

# 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

# I MEETING OF THE UNEP GROUP OF LEGAL EXPERTS TO EXAMINE THE IMPLICATIONS OF THE "COMMON CONCERN OF MANKIND" CONCEPT ON GLOBAL ENVIRONMENTAL ISSUES

*Malta, December 13 - 15, 1990*

## REPORT

1. The UNEP Group of Legal Experts to Examine the Implications of the "Common Concern of Mankind" Concept on Global Environmental Issues held its first meeting in Malta, on 13-15 December 1990. The meeting was organized jointly by the United Nations Environment Programme (UNEP), the Ministry of Foreign Affairs and Justice of Malta and the University of Malta. The Group of Experts was integrated by the following participants: Dr. Mostafa K. Tolba UNEP Executive Director and Chairman of the Group, Judge Manfred Lachs (International Court of Justice), Ambassador Julio Barboza (Argentina), Professor Antonio A. Cançado Trindade (Brazil), Mr. Tang Cheng Yun (China), Mr. Franck X. Njenga (Kenya), Mr. Patrick Szell (United Kingdom), Mr. Ajai Malhotra (India), Professor David Attard (Malta), Dr. N. Hassan Wirajuda (Indonesia), Dr. Iwona Rummel-Bulska (UNEP), Dr. Alexandre Timoshenko (USSR) and Mr. Lal Kurukulasuriya (Sri Lanka). Professor A.A. Cançado Trindade and Professor David Attard were designated co-rapporteurs of the Group. The following is a report of the four rounds of discussions held at the first meeting of the UNEP Group of Legal Experts on the "Common Concern of Mankind" Concept.

2. In the first round of discussions attention was centered on the origin, contents, rationale and implications of the concept of common concern of mankind. It was initially recalled that in the past the notion of international

concern had been resorted to in the practice of U.N. organs in dealing with cases pertaining to the protection of human rights and self-determination of peoples, thus operating a reduction of the domain of domestic jurisdiction of states. This evolution was pushed forward by the judicial recognition that certain issues were the concern of all States creating *erga omnes* obligations (the 1970 ICJ judgment (page 32) in the Barcelona Traction Case (2nd Phase). The present concept of common concern of mankind, which found expression in U.N. General Assembly Resolution 43/53 of December 1988, wherein climate change was so characterized, went much further, disclosing a pronounced temporal and social dimension and focusing on issues which were truly fundamental to all mankind. The concept was also being considered in other contexts of international environmental law (such as biological diversity).

3. Still with regard to the origins of this new concept, there was general agreement that the distinct notion of common heritage of mankind had been marked by controversies around the element of exploitability of resources (e.g., of the sea bed and ocean floors beyond national jurisdictions). The more recent concept of common concern of mankind, in its turn, did not have such proprietary connotations and thus proved more suitable to address global environmental issues (e.g., depletion of ozone layer and global climate change); hence its apparent growing acceptance, in the context of such global issues (e.g., the 1989 Hague Declaration, the 1990 Langawi Declaration) in the last three years, with the emphasis on the element of protection. It was pointed out that regimes of protection have a specificity of their own, based upon considerations of *ordre public*, transcending reciprocity.

4. The UNEP Note on the Common Concern of Mankind Concept, circulated to participants, proved to be a thoughtful and useful basis for discussion of the contents and rationale of the concept. The starting-point of the debates which followed was the general recognition of the legitimate interest of mankind to concern itself with issues pertaining to global climate change (even when activities took place within a country's territory). Hence the notion of commonness (affecting all humankind): a global threat to the environment could become a common concern of mankind, bringing to the fore the notion of obligations *erga omnes*. It was recalled that pertinent elements could be detected in explanatory theories, such as: the idea of freedom of access and equitable sharing by all (doctrine of *res communis*), the idea of non-appropriation and gestion under public law (doctrine of international public domain), the idea of protection of a common good, extending the beneficiaries to future generations (doctrine of [public] trust).

Hence the constitutive elements of common concern, namely: involvement of all countries, all societies, and all classes of people within countries and societies; long-term temporal dimension, encompassing present as well as future generations; and some sort of sharing of burdens of environmental protection (*infra*).

5. It was suggested that the concept of common concern of mankind ought to be approached from a novel juridical perspective. The term mankind from the start disclosed the link with the human rights framework (*infra*) and the long-term temporal dimension (encompassing also future generations). The term concern suggested a primary focus on the causes of the problem (e.g., emissions of certain gases to the atmosphere causing severe environmental degradation to the detriment of the humankind), thus stressing the preventive character of environmental protection (the general obligation of due diligence); but it also focused on consequential effects or responses to be taken (e.g., application of pollution control standards, recognition of rights of action at national and international levels, and establishment of institutional framework for protection). The term common (as in "common concern") was employed in a same and parallel way as "public" (as in "public order") in domestic law, given the decentralization of the international legal order; the notion of "common concern" appeared thus closely related to such concepts as "obligations *erga omnes*", "*jus cogens*", "common heritage" and "global commons". Attention was drawn to the distinct connotations -if not ambiguities- in the common law system of the term interest, which, however, were not present in the civil law system, thus allowing in the light of this latter to speak of a "common interest of mankind".

6. As to the implications of the concept of common concern of mankind, it was first pointed out that the present discussions of the UNEP Group of Legal Experts meant to lay down the normative basis for the ongoing negotiating process preparatory to the 1992 U.N. Conference on Environment and Development (working out of normative principles); hence the need to clarify the concept at issue, from which -once definitively accepted by the international community- rights and obligations were to flow in the near future in dealing with global environmental issues. The need of relating preventive with corrective measures was also stressed: it was commented that the current corrective measures are here being approached from an intra-generational perspective, while preventive measures seem to lend themselves more easily to an inter-generational perspective.

7. Another implication was identified in the need to conciliate the global treatment that issues, such as climate change, require with the differential treatment that many countries (e.g., developing countries) require. The 1987 Montreal Protocol on Substances that Deplete the Ozone Layer was recalled in that connection. There was special emphasis on the need to balance sovereign rights of States with the interests of the international community in respect of environmental protection (Principle 21 of the 1972 Stockholm Declaration on the Human Environment having been referred to in that respect); this question brought to the fore the central issue of the sharing of burdens in environmental protection.

8. In fact, the whole second round of discussions centered on this last point. The majority of participants supported the notion of equitable sharing of burdens, whereas some preferred the expression fair sharing of burdens. The former recalled the application of equitable considerations in the law of the sea (maritime delimitations); the latter referred to the distinct connotations of the equitable principle. There was general agreement, however, that some sort of sharing of burdens there must certainly be. Some experts regarded sharing of burdens as an important subsidiary principle instrumental in the application of the common concern of mankind concept itself (collective or concerted actions); other experts went further, in expressing the view that the success or failure of the very concept of common concern of mankind would ultimately depend on the recognition or acceptance of the principle of equitable sharing of burdens.

9. It became clear that the present debates related essentially to the sharing of costs and benefits of environmental protection. All countries shared a common concern for the protection of the global environment and all countries had to contribute to the achievement of that protection: equitable sharing of burdens meant however that often some countries were to give greater contributions to that effect than others (the example of the 1987 Montreal Protocol having again been invoked in that connection). The experts developed two sets of considerations, in the form of guiding principles in that regard. First, in the present context equitable or fair sharing of burdens meant much heavier burdens on developed countries, proportional to their historical and present responsibility for atmospheric pollution, and for the excessive levels of per capita emissions of gases deteriorating the atmosphere (application of the "main responsibility" principle). Secondly, in the present context equitable or fair sharing of burdens also meant, rather than imputation of liability and responsibility on States, the account to be taken of the distinct economic, financial and technological capabilities of States to contribute to the resolution of the problem

(preventive and corrective action). Both guiding principles were to be taken into consideration.

10. It was exemplified that conversion of means of production so as not to emit harmful substances into the environment required technology transfer (to developing countries) at affordable cost and technical and financial assistance (to developing countries) at much higher levels, which could only be achieved if developed countries came to regard them as duties emanating from the common concern of mankind concept in respect of adverse climate change. The opinion was voiced that it was impossible to detach "common concern" (linked to common responsibilities) from issues such as poverty and underdevelopment, and that environmental considerations should thus not be advanced to introduce conditionalities in development financing. It was agreed that obligations should here be met in accordance with the capacities of the countries (equitable or fair sharing of burdens in response to a common concern of mankind).

11. The third round of discussions centered on the relationships between environmental protection and human rights protection. It was initially pointed out that resort to the concept of common concern of mankind, besides disclosing the link with the human rights framework, warned that one was here before a crucial question of survival, which brought to the fore the fundamental right of all to live in a clean, safe and healthy environment. Hence the fundamental importance of the human rights framework also for environmental protection, some participants recommended that the theory of "generations of human rights", in particular, was preferably to be avoided in view of its inadequacies. There was on the main issue general agreement that environmental protection and human rights protection were in fact linked and could not be divorced from each other, and that emphasis should here be laid on fundamental rights.

12. The framework of human rights, with emphasis on social dimension and participation, was regarded as more appropriate than the framework of international ecological security, with emphasis on the State system, for approaching global environmental issues. It was pointed out that the preventive dimension was present in both environmental protection and human rights protection (in the instruments of protection themselves, in their evolutionary interpretation, in the evolving notion of potential victims). It was considered important to bring together the evolutions of environmental protection and human rights protection: they disclosed many affinities and both underwent a process of globalization. It was argued that a bridge between the two lay in the fundamental rights to life and to health in their



wide dimension, comprising negative as well as positive measures, resting at the basis of the *ratio legis* of the two regimes of protection and paving the way for the recognition and cristallization of the right to a healthy environment. It was further argued that the protection of vulnerable groups (e.g., indigenous populations) lay at the confluence of environmental protection and human rights protection, thus disclosing the need to bring together human and environmental considerations. The need was pointed out to develop further attention and research on the question of the implementation of the right to a healthy environment, in its individual and collective dimensions.

13. The fourth and last round of discussions concentrated on the alternatives to Convention -either on Climate or on Biological Diversity- to be adopted at the forthcoming 1992 U.N. Conference on Environment and Development. It was stressed that such [future] Convention should attract support from as many countries as possible. In case it were not adopted at the 1992 Conference, the possibility of a Code of Conduct was raised; other alternatives mentioned were a Declaration of Principles (by the U.N. General Assembly) or else a Framework of Principles and Guidelines. It was suggested that, should a Convention not be reached by 1992, the negotiating process should continue even after that date, as one should not sacrifice content for expediency.

14. At the end of the debates, it became clear that a couple of points remained to be considered in due course, e.g., issues pertaining to the implementation of the "common concern" concept, to the ways and means whereby the concept could develop into an institution of public international law, to the methods to be devised for implementation, and to the corresponding organizational framework. It was at last decided that the UNEP Group of Legal Experts on the "Common Concern of Mankind" Concept was to hold its second Meeting in the last week of March 1991, at a place still to be determined.

*Professor A.A. Cançado Trindade*

*Professor D.J. Attard*

*Co-Rapporteurs of the UNEP Group of Experts.*