

Comment: The Common Interest in International Law: Some Reflections on its Normative Content

*Nele Matz**

I would like to take the opportunity for a short comment on the presentation given by Prof. Doris König earlier this afternoon. Prof. König, in her presentation, has spoken about the possibility that individual States can unilaterally enforce law in the interest of all, i.e. in the common interest or as she has called it the community interest. Let me add some – in a way more general – thoughts on this common interest, since, although the term is frequently used, its content and implications are often disregarded. Prof. Wolfrum in his lecture given at The Hague is an exception to this extent.¹

1. Introduction

International law, particularly international environmental law, knows the notion of a common interest, a community interest, a common concern of humankind and the common heritage of humankind. I will today leave aside the common heritage concept, as this would lead too far. Let me instead concentrate on the common interest and common concern in international law. As a footnote I would like to add that the question whether there is any clear distinction between the common interest on the one hand and the common concern on the other will not be discussed in any detail today.²

The question that appears most relevant in the context of the common interest is whether the notion of a common interest or a common concern has any normative content at all. Is the common concern of States a fully-fledged principle of international law? Most of you assembled here today who have an interest in environmental law would most probably answer this question with “no”. Is the common concern merely a political affirmation that an issue is considered relevant for all States then? I know that, for example, Prof. Beyerlin is of this opinion, according to his recent book on international environmental law.³ In my opinion, the answer

* LL.M., Candidate for Second State Law Examination, District Court Bonn.

¹ R. Wolfrum, *Means of Ensuring Compliance with and Enforcement of International Environmental Law*, 272 *Recueil des Cours*, 1998, 7, 153 et seq.

² Whether the common concern is just a facet of the common interest or whether the common concern has a higher status than a common interest is not primarily relevant for the assessment of the normative content of these concepts. See J. Brunnée, “Common Interest” – Echoes from an Empty Shell?, 49 *ZaöRV*, 1989, 791, 792 for the prior, and F. Biermann, *Common Concern of Humankind: The Emergence of a New Concept of International Environmental Law*, 34 *AVR*, 1996, 426, 431 for the latter opinion.

³ U. Beyerlin, *Umweltvölkerrecht*, 2000, para. 126.

must be looked for somewhere in between these two considerations, even if the weight might still be on the political side.

2. The Normative Content of a Common Interest Concept

First of all, the notion of the common interest does of course acknowledge a political necessity for some form of international governance on an issue.⁴ Where the common interest is recognised, the matter is no longer solely an internal affair of a State.⁵ In addition to political implications the following four legal consequences could – in theory – be assigned to the recognition of a common interest of States.

1. The potentially strongest implication of the common interest would be a duty to positively act to prevent or mitigate harm to those features, resources of values that are in the common interest of States.

Although the common interest or the common concern might be the underlying philosophical considerations, when agreeing on obligations in international treaties, the recognition of a common interest alone does not invoke any positive duties. Insofar, the common interest is not a principle of law at all, but rather a concept that, together with other considerations, leads to the negotiation of obligations in treaties.

2. A second potential implication, weaker than my first consideration, would be to use the common interest as a justification for such unilateral actions that have implications for other sovereign States.

This argument, as we have learned from Prof. König's presentation today, is already being invoked in international law. We might still be far from recognizing the common interest as a customary law justification for unilateral restrictions of States' sovereign rights by other States. One reason for this lack of recognition is the lack of clear criteria, when an issue can be considered a common concern of humankind in a legal sense. However, the recognition of the necessity to generally restrict national sovereignty as far as common interests are concerned is an important aspect of the development of international environmental law. The unilateral enforcement of law in the common interest is the facet, where the common interest gains particular importance as a legal concept, since States wishing to enforce universally applicable standards would no longer have to prove any specific legal interest other than the protection of the interests of the community as a whole.⁶

3. A third element is the negative counterpart of my first consideration; that is in this case a duty for States not to undertake activities that run counter the common interest.

⁴ Biermann (note 2), 430 et seq.

⁵ This is despite the fact that the common interest is primarily the sum of coinciding individual interests; see also Brunnée (note 2), 792 et seq.

⁶ In regard to the law of the atmosphere see Biermann (note 2), 451.

Insofar as the common concern of humankind has led to general standards of conduct that are recognized as customary international law, the duties not to act contrary to the common interest are evident. This is for example the case in respect to the protection of the ozone layer, where the substantial duties not to emit substances that destroy the ozone layer are by now considered customary international law.⁷ However, the common interest in an issue alone is by no means sufficient to establish obligations for States, let alone customary international law. In this regard the concept of common interest or common concern is – again – only the underlying reason for the evolution of customary law and does not establish legal prohibitions itself.

4. Last but not least an issue closely linked to the other three considerations is the question of liability resulting from acts contrary to the common interest.

I consider this issue particularly relevant, since to some extent it bridges the gap between potential material duties on the one hand and the enforcement of law by States on the other hand. Article 33, para. 1, of the Draft Articles on State Responsibility most recently adopted by the ILC explicitly acknowledges liability for a breach of obligations owed to the international community as a whole. But yet again, the common interest must first lead to an obligation and when that obligation is breached, liability might follow. Once more it follows that the common interest cannot be considered a legal principle in itself but rather the first step that leads to obligations.

3. Conclusion

The common interest, although not – or not yet – being a clear enough principle of law, is already more than an empty political phrase. It serves as a catalyst for the development of binding rules on diligent conduct of States and hence prepares the ground for unilateral enforcement measures as well as for liability. It is also an analytical concept for the development and assessment of regulations. While still lacking legal content itself, the concept already has legal implications concerning the enforcement of law. As such it is also one of the most important aspects of the progressive development of international environmental law and the restriction of national sovereignty for the benefit of the community of States. I am looking forward to learn some more about this issue from Prof. Wolfrum, or maybe his scholars, in the years to come. Thank you for your attention.

⁷ Ibid., 447 et seq.

