

“Common Interest” – Echoes from an Empty Shell?

Some Thoughts on Common Interest and International Environmental Law

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I. Introduction

In a recent assessment of the state of international environmental law it was suggested that it lacked an all encompassing conceptual basis which could explain the existing body of rules and guide its evolution. Instead, it was submitted, international environmental law was evolving in pursuit of three different approaches: “transboundary impact”, “shared resources”, and the “common concern of mankind”¹. It was concluded that notably the concept of “common concern of mankind” did not include principles sufficiently concise to govern the resolution of arising environmental problems. This concept, it was argued, did not offer more than a potential frame of reference for limited areas².

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Abbreviations: AJIL = American Journal of International Law; AVR = Archiv des Völkerrechts; EC = European Communities; EPIL = Encyclopedia of Public International Law, ed. by Rudolf Bernhardt; ICJ = International Court of Justice; RdC = Académie de Droit International, Recueil des Cours; Rep. = Reports; YBILC = Yearbook of the International Law Commission.

¹ See M. Schröder, *Instrumente des internationalen Umweltrechts unter Berücksichtigung der Noumea-Konvention vom 24./25.11.1986*, (1987) 3 *Jahrbuch des Umwelt- und Technikrechts* 273 at 275 *et seq.*; with a view to the suggested three concepts see also A. Kiss, *The International Protection of the Environment*, in: R. St. J. Macdonald/ D. M. Johnston (eds.), *The Structure and Process of International Law. Essays in Legal Philosophy, Doctrine and Theory* (1983) 1069 at 1071 *et seq.*, 1080 *et seq.*

² Schröder, *ibid.* at 280.

Is the concept of "common concern of mankind" really no more than a shell resounding echoes impressive but void of legal substance and consequence? Or is it rather that the "shell" produces a variety of "echoes" including some so powerful that they spell out legal obligations?

It is hoped that this article can show that the conclusions recounted in the first paragraph do not give due consideration to the comprehensive and all pervading character of the concept of "common interest", only one facet of which is the "common concern of mankind". Not only does the above evaluation of "common concern of mankind" fail to adequately describe the concept's quality in relation to other phenomena of "common interest" in international law and cooperation. The effects of "common interest", it should be noted, go beyond the idea of "common concern of mankind". It also neglects the fact that international law is at a turning point from a system balancing conflicting sovereign interests to one of constructive interaction for the common good. The concept of "common interest" is the frame of reference for an international law meeting the challenges of the future.

This article will attempt to show that in the spectrum of the "common interest" concept one can identify factual as well as legal elements³. To that end the author will trace "common interest" elements in international environmental law and cooperation in general and in the realms of the so-called solidarity rights and of *jus cogens* in particular.

II. Changing the Landscape: "Common Interest" in International Environmental Law

Over the past decades the notion of sovereignty has been confronted with a reality increasingly important for the development of international (environmental) law: the increasing interdependence between nations and the resulting "common interest" in a certain minimum of reliable modes of conduct⁴.

Starting point of all common or shared interest, it is important to note,

³ See *infra*, Section IV for suggested terminology; with a view to those suggestions terminology such as "common interest" will be used in quotation marks throughout the article.

⁴ Cf. A. Cassese, *International Law in A Divided World* (Oxford 1986) at 30–32; A. Pardo / C.Q. Cristol, *The Common Interest: Tension Between the Whole and the Parts*, in: R. St. J. Macdonald/D.M. Johnston (eds.), *The Structure and Process of International Law. Essays in Legal Philosophy, Doctrine and Theory* (1983) 643 at 644.

are the individual interests of the states concerned⁵. From this perspective “common interest” is the result of coinciding individual interests. It does, therefore, have egocentric rather than altruistic features⁶.

This assessment as such does certainly not provide an argument in favour of a legal quality attributable to the notion of “common interest”. On the contrary, the aforementioned level of “coinciding interests” must be carefully distinguished from legally relevant “common interests”. At the same time, however, the level of “coinciding interests” provides the foundation for the “common interest” concepts’ significance on the legal level. This flows from the fact that the existence of (coinciding) interests generally inspires efforts to see them realized. In fact, such interests, the desire for their realization, and the development of international law are all mutually reinforcing. States wish to see their interests realized. Such realization is, in its scope and effectiveness, dependent on the degree of agreement between the parties concerned. This agreement, in turn, is most stable and of greatest continuity if it can crystallize into a rule of international law⁷. Such crystallization, finally, can only occur if the interests at issue are of continuing importance to the states. Accordingly, international law in general is a result of the “common interest” of the states in dependable relations guided by certain basic principles⁸.

Alexidze has eloquently put this assessment as follows:

“Contemporary international law ... reflects the coordination of the will of States with different socio-economic systems aimed at establishing a mutually acceptable legal rule of conduct meeting the class interest of the parties involved at that particular moment. (...) Every agreement turns into a common will reflecting mutually conditioned and socially adjusted different wills which are brought together under the pressure of existing objective factors responsible for the emergence of common interest (...)”⁹.

⁵ E. Klein, *Statusverträge im Völkerrecht. Rechtsfragen territorialer Sonderregime* (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Vol.76) (1980) at 53.

⁶ As well as anthropocentric features, as is pointed out by L. Wildhaber, *Rechtsfragen des Internationalen Umweltschutzes*, Offprint, 1st Herbert-Miehler-Gedächtnisvortrag an der Universität Salzburg, June 19, 1987, at 4.

⁷ Klein (note 5) at 53; Pardo/Christol (note 4) at 647.

⁸ Klein *ibid.* at 54.

⁹ L. A. Alexidze, *Legal Nature of Jus Cogens in Contemporary International Law* (1981 III) 172, 219 at 245.

Similarly, Max Huber, in his famous treatise on the sociological basis of public international law, described international law as the legal result of continuous collective interests¹⁰.

These mechanisms can be traced in all areas of international law and cooperation.

Sovereign interests, for example, were essential to the development of the concepts governing international neighbourhood relationships, the use of shared resources, or the law of state responsibility. However, these concepts could not function relying exclusively on the reciprocity mechanism underlying much of the contemporary international law. Equally, the idea of reciprocity does not apply in the realm of human rights and most notably that of "human rights of the third generation" or "solidarity rights". Motivating and consolidating factor for the evolution and further development of all these areas is the growing awareness of the web of interdependence tying all states together (see below under III).

Beyond such effects the notion of "common interest" may assume another quality where the emerging, shared or coinciding interests are of such intensity that their realization commands action on the international level. The interest in question can be so vital that it permits – factually and legally – only one mode of conduct. It will be suggested that a "common interest" of such intensity has gained legal relevance as is manifest in the concept of international crimes and in those rules of international (environmental) law considered *jus cogens* or rules *erga omnes* (see below under IV).

III. "Common Interest" Motivating and Consolidating International (Environmental) Law

1. International Environmental Law

International environmental law is still characterized by much dispute as to both existence and scope of binding rules. These controversies cannot be addressed in this article¹¹. For the present purposes the following outline may suffice.

The need for international environmental law is rooted in the fact that man-made boundaries create units artificially dividing what truly is one environment. Because of the natural interrelatedness certain activities in

¹⁰ »Die soziologischen Grundlagen der Völkerrechtsordnung«, (1948) 3 Vermischte Schriften 59.

¹¹ The reader be referred to J. Brunnee, Acid Rain and Ozone Layer Depletion: International Law and Regulation (1988), Chapter IV.

one unit inevitably have effects in another. Since the units are governed by separate political and legal systems, international law must bridge the discrepancy between ecological unity and administrative separation.

In answer to the arising problems rules were developed with a view to transfrontier pollution, the use of shared resources and the communication and cooperation in environmental matters. The present writer suggests that the following are binding rules of international environmental law:

- The prohibition of transfrontier pollution causing serious damage (principle of good neighbourliness).
- The principle of equitable utilization of shared resources defined in such a way that there is a breach if serious damage is caused to another state without the existence of extraordinary circumstances excluding the wrongfulness of such conduct.
- The duty to provide another state with early information in emergency situations and early warning if there is a risk of serious damage.
- The duty to consult with another state if conduct of the acting state creates a risk of serious damage¹².

“Common interests” can be traced as the motivating and consolidating agents in the development of these rules as well as related concepts.

First, there is a general evolution of international law from a law of coexistence to a law of cooperation. This is mirrored in various types of cooperation, all of which promote “common interests”. Apart from technical and informational cooperation a growing body of procedural rules fills gaps left by substantive provisions. Such procedural rules may be found in agreements covering specific sectors. Yet the continuing and vital importance of communication and cooperation is most clearly manifested in the crystallization into the aforementioned general rules of international law which impose duties to inform and consult. The catalytic function of common or coinciding interests can best be highlighted by pointing at the restricted prospects and limited usefulness of cooperative practice without such underlying interests. The United States and Canada’s efforts to address acid rain are a case in point. Elaborate cooperative mechanisms and even long-standing cooperative practice have not yielded substantial results¹³.

¹² See e.g. R. Wolfrum, *Die grenzüberschreitende Luftverschmutzung im Schnittpunkt von nationalem Recht und Völkerrecht*, (1984) *Deutsches Verwaltungsblatt* 423 *et seq.*; L. Gündling, *Environment, International Protection*, in: *EPIL Instalment 9* (1987) 119; D. Rauschnig, *Legal Aspects of the Conservation of the Environment*, in *International Law Association, Report of the Sixtieth Conference, Montreal 1982*, 157 *et seq.*

¹³ J. M. Schwartz, *On Doubting Thomas: Judicial Compulsion and Other Controls of Transboundary Acid Rain*, (1987) 81 *AJIL* 361 at 379.

Further evidence of the importance of “common interest” can be found in the field of treaty-based cooperation. Especially in the environmental context one can often trace a feature contradicting the traditional reciprocity mechanisms: states agree to obligations which basically are unilateral. Reciprocity is, in these cases, not to be conceived as “giving” and “taking”. The contracting states’ benefit lies in the protection of environmental or other values and thus in an interest common to the international community¹⁴.

Third, the trend to cooperation and the underlying “common interest” in the safeguarding of certain conditions is mirrored in the existence of substantive rules of general international law as such. The aforementioned principles of good neighbourliness and shared resources would not have emerged without the increasingly urgent interest in the maintenance of environmental minimum standards.

Finally, there are concepts of international law which overlap with the notion of “common interest” or share the same roots. The idea of “sustainable use” of a (shared) resource in the mutual interest in the preservation of resources vital to the well-being or survival of mankind may be mentioned here¹⁵. A related concept is that of the conservation of resources for present and future generations¹⁶. Similarly, the concept of “common heritage of mankind” is based on the idea that a given resource can be preserved, managed and equitably used only by the international community as a whole¹⁷.

2. Human Rights of the Third Generation – Solidarity Rights

Traditionally, human rights were perceived as protective rights against governmental infringement upon individual freedom¹⁸. On a second, more limited, level human rights may entitle a citizen to government action creating the necessary conditions for such individual freedoms.

On both the national and international levels the entrenchment of a

¹⁴ Kiss (note 1) at 1085; R.J. Dupuy, *La communauté internationale entre le mythe et l'histoire* (1986) at 153 and 161.

¹⁵ See World Commission on Environment and Development, *Our Common Future* (1987) at 43.

¹⁶ See statement of A. Kiss, in (1981) 75 *Proceedings of the American Society of International Law* 39 at 40.

¹⁷ See W. A. Kewenig, *Common Heritage of Mankind – Politischer Slogan oder völkerrechtlicher Schlüsselbegriff?*, in: *Festschrift für Hans-Jürgen Schlochauer* (1981) 385; for a critical opinion: M. Bedjaoui, *Towards a New Economic Order* (1979) 220 *et seq.*

¹⁸ See P. Sieghart, *The Lawful Rights of Mankind* (1985) 161; H. H. Rupp, *Die verfassungsrechtliche Seite des Umweltschutzes*, (1971) *Juristenzeitung* 401.

human right to environmental protection continues to be controversial¹⁹. If such rights are formulated they are very often more similar to policy statements than to actual rights²⁰.

In recent years scholars have suggested that beyond the human rights of the first and second generation there may be "human rights of the third generation". The concept as well as the terminology must largely be attributed to Karel Vasak who, in reference to the famous trilogy of *liberté, égalité, fraternité*, also coined the term "solidarity rights" for this third generation of rights²¹.

The concept is closely linked to the concept explored in this article: the notion of an interest in the protection of certain values common to the international community which can only be safeguarded by international cooperation and through international law.

The roots of the development of rights of the third generation are generally seen in the fact that, because of the interdependence between states, peoples, groups and individuals, certain needs can be met and secured only through joint efforts at the international level²². Apart from the right to peace, the right to development or the right to self-determination, the right to adequate environmental quality is widely considered a prime candidate for the status of a human right of the third generation²³.

The Stockholm Declaration on the Human Environment spells out

¹⁹ See E. Klein, Human Rights of the Third Generation, in: C. Starck (ed.), *Rights, Institutions and Impact of International Law according to the German Basic Law* (1987) 63.

²⁰ Examples for references to environmental protection can be found *inter alia* in the constitutions of Spain, Portugal, Peru, Yugoslavia, Poland, Hungary, Greece, Switzerland, Czechoslovakia, the GDR, China, the USSR, Sri Lanka, Bulgaria, Illinois and Rhode Island; see S.P. Marks, *Emerging Human Rights: A New Generation for the 1980's?*, (1981) 33 *Rutgers Law Review* 435 at 443; for an assessment of the international situation see Brunneé (note 11) at 121 *et seq.*

²¹ K. Vasak, *For the Third Generation of Human Rights: The Rights of Solidarity*, Inaugural Lecture to the Tenth Study Session of the International Institute of Human Rights, Strasbourg, 2–27 July 1979; Final Report of Unesco Expert Meeting on Human Rights, Human Needs and the Establishment of a New International Economic Order, Paris, 19–23 June 1978, Unesco doc. SS-78/CONF.630/12; see also assessment of K.J. Partsch, *Menschenrechte und Rechte der »Völker«*, (1986) *Vereinte Nationen* 155.

²² See E.H. Riedel, *Theorie der Menschenrechtsstandards* (1986) 210 *et seq.*, 339 *et seq.*; Klein (note 19) at 65; P. Alston, *A Third Generation of Solidarity Rights: Progressive Development or Obfuscation on International Human Rights Law?*, (1982) 29 *Netherlands International Law Review* 307 at 313.

²³ Riedel, *ibid.* at 239; P. Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, (1984) 78 *AJIL* 607 at 612; Marks (note 20) at 442f.; Klein, *ibid.* at 71 *et seq.*; Sieghart (note 18) at 167; Partsch (note 21) at 156.

man's "fundamental right to ... an environment of a quality that permits a life of dignity and well-being" and puts it in relation to a duty to protect and improve the environment for present and future generations²⁴. The Stockholm Declaration is, therefore, cited as reinforcement of the solidarity concept. One writer argues that the right to environmental quality and the duty to protect it are inseparable. He concludes that, therefore, the principle of international solidarity demands the observance of certain international duties regarding environmental protection²⁵.

The only explicit formulation of a right to adequate environmental conditions as a human right of the third generation is to be found in the African Charter on Human and Peoples' Rights²⁶. Art.24 of the Charter recognizes that "all peoples ... have a right to a general satisfactory environment favourable to their development".

However, neither the regional approach of the African Charter nor the Stockholm Declaration are sufficiently compelling and precise to permit the conclusion that they confer a right strictly speaking. At best they can be indicative of the criteria according to which a right to environmental protection in the shape of a solidarity right or a right of the third generation may develop.

Traditional human rights entitle individuals to the protection of "private goods" such as life, well-being or property. However, natural resources such as water or air are "public goods". This implies that, typically, they cannot be owned so that consumption by one individual impacts on quantity and quality available to others. Their protection on the human rights level requires a parallel infringement upon one of the aforementioned "private goods"²⁷.

On the other hand, because of the very nature of these "public goods", their preservation and enhancement lies in the "common interest" of all (potential) users. While this "common interest" may consist of numerous coinciding individual interests, traditional human rights do not provide protection in cases outside the ones mentioned in the preceding paragraph. The solidarity of all concerned is indispensable. By the same token, inter-

²⁴ Report of the United Nations Conference on the Human Environment, June 5-16, 1972, U.N. doc. A/CONF. 48/Rev.1, at 4 (1973).

²⁵ O. Kimminich, *Das Völkerrecht und die neue Weltwirtschaftsordnung*, (1982) 20 AVR 1 at 38, 39.

²⁶ OAU doc. CAB/LEG/67/3/Rev.5 (1981); and (1982) *International Legal Materials* 59.

²⁷ For example: serious aquatic or atmospheric pollution proves to be detrimental to an individual's health or damaging to property.

national environmental problems such as acid rain or ozone layer depletion require international solidarity – there are no national solutions.

However, does this provide individuals with a right of the third generation, with a solidarity right entitling them to protective measures to be taken by the international community? Some authors rightfully caution that the notion of “human right” should not be watered down by applying it to concepts which in reality are of a different nature²⁸. Although it may be desirable to give more weight to the environmental cause this does not automatically transform the cause into a human right in the strict sense.

One should also consider that, in the final analysis, a human right should provide an individual with an enforceable position. What avenues are there to the enforcement of a right of the third generation²⁹? Not only do conceptual difficulties arise in the bridging of the gap between the environmentally necessary or desirable and the existence of a human right. The lack of concise environmental standards creates a further obstacle. The right to “adequate” environmental quality is presently not concrete enough to permit the identification of specific rights and duties³⁰. One could be tempted to argue that the necessity to cooperate in the interest of environmental protection and thus the well-being or even survival of mankind may create a “common interest” of such intensity that states may find themselves under the duty to exercise solidarity in the interest of their citizens³¹. Massive pollution infringing upon the realm protected by *jus cogens* could be cited as a case in point. The role of *jus cogens* will be discussed below and must not be confused with the solidarity rights concept. First and foremost, however, the above-mentioned argument neglects that in such serious cases of pollution the individual may not need the protection of a “new generation of human rights”. Protection may already flow from the traditional human rights safeguarding life, well-being or property.

Hence it must be concluded that the “solidarity right to adequate environmental quality”, as other human rights of the third generation, is not a right *strictu sensu* but a concept still in the state of development³².

²⁸ Riedel (note 22) at 241, suggests that the addition of a “third floor” to the “house of human rights” cannot close the gap between “is” and “ought”; see also: Klein (note 19) at 66; Alston (note 23) at 613; Partsch (note 21) 155.

²⁹ Cf. Sieghart (note 18) at 161, 167.

³⁰ For further aspects and criteria see Alston (note 23) at 615 *et seq.*

³¹ U. Scheuner, Solidarität als Grundsatz in der gegenwärtigen internationalen Gemeinschaft, in: Recht im Dienst des Friedens. Festschrift für Eberhard Menzel (1975) 251 at 274.

³² Sieghart (note 18) 161; Klein (note 19) at 66; Partsch (note 21) at 235.

Yet while one may not be able to argue for the legal quality of such a right, the foregoing discussion does show once more the catalytic function of "common interests". They lie at the heart of the solidarity right concept and they are, as the above-mentioned analysis shows, the focal point of all arguments in favour of these rights. Indeed, the idea of solidarity rights very strongly points to the direction of legal relevance of "common interests". The suggestion that "common interests" may be of such vital importance that they spell out an international legal obligation will be elaborated in the following pages.

IV. "Common Interests" as Legal Obligations in International Law

Similar to the idea of solidarity rights the *jus cogens* doctrine flows from the realization that certain goals can only be attained through concerted action. With the emergence of sovereign states the recognition of the fact grew that, in the interest of the functioning of the international community, not all international rules could be left at the states' disposal³³. Today it is widely recognized that there are rules which are of such vital interest to the international community that unilateral acts or treaties incompatible with these rules cannot be allowed to prevail³⁴. This body of rules is referred to as *ordre public*³⁵.

It is further recognized that, within this *ordre public*, there are rules which mark the limits to the states' treaty making powers and which are thus beyond the reach of spontaneous change³⁶. These rules, termed *jus cogens*, are rooted in the states' *opinio juris* and the recognition of their indispensability for the existence of the international order³⁷. The resulting

³³ With regard to this development see F. A. Mann, The Doctrine of Jus Cogens in International Law, in: Festschrift für Ulrich Scheuner (1973) 399; Alexidze (note 9) 233 *et seq.*

³⁴ R. St. J. Macdonald, The Charter of the United Nations and the Development of Fundamental Principles of International Law, in: Bin Cheng/E. D. Brown (eds.), Contemporary Problems of International Law – Essays in Honour of Georg Schwarzenberger (1988) 196 at 197; and: R. St. J. Macdonald, Fundamental Norms in Contemporary International Law, (1987) 25 Canadian Yearbook of International Law 115.

³⁵ See H. Mosler, The International Society As A Legal Community (1980) 32; Alexidze (note 9) at 230.

³⁶ *Jus cogens* is generally more narrowly construed than public order and differs from the latter in that it applies only to treaty relations; see Macdonald (note 34) at 213; Mosler, *ibid.* at 19.

³⁷ J. A. Frowein, Jus Cogens, in: EPIL Instalment 7 (1984) 327 *et seq.*

limits imposed on the law of treaties have found expression in Art.53 of the Vienna Convention on the Law of Treaties³⁸:

“A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of international law. For the purpose of the present convention, a peremptory norm of international law is a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”.

The most significant feature of these rules is the fact that compliance with them generally is an obligation *erga omnes*³⁹. The much quoted *Barcelona Traction* case lends expression to this idea. The ICJ held there were “... obligations of states toward the international community as a whole ...” which were “... the common concern of all States ...”. The Court concluded that in “... view of the importance of the rights involved, all States can be held to have a legal interest in their protection”⁴⁰. Accordingly, third states (other than the one immediately concerned) are entitled to the observance and enforcement of these rules⁴¹. Indeed, it would not be consistent to assume a vital interest of all states in the observance of certain rules, but to deny them their enforcement.

The evolving state practice and *opinio juris* indicate that, in case of a breach of rules *erga omnes*, states other than the victim immediately concerned may resort to countermeasures including reprisals⁴². The latter must, of course, be *ultima ratio*⁴³. Notably, if the rule breached was one serving the protection of the “common interests” of the international community, collective measures of third states will be easiest to justify⁴⁴.

³⁸ Vienna Convention on the Law of Treaties, U.N. doc. A/CONF.39/11/Add.2, 287; reprinted in (1969) 63 AJIL 875.

³⁹ J. A. Frowein, Die Verpflichtungen *erga omnes* im Völkerrecht und ihre Durchsetzung, in: Völkerrecht als Rechtsordnung – Internationale Gerichtsbarkeit – Menschenrechte, Festschrift für Hermann Mosler (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Vol.81) (1983) 241; while a distinction is usually made between *jus cogens* and rules *erga omnes*, most writers agree that a clear line cannot be drawn and the terms are often used interchangeably; see T. Meron, On a Hierarchy of International Human Rights, (1986) 80 AJIL 1 at 11.

⁴⁰ ICJ Rep. 1970, 3 at 32.

⁴¹ Mann (note 33) at 406; Frowein (note 39) at 245.

⁴² Examples of state practice: EC sanctions against Iran in reaction to the “hostage crisis”, see Bull. EC 4-1980, 26 *et seq.*; reactions of third states to hijacking, see Frowein, *ibid.* at 252.

⁴³ C. Domenicé, Die internationalen Verbrechen und deren rechtliches Regime, in: Völkerrecht und Rechtsphilosophie. Festschrift für Stephan Verosta (1980) 227 at 238.

⁴⁴ Frowein (note 39) at 259 *et seq.*

How can rules of *jus cogens* or rules *erga omnes* be identified? Although the foregoing considerations appear to provide only general guidelines, a number of leads can be found upon a more careful review of the existing authorities on *jus cogens*.

In his detailed analysis of this question the Finnish writer Lauri Hannikainen concludes that there are five major criteria for the identification of *jus cogens*⁴⁵. First, a peremptory norm is a norm of “general international law”, which means that it is of general and not only regional applicability. Second, it has to be “accepted and recognized by the international community of states as a whole”. This implies that the “double consent” to a given rule of international law as well as its peremptory character⁴⁶ has to be given by all essential components of the international community. Third, a peremptory norm, unless in cases of *force majeure* or distress, permits no derogation. Accordingly it can, fourth, be modified only by a new peremptory norm.

While these four criteria are derived from the Vienna Convention on the Law of Treaties, the fifth aspect flows from the purpose of *jus cogens*: peremptory norms protect overriding interests of the international community of states. It is this last criterion which is central to the identification of *jus cogens*⁴⁷ and which, accordingly, has been scrutinized with great care.

One of the earliest proponents of the *jus cogens* concept in modern international law, Alfred Verdross, concluded that

“[I]n the field of general international law there are rules having the character of *jus cogens*. The criterion for these rules consists in the fact that they do not exist to satisfy the needs of the individual states but the higher interest of the whole international community”⁴⁸.

In support of this assessment, Verdross referred to the ICJ’s Advisory Opinion Concerning Reservations to the Genocide Convention which held that

⁴⁵ L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law – Historical Developments, Criteria, Present Status* (1988) at 207 *et seq.*

⁴⁶ G. J. H. van Hoof, *Rethinking the Sources of International Law* (1983) at 157.

⁴⁷ See Klein (note 5) at 57; see as well the International Law Commission’s assessment, in: GA Official Records, Twenty-First Session, Suppl.9/A/6309/Rev.1 at 76, 77: “... it is not the form of a general rule of international law but the particular nature of the subject matter with which it deals that may ... give it the character of *jus cogens*”; cf. van Hoof, *ibid.* at 154, who terms this the “concept of recognized necessity” and considers it a theoretical explanation of *jus cogens*.

⁴⁸ *Jus Dispositivum and Jus Cogens in International Law*, (1966) 60 AJIL 55 at 58; see as well the recent analysis of K. Parker, *Jus Cogens: Compelling the Law of Human Rights*, (1989) 12 Hastings International and Comparative Law Review 411 at 428.

“The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. (...)

[I]n such a convention the contracting States do not have any interest of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d’être* of the Convention”⁴⁹.

A similar approach was taken in the aforementioned *Barcelona Traction* case and can also be traced in the ILC’s work on state responsibility. The ILC addressed the issue of whether the breach of *jus cogens* would merit different legal consequences than the breach of other rules of international law. The Commission’s former rapporteur Roberto Ago was of the opinion that it would be contradictory if the breach of rules *erga omnes* established a relationship of international responsibility only between the wrongdoer and the immediate victim⁵⁰. Therefore, the ILC developed the distinction between international delicts and international crimes as categories of internationally wrongful acts⁵¹.

Art.19 of the ILC Draft Articles on State Responsibility stipulates:

“2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community as a whole, constitutes an international crime”⁵².

In most recent literature Alexidze points out in detail that *jus cogens* is the expression of common interests of the members of the international community aimed at establishing compulsory fundamentals of the legal order⁵³.

Dupuy draws an interesting parallel to the

«... domaine rousseauiste de la volonté générale, à la fois la volonté de tous et déclaratrice du bien commun, minimum irréductible à quantitatif et qualitatif coïncident»⁵⁴.

Finally, it should be noted that the International Law Commission, the Institute of International Law, the American Law Institute, and most gov-

⁴⁹ ICJ Rep. 1951, 23 at 69.

⁵⁰ Report of R. Ago, in: YBILC 1976 II (Part 1) 24.

⁵¹ Ibid. (Part 2) 95 *et seq.*; a critical attitude towards this distinction can be found in: D. Rauschnig, *Verantwortlichkeit der Staaten für völkerrechtswidriges Verhalten*, in: D. Rauschnig/A. Ranzelzhofer, *Staatenverantwortlichkeit* (1984) 7 at 26.

⁵² YBILC 1980 II (Part 2) 32.

⁵³ Alexidze (note 9) at 236 *et seq.*

⁵⁴ Dupuy (note 14) at 154; see as well: M. E. Turpel/P. Sands, *Peremptory International Law and Sovereignty: Some Questions*, (1988) 3 *Connecticut Journal of International Law* 364, 365.

ernments accept the special nature of norms addressing the fundamental interests of the international society⁵⁵.

More cautious voices suggest that the individual norms of *jus cogens* must be proclaimed on the basis of a certain value system with the area of shared values not being very large⁵⁶.

The present writer suggests that, in the realm of international environmental law, it is possible to identify such shared values which also meet the requirements of the Vienna Convention on the Law of Treaties. The criterion of "indispensability for the existence of the international community" permits the adaptation of the existing body of *jus cogens* to new needs and demands. Mosler suggested that the use of atomic weapons or other means of mass destruction – leaving aside the problem of self-defense – is prohibited by a rule of the public order of the international community. He argued such use could lead to the destruction of the community as a whole⁵⁷.

In transferring this argument to environmental degradation one must conclude that pollution reaching such degree that it would represent a threat to the entire international community (e.g. critical ozone depletion or climate change) would be in conflict with a peremptory rule of international law.

This assessment finds support in the ILC's Draft Principles on State Responsibility and in the literature.

Art.19(d) of the ILC's Draft Principles lists as one example for an international crime

"... a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or the seas"⁵⁸.

Similarly, Gómez Robledo in his review of methods of identifying *jus cogens* lists the protection of the environment as one of the interests protected by *jus cogens* according to Puceiro Ripoll's classification⁵⁹.

M. M. Whiteman includes the "contamination of the air, sea, or land

⁵⁵ Cf. G. A. Christenson, *Jus Cogens: Guarding Interests Fundamental to International Society*, (1988) 28 Virginia Journal of International Law 601 at 602.

⁵⁶ K. Zemanek, *Causes and Forms of International Liability*, in: Bin Cheng/E. D. Brown (eds.), *Contemporary Problems of International Law – Essays in Honour of Georg Schwarzenberger* (1988) 319 at 323.

⁵⁷ Mosler (note 35) at 18.

⁵⁸ See note 52.

⁵⁹ A. Gómez Robledo, *Le jus cogens international*, (1981 III) 172 RdC 9 at 172.

with a view to making it harmful or useless to mankind” in her “projected list of peremptory norms of international law”⁶⁰.

Pointing to the same direction while not mentioning the environment as such are the suggestions of Alexidze that “... principles prohibiting the appropriation of parts of space vitally important to all States ...” and of Caicedo Perdomo that imperative norms regarding the usage of terrestrial and extraterrestrial space belonging to the international community have *jus cogens* character⁶¹.

When applying these considerations to the rules of international environmental law mentioned earlier, it can be seen that the *jus cogens* protecting environmental core values applies to various situations.

Beyond the realm of cases where it may be doubtful whether or not certain activities cause “serious environmental damage” or “serious danger of environmental harm”, the principles of good neighbourliness and equitable utilization of shared resources protect fundamental environmental interests which are, clearly, violated in certain cases of serious pollution. When pollution threatens to deplete the ozone layer in a way creating health hazards, to dangerously alter world climate, to disrupt vital food chains or the like, the very survival of mankind is in peril⁶².

The issue is no longer one of values or degree. There are no interests more fundamental and vital to the existence of the international community than the prevention of life-threatening environmental degradation. International environmental law cannot wait for scientific proof, it cannot retreat to the maxim “innocent until proven guilty”.

With regard to the principle of equitable utilization of shared resources this would also mean that, in the aforementioned realm, there can be no extraordinary circumstances excluding the wrongfulness of pollution.

From the present state practice one can also conclude that states generally accept that “serious pollution” violates international law. This requirement is not disputed in its validity, but usually only as to whether a given

⁶⁰ *Jus Cogens in International Law, with a Projected List*, (1977) 7 *Georgia Journal of International & Comparative Law* 609 at 626; see also: Klein (note 5) at 59 *et seq.*

⁶¹ Alexidze (note 9) at 263; Gómez Robledo (note 59) at 174.

⁶² For an overview of the possible dimensions of pending environmental catastrophes see: L. Dotto, *Thinking the Unthinkable* (1988); and J. G. Titus / U.S. Environmental Protection Agency (eds.), *Effects of Changes in Stratospheric Ozone and Global Climate*, Vol.1: Overview (1986).

case of pollution is to be considered as "serious" or not⁶³. Consequently, given the acceptance of the principles of good neighbourliness and equitable utilization and given the acceptance of the doctrine of *jus cogens* as such⁶⁴, one must conclude that the aforementioned two rules are peremptory rules of international law. When the survival of humankind and life on earth is at stake there can be no margin of appreciation. As Alexidze suggested,

"It is the meaning of the term 'common interest' that it is an objectively existing phenomenon forcing States to seek to establish legally binding rules reflecting the results of their cooperation and struggle"⁶⁵.

With a view to the aforementioned rules of information and consultation one must be more careful in attributing *jus cogens* character to them. They flow from the duty to prevent or mitigate damage. Accordingly there is only an indirect link to the occurrence of pollution as such. But again, the foremost feature of *jus cogens* is its indispensability for the existence of the international community. Therefore one must conclude that the duty to provide timely and adequate information is part of the body of *jus cogens*. After all it may just be the violation of the duty to inform which may lead to serious damage and conflicts between states because effective counter-measures are rendered impossible. At least for the realm of ultra-hazardous activities the importance of information duties should be clear. It is well documented by the Chernobyl incident and the subsequent discussion about information duties⁶⁶.

The duty of consultation in cases of environmental danger or damage, however, must be excluded from the *jus cogens* realm. Consultations can certainly help to minimize or prevent environmental damages. Equally, consultations are important for the functioning of the international order – they are certainly desirable. Yet it will be difficult to argue that they are indispensable for the existence of the international community. The latter is adequately, although clearly not perfectly, protected by the aforementioned rules.

⁶³ Brunnée (note 11) at 136, 137; G. Handl, National Uses of Transboundary Air Resources: The International Entitlement Issue Reconsidered, (1986) 26 *Natural Resources Journal* 405 at 413.

⁶⁴ Frowein (note 37).

⁶⁵ See note 9 at 245.

⁶⁶ M. Kloepfer, Internationalrechtliche Probleme grenznaher Kernkraftwerke – dargestellt am Beispiel Cattenom, (1987) 25 *AVR* 277; D. Rogalla/C. Schulz, Umweltgefährdende Anlagen in Grenzfläche aus völkerrechtlicher Sicht, (1987) 5 *Natur und Recht* 195 at 197.

By way of conclusion it can thus be said that there are several rules of international environmental law which are applicable *erga omnes*. The underlying "common interest" being the driving force in their development.

V. *Conclusions and Terminological Considerations*

The foregoing survey permits several conclusions relevant to the "common interest" concept in international law. It should be clear that "common interest" terminology must be used carefully so as not to blur the dividing lines between different phenomena. In fact, "common interest" should be used only as a generic term which encompasses three related yet separate aspects.

It was suggested at the outset that a shared interest may be of merely factual importance in motivating various kinds of international activities. We can find a relatively strong link to the idea of reciprocity: the interest in not being impaired by equal conduct of another state. Interests coinciding at this level motivate and enhance cooperation. At the same time they are limited to this effect. Therefore they should be referred to as *coinciding interests*.

On a further level we can find interests which are recognized as stable, long-term interests. They have found expression in state practice or general rules of international law aimed at their protection. It should be underlined that these interests themselves do not contain a legal obligation. Rather they provide guidelines for the desired conduct. The internationally shared interest in environmental protection in general which promoted consistent state practice and the development of international environmental law is a case in point. For this type of "common interest" one should use the term *shared interest*.

Finally, in some cases, the "common interest" can crystallize into a rule of international law triggering specific duties⁶⁷. We are faced with the phenomenon of a common interest so compelling that it alone formulates the rule and coincides with the rule's content. Only in such cases should we speak of *common concern of mankind*.

International law must recognize and respond to the new demands placed upon it by the emergence of interests of an international community

⁶⁷ See Klein (note 5) at 55.

rather than those of individual sovereign states⁶⁸. A promising initiative is the “new thinking” recently promoted by Soviet scholars. Recognizing that the reality of an interdependent world is not yet adequately reflected in international law they call for the acceptance of the supremacy of shared values such as environmental protection and common survival above all others⁶⁹. Similarly, in his insightful analysis of the development of an international community and the concept of humanity (*humanité*) in international law Dupuy points at the threats to the very existence of mankind which were inconceivable only fifty years ago. Aware that there will be no sudden change of conscience, he calls for relentless efforts. He urges:

«Le droit international de l'avenir devrait donc accentuer et développer par des mesures concrètes de poursuite de finalités à l'échelle planétaire qu'il n'y a pu, pour l'heure, faute d'une ouverture plus large des Etats sur le devenir»⁷⁰.

It is to be expected that “common interests” in all their facets will promote the development of international environmental law. International cooperation, institutional mechanisms and rules will develop and – so it is hoped – in turn create a wider basis for future “common interests”. One should also hope that this process will bring about a timely expansion of the realm of common concerns of mankind. We can no longer allow increasingly hazardous pollution to define our concerns – international law must be one step ahead.

⁶⁸ Cf. M. Donelan, A Community of Mankind, in: J. Mayall (ed.), *The Community of States – A Study in International Political Theory* (1982) 140 at 142 *et seq.*

⁶⁹ V.S. Vereshehtin / R.A. Miullerson, *New Thinking and International Law*, (1988) 3 *Sovetskoe Gosudarstvo i Pravo* 3 *et seq.* [translated by L. Kreyin and R. Taylor for the Parker School of Foreign and Comparative Law, Columbia University].

⁷⁰ Dupuy (note 14) at 177.