

THE PROSPECTS OF COMMON CONCERN OF HUMANKIND IN INTERNATIONAL LAW

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.

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Edited by Thomas Cottier , Edited in association with Zaker Ahmad
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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

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

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

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Thomas Cottier
Bern, February 2021

ABBREVIATIONS

AB	Appellate Body
BCBS	Basel Committee on Banking Supervision
BIS	Bank for International Settlements
CBD	Convention on Biological Diversity
CBDR	common but differentiated responsibility
CCH	Common Concern of Humankind
CIRR	Commercial Interest Reference Rates
CJEU	Court of Justice of the European Union
COP	Conference of Parties
CO ₂	carbon dioxide
CPD	International Conference on Population
CVD	countervailing duty
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
ECA	export credit agency
ECB	European Central Bank
ESCB	European System of Central Banks
ESF	Exchange Stabilisation Fund
EST	environmentally sound technologies
FDI	foreign direct investment
FSB	Financial Stability Board
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GCM	Global Compact for Safe, Orderly and Regular Migration
GFC	global financial crisis
GFMD	Global Forum on Migration and Development
GFSN	global financial safety net
GHG	greenhouse gas
GMG	global migration group
GPG	global public goods
GVC	global value chain
HIs	horizontal inequalities

ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
ICP	United Nations Open-Ended Consultative Process on Oceans and the Law of the Sea
ICT	information and communications technology
IFDP	International Finance Discussion Papers
ILA	International Law Association
ILC	International Law Commission
ILO	International Labour Organization
IMF	International Monetary Fund
IMS	International Monetary System
IOM	International Organization for Migration
IPCC	Intergovernmental Panel on Climate Change
IUCN	International Union for Conservation of Nature
LCT	low-carbon technology
LDC	least-developed country
MBI	market-based instruments
MEA	multilateral environmental agreement
MFN	most-favoured-nation
NDC	nationally determined contribution
NPA	non-physical attributes
NT	national treatment
OECD	Organisation for Economic Co-operation and Development
ODA	official development assistance
PPM	process and production measures
QE	quantitative easing
R2P	responsibility to protect
RCP	regional consultative processes on migration
RFA	regional financing arrangements
SCM	subsidies and countervailing measures
SDGs	sustainable development goals
TBT	Agreement on Technical Barriers to Trade
TFEU	Treaty on the Functioning of the European Union
TNA	technology needs assessment
TRIPS	Trade-Related Aspects of Intellectual Property Rights
TRN	transnational regulatory network
SWIFT	Society for Worldwide Interbank Financial Telecommunication
UN	United Nations
UNCLOS	United Nations Convention for the Law of the Sea
UNCSD	United Nations Conference on Sustainable Development
UNEA	United Nations Environment Assembly
UNEP	United Nations Environment Programme

LIST OF ABBREVIATIONS

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

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