</td>
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<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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<td>TNA</td>
<td>technology needs assessment</td>
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<td>TRIPS</td>
<td>Trade-Related Aspects of Intellectual Property Rights</td>
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<tr>
<td>TRN</td>
<td>transnational regulatory network</td>
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<td>SWIFT</td>
<td>Society for Worldwide Interbank Financial Telecommunication</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNCLOS</td>
<td>United Nations Convention for the Law of the Sea</td>
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<td>UNCSD</td>
<td>United Nations Conference on Sustainable Development</td>
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<td>UNEA</td>
<td>United Nations Environment Assembly</td>
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<td>UNEP</td>
<td>United Nations Environment Programme</td>
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LIST OF ABBREVIATIONS

UNFCCC United Nations Framework Convention on Climate Change
UNHCR United Nations High Commissioner for Refugees
USD United States Dollars
UNSC United Nations Security Council
VIs vertical inequalities
WTO World Trade Organization