

REVISTA IIDH

INSTITUTO INTERAMERICANO DE DERECHOS HUMANOS
INSTITUT INTERAMERICAIN DES DROITS DE L'HOMME
INSTITUTO INTERAMERICANO DE DIREITOS HUMANOS
INTER-AMERICAN INSTITUTE OF HUMAN RIGHTS



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DOCUMENTOS

THE IMPLICATIONS OF THE "COMMON CONCERN OF MANKIND" CONCEPT ON GLOBAL ENVIRONMENTAL ISSUES*

During the discussion at the international fora on climate change, the new concept of "Common concern of mankind" was referred to on several occasions. It was first referred to *expressis verbis* in the UN General Assembly Resolution 43/53 which in its operative Paragraph 1 "Recognizes that climate change is a common concern of mankind, since climate is an essential condition which sustains life on earth". During 1989 this concept was referred to in several international documents, declarations, decisions and resolutions (Report of 1989 Ottawa meeting, 1989 Noordwijk Declaration, UN General Assembly Resolution 44/207 of December 1989, IPCC First Assessment Report - Overview, August 1990, Declaration of the UNGA Special Session on Development 1990).

The concept of "Common concern of mankind" is closely related to the other international concepts such as "common interest", "global commons", "intergeneration equity /responsibility/rights" and "common heritage of mankind", from which it originally evolved at the General Assembly in 1988. Some elements of the above quoted concepts are finding their reflections in the "common concern of mankind".

There are however, differences between these concepts. It is recommended in the document; Possible Elements for inclusion in a Framework Convention on Climate Change (IPCC Overview - Annex 1) that the Climate Change Convention would contain a preamble which might seek to address among others, the following item: "recognition that climate change is a common concern of mankind, affects humanity as a whole and should be approached within a global framework, without prejudice to the

* Note of the Executive Director of UNEP, Dr. Mostafa K. Tolba, to the Group of Legal Experts meeting. Malta, December 13-15, 1990

sovereignty of states over the airspace superadjacent to their territory as recognized under international law". Taking into account this recommendation it is very important that the concept of "common concern of mankind" is further elaborated to make its contents and scope understandable and clear; it is also important to make sure how this concept can be interpreted in the terms of rights and obligations of states in the process of its implementation. It is understandable that since it is a new concept in international law and international relations it will develop further in the near future and its interpretation given today, will evolve. However, before the negotiations on climate convention start it is needed to identify the main elements of this concept. That is why I would appreciate your contribution to the elucidation of this concept which appears to have significant implications for the planned February 1991 negotiations on the climate change convention.

Please find attached below, note from the Secretariat on this subject which gives detailed information regarding the concept of common concern of mankind.

Note from the Secretariat

1. In the course of the current decade we are up against a new range of global challenges: ozone layer depletion, global climate change, conservation of biological diversity being some of them. The global challenges proved to be difficult, if not impossible, to deal with on the basis of classic postulates of inter-state reciprocity of advantages state-to-state liability, and traditional legal standing.
2. The world community is being faced with the necessity of prompt political and legal responses to cope with global environmental problems, which put at stake the very survival of human civilization, its present and future generations.
3. Some of the possible responses can be found in newly emerged concepts of global commons, common heritage of mankind, intergenerational equity, ecological security. The most recent concept which is appropriate in this context is the concept of common concern of mankind.
4. The concept of "common concern of mankind" is deeply rooted in such concepts as common interest, global commons, common heritage of mankind and closely linked to the concept of inter-generational rights. Indeed, the significant controversies and conflicting interpretations which have appeared during application of the 'common heritage' approach in different areas like the law of the sea and space law inspired governments

to choose another derivative, i.e. common concern, to serve concerted actions in equitable sharing of burdens in environmental protection, rather than of benefits from exploitation of the environmental wealths.

5. "Common concern" concept has at least two important facets: spatial and temporal. Spatial aspect means that common concern implies co-operation of all states on matters being similarly important to all nations, to the whole international community. Temporal aspect arises from long-term implications of major environmental challenges which affect the rights and obligations not only of present but also of future generations. Indeed, a complex interaction of natural environmental factors preconditions a prolonged time-lag between the cause and effect of many human activities. For example, a complete revelation of casual relationship between chlorofluorocarbons emissions and ozone layer destruction or between green house gases emissions and global warming can take the lifetime of several generations.
6. Both facets of the "common concern" conception can be traced in the positive environmental law. The 1972 World Heritage Convention (preamble refers to "the heritage of all the nations of the world", while the 1973 Convention on International Trade in Endangered Species of Wild Flora and Fauna (preamble) recognizes that "wild fauna and flora in their many beautiful and various forms are an irreplaceable part of the natural systems of the earth which must be protected for this and the generations to come. "One more aspect of the "common concern" is a social dimension. Common concern presumes involvement of all structures and sectors of the society into the process of combatting global environmental threats. i.e. legislative, judicial and governmental bodies together with private business, non-governmental organizations, citizen groups. This relatively new phenomenon has been manifested via green movements, comprehensive environmental policies introduced by governments and even market forces, but it needs to be supported with stronger legal guarantees.
7. The fundamentals of the "common concern" concept can be traced in various resolutions/declarations of the UN General Assembly. Back in 1972 the Stockholm Declaration on Human Environment expressly referred to the "common good of mankind" (pr. 18). In 1974 the UN Charter on Economic Rights and Duties stressed that the protection and preservation of the environment for present and future generations were the responsibility of all States (art. 30). In 1980 the UN General Assembly adopted a resolution on the historic responsibility of States to protect the environment for the benefit of present and future generations. In 1989 in its resolution 44/

228 on convening a UN Conference on Environment and Development the General Assembly pointed out that environmental problems in their global dimension required action at all levels, involving the commitment and participation of all countries.

8. In December 1988 the UN General Assembly in its resolution 43/53 explicitly stated that climate change was a common concern of mankind. This was partially a way out of the controversies related to the common heritage of mankind concept, which had initially been introduced by Malta as a basis for this resolution. At the same time, the resolution wisely indicated a new path to achieving a consolidated set of legal obligations to protect global climate. A new formula, though well originated in the past, was enthusiastically welcomed in other international fora. In the report of 1989 Ottawa Meeting of Legal and Policy Experts it was attempted to re-formulate this concept by defining the atmosphere as a "common resource of vital interest to mankind". Meanwhile the 1989 Noordwijk Declaration expressly stated that "climate change is a common concern of mankind". In December 1989 the UN General Assembly recalled that climate change had been recognized as a common concern of mankind (UNGA resolution 44/207). In August 1990 the Fourth session of the Intergovernmental Panel on Climate Change adopted the IPCC First Assessment Report Overview, where recommended as an urgent international action the elaboration of an international convention on global climate, which would serve as a "firm basis for effective co-operation to act on green house gas emissions and adapt to any adverse effects of climate change". The report stressed that "the Convention should recognize climate change as a common concern of mankind". The more widely application of such new notion as "common concern of mankind" by the world community undoubtedly appeals to all international agencies to assist to this growing international consensus, which in the long run might reach an 'opinio juris' on the applicability of the concept to a wide range of global environmental matters.

9. The concept of common concern of mankind acquires always more attractiveness, since it liberates from controversial treatment of common heritage objects. The Declaration of the UNGA Special Session on Development Co-operation, adopted on 1 May 1990 (para.29) stated: "The current threat to the environment is the common concern of all. All countries should take effective measures for the protection and enhancement of the environment in accordance with their respective capacities and responsibilities, and taking into account the specific needs of developing countries. As the major sources of pollution, the developed countries have the main responsibility for taking appropriate measures urgently. The economic

growth and development of developing countries are essential in order to address problems of the degradation and protection of the environment. New and additional financial resources will have to be channelled to developing countries. Effective modalities for favorable access to, and transfer of, environmentally sound technologies, in particular to developing countries, including on concessional and preferential terms, should be examined". To certain extent these provisions of the Declaration might serve as a tentative description of the "common concern" concept, since it includes such important aspects as the current paradigm of sustainable development, North/South interrelatedness, subsequent rights and obligations.

10. "Common concern of mankind" about environmental deterioration, which implies relevant concern of the world community as a whole, has also been manifested at the regional level. International practice gives examples of regional application of the "common concern" notion. In some instances it has been applied to such paramount issues as the "balance between socioeconomic development and environmental protection and conservation through sound management of natural resources and control of environmental impacts" (see "Declaration of Brasilia", issued by Ministers of State in charge of environmental management and the representatives of the countries participating in the Sixth Ministerial Meeting on the Environment in Latin America and the Caribbean, Brasilia, March 1989, UN Doc. A/44/683, 25 Oct. 1989). In another case the States expressed their "common interest for the sustainable development" of the region and consciousness that the ecological heritage must be preserved through the rational use of the resources of the region, so that present and future generations may benefit from this legacy of nature" (The Amazon Declaration, adopted on 6 May 1989 by the Presidents of the States Parties to the Treaty for Amazonian Co-operation, UN Doc. A/44/275 E/1989679, 15 May 1989). The Twentieth South Pacific Forum expressed regional concern "about the possible effects on island countries of rising sea levels resulting from global warming, and emphasized the importance of a regional approach to environmental matters. It agreed that Forum members take decisive action to draw world attention to the way the environmental problem affected the South Pacific, and to represent regional views at appropriate international gatherings, possibly including, by way of a resolution, in the United Nations General Assembly" (Final Communique of the Twentieth South Pacific Forum, July 1989, UN Doc. A/44.463, 15 Aug. 1989).

11. The evidence that the environmental concern has been growing as the common concern can be found in a number of recent declarations adopted by different political groups of countries. The Group of 77 in the 1989 Cara-

cas Declaration, though without explicitly referring to "common concern", expressed in clear terms the philosophy of global interdependence, which underlies the common concern concept: "This should be in keeping with contemporary reality, in particular the full recognition of the compulsions of global interdependence. Today's problems can be solved only by nations acting together, not by each of them going its own way. No country or group of countries, however powerful it may be, can isolate itself from the consequence of global social, economic and environmental problems or succeed, without detriment to its own interest, in shifting the burden of solving these problems to the weaker members of the international community" (Caracas Declaration of the Ministers of Foreign Affairs of the Group of 77 on the occasion of the twenty-fifth anniversary of the Group, June 1989, UN Doc. A/44/361, 30 June 1989).

12. The non-aligned countries at their Ninth Conference (Belgrade, September 1989) adopted the Declaration where they stated: "...as we approach the 21st century, protection of the environment has emerged as a major global concern, dramatically emphasizing the growing interdependence of the world. This calls for urgent co-operative measures and global compact ensuring a sustainable and environmentally sound development. Such cooperation should take place within the overall framework of the objective of reviving growth, creating a healthy, clean and sound environment and meeting the basic needs of all. Multilateral approaches need to emphasize supportive measures, while seeking to redress existing asymmetries. The international community must set aside net additional financial resources for environmental cooperation and facilitate developing countries' access to environmentally safe technologies" (UN Doc. A/44/551 S/20870, 29 Sept. 1989).

13. Another large political grouping, the Commonwealth countries, which represents a quarter of the world's population and a broad cross-section of global interest, adopted at their Langkawi Summit (October 1989) a Declaration on Environment where they expressed their deep concern "at the serious deterioration of the environment and the threat this poses to the well-being of present and future generations". The Declaration proceeded that "the current threat to the environment, which is a common concern of all mankind, stems essentially from past neglect in managing the natural environment and resources" (UN Doc. A/44.673, 25 October 1989).

14. In the 1989 Hague Declaration 24 heads of states and environmental ministers of wide geographical representation, inspired with seriousness of

global climate problem, not only expressly referred to the UNGA resolution 43/53 formula, which recognized climate change as a common concern of mankind, but also stressed "the right to live in dignity and a viable global environment, and the consequent duty of the community of nations vis-a-vis present and future generations..." (UN Doc. A/44/340 E/1989/120, 22 June 1989).

15. Another action-oriented Declaration has emerged at the Arch Summit meeting of seven major industrial nations (July 1989). The basics for the declaration were the great concern about the growing pollution of air, lakes, rivers, oceans and seas; acid rain, dangerous substances; and the rapid desertification and deforestation, which endangers species and undermines the well-being of individuals and societies. The declaration called for joint actions to achieve the common goals of preserving a healthy and balanced global environment in order to meet shared economic and social objectives and to carry out obligations to future generations (UN Doc. A/C.2/44/11, 6 December 1989).

16. A general approach to the concept of common concern which has been introduced in a number of international documents, represents at the current stage a holistic paradigm aimed mainly at the global climate issue. The paradigm needs in-depth conceptual elaboration to expand its application to all major environmental challenges.

17. Certain common elements can be tentatively deduced from the analysis of the international documents quoted above. First, they give evidence that the concept of "common concern" serves as consolidating factor for East-West-North-South environmental dialogue in spite of existing geographical, economic and political differences. It can also be stated that the common concern has acquired global character (not excluding its regional manifestations). The obligation to co-operate which stems from the concept should involve all countries and all levels of concerted actions. The ecological inter-dependence, which transpierces world community, has obtained not only spatial, but also temporal (inter-generational) parameters. Possible actions, stemming from the common concern, require innovative solutions (Arch Declaration), new approaches and even introduction of new principles of international documents limit themselves by merely expressing a "concern" over environmental deterioration.

18. At the current stage the concept of "common concern" has created only a general framework for possible legal developments to withstand global environmental challenges. This means that many unanswered questions begin to arise. Firstly, the individual elements of the "common

concern of mankind" notion need to be translated into legal terms. From the above mentioned normative material one may deduce that the first element "common" could be interpreted as analogous to a better known concept of "common interest", i.e. as referring to all members of the world community, and to the states in the first place. The analogy between "common concern" and "common interest" raises the question of hierarchy of different categories of interests and concerns. The superiority of common interest of the world community over the interests of individual states or even over the sum of such interests has been widely accepted (Kiss A. *Droit International de L'Environnement*, 1989). The International Law Commission in its draft Articles on State Responsibility recognized the superiority of fundamental interests of the international community, stating that the breach of an international obligation so essential for the protection of such interests constitutes an international crime. Moreover article. 19 of the draft stated that "an international crime may result, inter alia, from... a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as prohibiting massive pollution of the atmosphere or of the seas" (Y.B. Int'l L. Comm'n, 1979). A similar superiority may be easily attributed to the "common concern of mankind".

19. The "concern" element presupposes nothing more than that the states are objectively pushed towards joint and concerted actions. But since the UNGA resolutions 43/53 and 44/207 link "common concern" in the global climate field to possible elaboration of an international convention, the "concern" becomes a basis for specific legal obligations.

20. "Mankind" is the most controversial element of the concept. On the one hand, the legal impersonalization of mankind can be executed through the generally acknowledged subjects of international law - the states. Here it would be expedient to refer to the idea of 'expanded legal standing' on behalf of mankind by the states not directly injured with environmental disturbances, which was recently introduced by F.L. Kirgis Jr. (AJIL, vol. 84, N°2, 1990, p. 525-530). The author's arguments deserve profound analysis and further elaboration. Meanwhile this approach does not cover all possible implications, since it limits itself with vindication for collective interest. Thus, it does not illuminate the temporal (inter-generational) facet of the "common concern of mankind" concept, and therefore it gives no reply on how to institutionalize legal representation of future generations. The current vision of "mankind" does not confine to inter-state system. It includes new 'actors' or 'factors' of international decision-making like non-governmental organizations (some of them have been already well

established in the sphere of international environmental protection); citizen groups, scientific community, public opinion.

21. The source material to which one can address to study the substance and possible legal implications of the concept of "common concern of mankind" is contained basically in the international resolutions and declarations. A disputable issue of normative significance of the UN resolutions (see Sloan B. *General Assembly Resolutions Revisited*. The British Y.B. Int'l L., 1987, p.31-151), which led a great number of lawyers to the idea of 'soft law' can be evaded by inclusion into a possible global climate convention of a provision giving to global climate the legal status of a matter of common concern of mankind.

22. A number of authoritative international lawyers (W.P. Gormley, Judge R.S. Pathak, A.A. Cançado Trindade) have decisively linked environmental protection to the human rights issue. Indeed, from the 1972 Stockholm Declaration the environmental protection has been always seen in human dimension. This indicates another possibility to consider the common concern concept as applicable to protection of fundamental human rights, in particular, the right to healthy and safe environment. Yet another aspect to be considered are the inter-generational rights (i.e. temporal facet of the common concern of mankind). A number of scholars have already included these rights into the category of 'collective' or 'solidarity' rights. These 'third generation' human rights were described, inter alia, as rights of every human being and of all human beings taken collectively UNESCO Symposium on New Human Rights: The Rights of solidarity, Mexico City, 1980, p.30).

23. One more implication of temporal aspect of the "common concern of mankind" concept consists in the fact that many environmental effects manifest in a long time manner, what makes their predictability and timely mitigation a rather complicated and low-reliable matter. This again reinforces an already established assumption of vital importance and preferability of precautionary approach to any activity which may seriously affect common environmental concerns.

24. Along with new set of legal rights and obligations the concept of "common concern of mankind" triggers further institutional developments. The first step would be an enhanced use of the existing international institutions. This trend is easily detectable in recent international law developments. Both the 1986 Convention on Early Notification of a Nuclear Accident and the 1986 Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency upgrade the participation of

the IAEA in submitting notifications and other relevant information and in rendering assistance. The principles of atmosphere protection, adopted by the 1988 Toronto Conference "The Changing Atmosphere: Implications for Global Security", stress the importance of the competent international organizations involvement into the process of notification on serious anthropogenic interference in the atmosphere. The Statement issued by the 1989 Ottawa Meeting of Legal and Policy Experts refers to a similar participation of competent international organizations.

25. Another step could be the assignment of new functions to the existing bodies. An assumed superiority of the "common concern of mankind" over other concerns and interests conditions strict observance of the international legal rules which would protect and vindicate such superiority. The existing UNEP monitoring and information systems (GEMS, GRID, INFOTERRA) could be adopted to monitor compliance with international obligations. The existing systems could also be utilized for an even more ambitious task: evaluation of the environmental legal regulation efficiency in the state of the environment indices.

26. Joint efforts of governments, scientific community, scholars and public opinion are of crucial importance for the concept of "common concern of mankind" does not rest as just a vague political formula, which could be used to legitimize lack of concrete actions by simply declaring an environmental concern. Only based on such efforts the concept may acquire necessary legal validity, thus transforming in a source of wide range of action-oriented binding obligations. The development of the concept of "common concern of mankind" would be not only of theoretical significance, but in the first place of practical viability for international law making processes currently on the agenda. The nearest opportunity to test legal validity of the emerging theoretical hypotheses are the forth-coming negotiations on global climate and biological diversity conventions. The preparation of these conventions, if successfully accomplished, would create a unique input into the substantial content of the 1992 UN Conference on Environment and Development.