Globalisation and Transnational Human Rights Obligations (GLOTHRO)

The Common Interest in International Law

Workshop | 11-12 October 2012 | University of Graz (Austria)

Workshop Report

Summary

The traditional view of the international legal order is that it is composed of formally equal independent states. The system of sources of international law takes state consent as a point of departure. Treaties are only binding on States after they have expressed their consent to be bound. The existence of a rule of customary law needs to be established by proving general State practice supported by the conviction of states.

An alternative view of international law is that it is a system of law that reflects the general conscience of the international community (a concept not limited to States), aimed at achieving the common (global) interest. The common interest can only be safeguarded through international cooperation by states, and by other actors. The Workshop examined different areas in which such cooperation takes place and analyzed what lessons can be drawn from these regimes for extraterritorial human rights obligations.

The three keynote addresses focused on the role of common interest as a key concept of international law. The pursuance of the common interest by the international community has substantially influenced the evolution of international law. Contributors identified the role of the interests of the international community within a state-centric legal system and queried inhowfar existing legal institutions were obstacles to protecting the common interest. The participants concluded that there was a pluralism of approaches to defining common interests but warned that too broad a definition could water down the usefulness of the concept.

Admitting that ensuring the common interest is in the interest of a progressive international law, we are still faced with both conceptual problems, including the critique of the cosmopolitan paradigm, and practical problems, such as the attribution of responsibility between international organizations and states. Common interests are also pursued in asylum law, environmental law and International Internet Law. Though there was agreement on the importance of common interest, a central problem remained in the redefinition of sovereignty in light of enforcing extraterritorial human rights obligations. This quest ties in intimately with the evolution of the responsibility to protect, the primary duty of each state to protect its population coupled with a residual duty by all states to ensure this common interest in case the home state is unwilling or unable to ensure adequate protection.

Centrally, the workshop also queried into the legal impact of defining an issue as one of lying in the common concern and the mechanisms of implementation and enforcement of issues of common concern. International law still does not provide an answer to the question of whether issues of common interest are value-neutral or imbued with values.

The workshop concluded that in light of the present dynamics in international law finding common ground is essential. The participants drew up a research agenda that included further research to be conducted and a book publication drawing together the different avenues of research.

Scientific content and discussion [4pp]

Wolfgang Benedek (University of Graz, Austria) opened the conference and reminded that safeguarding the common good had been at the center of international law since *Grotius*. But it was the task of the last four centuries of international law to introduce a human dimension to international law, a value basis, that has influenced the process of ensuring the "common interest" through international legal rules. The exciting question to be clarified in the workshop was the state of international law with regard to the actors that ensure the common interest and the definition of the common interest itself in light of conflicting trends of constitutionalization and resouvereignization.

The **three keynotes** delineated the protection of the common interest in international law in light of the main purpose of the workshop: investigating to what extent new schemes to protect the common interest in various fields of international law can inspire efforts to move human rights law from a system based on territorial sovereignty to a system based on shared responsibilities among states (and possibly among various other actors).

Koen De Feyter (University of Antwerp, Belgium) argued that the real challenge was to motivate governments at the national level to protect the global common interest (especially, when the national and common interests do not overlap), as it is domestic law that can ensure the common interest most effectively. Exceptions included issues of international jurisdiction. There was no redistributive supranational authority yet to ensure the common interest and it was not likely that such an authority would win broad acceptance. In the Rio Declaration, states committed to an economically, socially and environmentally sustainable future for the planet with governments acting as custodians of the common interest. By now, there was a reasonable expectation that all states ensure the common interest. This implied a right by all states to monitor and comment on and a duty to assist states to ensure the common interest. Concluding the notion emerged that nature had a right to be let alone.

Christina Voigt (University of Oslo, Norway) showed that within societies the process to unite common interest and personal predilections was evolutionary. The development from coexistence to cooperation took time. Voigt argued that the common interest was more than the sum of individual state interests. There was further a difference between issues of common interest and of common concern. The latter demanded collaborative, concerted action, first visible in international environmental law. The overall goal of international law must be to meet the needs of a growing population within the confines of fragile environmental systems.

Daniel Thürer (University of Zurich, Switzerland) connected the protection of common interest in international law with the responsibility to protect. There existed three main schools on humanitarian intervention: that it was not allowed; that the UN Charter was qualifiedly silent on the issue; and that it may be illegal but legitimate. States, in the World Summit Outcome Document, committed to a responsibility to protect populations from genocide and other serious crimes, under certain precautionary provisions. The question of

what character the R2P principle had, was difficult to answer – it could be defined as a political strategy, a new way of talking about challenges facing international law.

Session I – Common Interest: Fundamental Questions

Jure Vidmar (University of Oxford, UK) argued that though international law was based on a community of more than just states, recourse is made to states in the enforcement of international law. It was *state* practice and *state* opinion iuris on which international customary law was based. Over the years, ethical underpinnings emerged in international law and a reorientation took place towards the individual. An important step in ICJ jurisprudence was that, in *Barcelona Traction*, the court referred not to the international community *of states* but just to the international community. Contemporary international law accepted actors other than states, but in the enforcement of community interests states are still required.

Sten Schaumburg-Müller (Aarhus University, Denmark) warned that the danger of paternalistic unversalism and imperialistic internationalism were serious. Historically, British colonialism was partly legitimized in terms of bringing law and civilization to the needy. Sovereign states had a tendency to create an international order which fit their needs. Much of this had changed, but there were remnants which made the furthering of common interests difficult.

Session II – Common Interest, the Use of Force and Development

Vito Todeschini (EIUC, Venice, Italy) argued that within the cosmopolitan paradigm states remained not the only sources of legitimacy. A major distinction to be made within the responsibility to protect was between the primary responsibility of the home state and the residual responsibility of the international community. The main challenge lay in overcoming selectivity concerns – an important step for which the establishment of a legal norm would probably not suffice. Furthermore, an obligation to intervene was not desireable – better to increase the potential of states to ensure human rights protection as a common interest.

Sofia Freitas de Barros (KU Leuven, Belgium) explained member states responsibility in the context of World Bank operations and defined a new framework of responsibility between World Bank and the member states. The World Bank, a subject of international law, is governed by legal framework that includes human rights. Art 14 of the Draft Articles on the Responsibility of International Organizations was of particular importance as it it proscribed that international organizations are responsible for human rights violations if they aid or assist a state in the commission of a wrongful act. Further, member states had extraterritorial human rights obligations in their tripartite typology to respect, protect and fulfill, including a duty of international cooperation and assistance. They continued to have responsibility for its own acts within the international organizations. The example of national human rights legislation, such as US Code, Chapter 7, Section 26d, showed that executive directors of the World Bank (and other officials of international organizations) are obliged to advance the cause of human rights.

Henning Fuglsang Sørensen (Aarhus University, Denmark) presented states' reasoning of

why not extradite political offenders, especially because an assessment of the political nature of an offense might amount to interference in internal matters. Due to historic reasons attempts to attack heads of state were often not considered. Most extradition treaties contained a political offence exception, with differences made between pure political offences and relative political offences. Over time, a terrorism exception emerged in national extradition treaties. Further, in EU law no political exception existed because of the presumption that trials in all member states would be fair. Within Council of Europe member states, the political offence exception continued to apply, but the trail needed to be fair. Topical cases included those of Julian Assange, Andrei Lugovoy and Niels Holck. Sørensen concluded that the political offence exception can be replaced by a demand for fair trial but this was conditioned of an external review.

Werner Scholtz (North-West University, Potchefstroom Campus, South Africa) tied common interest in environmental law to self-interest, solidarity and sovereignty. There was a convergence of interests in human survival which gave birth to the notion of a common concern of mankind and gave rise to the legitimacy of normative attempts to regulate the environment. Solidarity was a guiding force in the international behaviour of states influencing them to add a material dimension to the forma equality of states. Permanent sovereignty allowed for both states and the international community to ensure issues of common concern. Common concern moulded the interpretation of permanent sovereignty towards the duties, with a *custodial sovereignty* emerging with the state as the custodian for the natural resources. States as territorial custodians had primary rights balanced by duties after a *greening* of permanent sovereignty.

Matthias C. Kettemann (University of Graz, Austria) assessed what perspectives International Internet Law as an instrument to secure the common interest of a stable, secure and functional Internet offers for human rights law. He showed that International Internet Law, as one of international law's newest regimes, contained principles and norms ensuring legitimately the protection of the stability, security and functionality of the Internet as an issue of common concern through normative arrangements based on a multistakeholder norm-creating and norm-executing structure. Multistakeholderism in Internet Governance was based on the cooperation, in their respective roles, of states, private sector, and civil society. This tripartite structure and its integration in normative arrangements held important lessons for human rights law.

Claire Buggenhoudt (University of Antwerp, Belgium) defined common interests as those transcending those of individual states, shared values or goods of the community. Ensuring these through litigation, however, was not completely institutionalized. The enforcement of international community interests remained state-centric. Substantively, the ICJ jurisprudence offered certain indicia of ensuring common interests through erga omnes obligations, including insights regarding standing (Barcelona Traction), provisional measures (Preah Vihear) and environmental protection (Gabcikovo). ITLOS recognized common interest procedurally regarding standing (Saiga) and provisionsal measures (SBT, Mox Plant) and substantively. The WTO Dispute Settlement System took human rights issues into account both procedurally (third party intervention, Softwood) and substantively (environmental concerns, Tuna Dolphin).

Assessment of the results and impact of the event on the future direction of the field (up to 2 pages)

This workshop has been organized in order to offer inspirational guidance to the Research Networking Programme (RNP). It has been highly succesful in introducing a wide variety of approaches to the common interest in public international law. The workshop will have an impact in at least three ways.

First, it has clarified the different meanings that can be given to the notion of sovereignty. GLOTHRO, in trying to expand the duty-bearer dimension of human rights law, often faces the objection of sovereignty. This workshop has made clear that these counter-arguments should not be ignored, but addressed. The workshop has also been helpful for identifying some of the counter-arguments. The notion of sovereignty is not absolute, but can be defined in a functional sense. As such, the duty dimension may have to be stronger developed. Also, there may be an internal dimension to sovereignty, that is closely related to popular sovereignty and the sovereignty of sub-national groups ?

Secondly, the workshop has triggered the following reflection points for the RNP:

- is the categorisation developed-developing countries still meaningful ? In particular in international environmental law, other categories and further differentiation are being used ;

- within international relations, human rights concerns are often perceived as national interests in disguise. To what extent is this concern legitimate, in particular with regard to extraterritorial human rights obligations ?

- the state is a relatively recent, historical construction; this point could be helpful in further developing the argument in favor of expanding human rights law to non-state actors ;

- in order to elaborate general principles underlying transnational human rights obligations, in particular on the issue of attribution and distribution of responsibility, inspirational guidance may be found in values or through a sociological approach.

Thirdly, useful discussion has taken place on some of the legal-technical questions regarding the reconfiguration of the duty-dimension of human rights law. Foundational changes are required with regard to the distribution of responsibility. Should the state retain primary responsibility, while residual or complementary responsibility is attributed to the international community? If common interest gives rise to common concern of mankind, how does this affect international law, and in particular the duty dimension of sovereignty and the question of legal personality? How useful and important is the involvement of different stakeholders in norm-creation on transnational human rights obligations? What can be learned from multistakeholderism in the law of Internet Governance, e.g. with regard to the inclusion of all stakeholders on an equal footing, but while respecting their respective roles?

The contributions to this workshop will be compiled into a book on ensuring common interest in international law. There will be an authors' meeting by mid-2013. By mid-2013 GLOTHRO will finalize conclusions that will feed into the final programme conference.

Final programme of the meeting

[on the subsequent pages]

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The Common Interest in International Law

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Programme

Thursday, 11 October

9.00 Registration and Morning Coffee

10.00 Introduction

Wolfgang Benedek (University of Graz, Austria)

10.20 Keynotes

Chair: Wolfgang Benedek (University of Graz, Austria)

Koen De Feyter (University of Antwerp, Belgium)
The Common Interest in International Law: An Introduction

Christina Voigt (University of Oslo, Norway)
Delineating the "Common Interest" in International Law

Daniel Thürer (University of Zurich, Switzerland)
Common Interest in International Law and the Responsibility to Protect

12.15 Lunch Break at the Resowi Cafeteria

13.30 Session I – Common Interest: Fundamental Questions

Chair: Daniel Thürer (University of Zurich, Switzerland)

Jure Vidmar (University of Oxford, UK)
The International Community Interest within a State-Centric Legal System

Sten Schaumburg-Müller (Aarhus University, Denmark)
To what Extent are Contemporary Legal Institutions Obstacles to Protecting Common Interests?

15.00 Coffee Break

15.30 Session II – Common Interest, the Use of Force and Development

Chair: Wolfgang Benedek (University of Graz, Austria)

Vito Todeschini (EIUC, Venice, Italy)
Use of Force and the Cosmopolitan Paradigm: Problematic Aspects of the R2P Doctrine

Sofia Freitas de Barros (KU Leuven, Belgium)
The Responsibility of the World Bank and the Common Interest in Development Law

17.15 **Social Programme: Guided tour through the old town of Graz, a UNESCO World Heritage site and Human Rights City**

19.30 **Workshop Dinner at *aiola upstairs* on the *Schlossberg* (castle mountain)**

Friday, 12 October

9.30 **Session III – Common Interest between Politics and Religion**

Chair: Christina Voigt (University of Oslo, Norway)

Henning Fuglsang Sørensen (Aarhus University, Denmark)
I am not a Crook, I am a Politician – or Am I? Political Activity, Extradition and the Common Interest

10.30 **Coffee Break**

11.00 **Session IV – Common Interest in the Offline and Online Environment**

Chair: Koen De Feyter (University of Antwerp, Belgium)

Werner Scholtz (North-West University, Potchefstroom Campus, South Africa)
Common Concern and ETOs: Towards a Universalist Outlook

Matthias C. Kettemann (University of Graz, Austria)
International Internet Law and the Common Interest: Perspectives for Human Rights Law

12.30 **Lunch Break at the Resowi Cafeteria**

14.00 **Session V – Common Interest in International Economic Law**

Chair: Wouter Vandenhole (University of Antwerp, Belgium

Claire Buggenhoudt (University of Antwerp, Belgium)
The Common Interest in International Litigation

14.45 The Common Interest in International Law: Towards a Workshop Publication

Koen De Feyter (University of Antwerp, Belgium)
Wolfgang Benedek (University of Graz, Austria)

15.00 Summary and Conclusions

Wolfgang Benedek (University of Graz, Austria)
Koen De Feyter (University of Antwerp, Belgium)

15.30 Closing Cocktail

Organizing Committee: Wolfgang Benedek | Matthias C. Kettemann | Stefan Salomon
Institute of International Law and International Relations
University of Graz | http://voelkerrecht.uni-graz.at

Conference Venue: University of Graz, Resowi Center
Universitätsstraße 15, building part G, 2nd floor, SZ 15.22

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