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Sovereignty Strikes Back: Continued Relevance of Common Concern of Humankind in Times of Polycrisis

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The doctrine of common concern of humankind (CCH), as shaped by Professor Thomas Cottier, envisages the identification of the most pressing shared global problems as common concerns and their effective redress through law, particularly by way of (i) cooperation, (ii) homework and (iii) unilateral responses. In doing so, the CCH doctrine advances a qualified reading of state sovereignty, creating room for deference to a rules-based global order. In practice, however, global affairs in recent years have taken a turn away from rules-based interactions between states. Aggression in the name of security and the race for subsidies in the name of climate action, among others, evidence an attempt to take control back from the global to the domestic level. Prompted by such developments, this chapter revisits the previously drawn conclusions on the utility of CCH doctrine in the areas of human rights enforcement via economic sanctions and low-carbon technology diffusion. It concludes that the doctrine remains more salient than ever, especially in moving towards a rule of law rather than a rule through power. With that in focus, the chapter updates the cooperation, homework and unilateral action agenda in the regimes mentioned above – opening an opportunity to compare and contrast the two and reinforcing the continued relevance of the doctrine in the current era of deglobalisation and crisis of the rules-based international order.

I. Introduction

From 2015, Professor Thomas Cottier led the project 'Towards a Principle of Common Concern in Global Law: Foundation and Case Studies' for four years, enlisting both of us as his PhD students. Although, looking back from 2024, the world in 2015 may look brighter, it was nothing but. Against the backdrop of the aftermath of the global financial crisis, unforeseen mass migration towards Europe, the occupation of Crimea by 'little green men', brewing tension over the nearing

expiry of non-market economy controls in China's World Trade Organization (WTO) Accession Protocol and no long-term climate agreement yet in place, the prospects of international law resolving shared global challenges looked very poor. The project was framed as a response to those challenges. Its goal was, in many ways, emblematic of Professor Cottier's vision of international economic law – realistic yet forward-looking – as it sought to explore the possibility of the predominantly environmental principle of common concern of humankind to be recognised as part and parcel of international law and have a positive structural impact upon the regulation of common interests, going beyond existing principles like sustainable development, prevention of transboundary harm and the common heritage of mankind. This goal was to be fulfilled by attaching stronger normativity to the principle, in the form of specific obligations binding all stakeholders to cooperate and resolve shared problems.

By the end of 2021, in the midst of the COVID-19 pandemic, the project was completed. It produced a propositional framework – the doctrine of common concern of humankind[1] – and several PhD theses which tested its application to different pressing problems, such as monetary stability, global inequality, human rights-related sanctions, migration, marine plastic pollution and transfer of low-carbon technologies.[2] In all of those studied areas, propositions of the doctrine were found to be useful in addressing collective action problems. However, instead of making any progress along the proposed trajectories, actual world affairs have since displayed a continuous shift away from the values of global community and solidarity. The rise of authoritarian and populist regimes, me-first economic policies, unaccountable and illegal acts of aggression against other countries and a general decline in multilateral cooperation are but a few indicators of the crisis of our times.

This chapter revisits some of the key messages of the common concern project, which are also one of Professor Cottier's latest contributions to public international law. Our goal is to situate the propositions of the CCH doctrine with recent developments and look for a continued relevance of engaging with this evolving notion. To that end, we begin by briefly recalling the key findings and propositions of the CCH doctrine and its application in the fields of climate change and human rights. This is then followed by an account of subsequent developments. On the one hand, we note the positive reception of the notion in an emerging field of common interest, ie the protection of the atmosphere. On the other hand, we highlight the signs of parochialism's resurgence in international affairs. Against

[1] Thomas Cottier (ed), *The Prospects of Common Concern of Humankind in International Law* (Cambridge University Press, 2021).

[2] Zaker Ahmad, *WTO Law and Trade Policy Reform for Low-Carbon Technology Diffusion: Common Concern of Humankind, Carbon Pricing, and Export Credit Support* (Brill, 2021); Alexander D Beyleveld, *Taking a Common Concern Approach to Economic Inequality* (Brill, 2022); Iryna Bogdanova, *Unilateral Sanctions in International Law and the Enforcement of Human Rights* (Brill, 2022); Lucía Satragno, *Monetary Stability as a Common Concern in International Law* (Brill, 2022); Judith Schäli, *The Mitigation of Marine Plastic Pollution in International Law* (Brill, 2022).

this dialectical, contested backdrop, we conclude that not only does the doctrine remain more relevant than ever, but also that continued engagement with it in new fields through 'claims and responses' is an essential part of the progress of solidarity and common interest norms in international law. Suggestions outlining that path in the fields of human rights sanctions, climate change and international economic law are provided at the end.

II. The CCH Doctrine in Context

International cooperation in pursuit of long-term, shared interests is hardest when it requires a large group of heterogeneous stakeholders to sacrifice localised economic and political gains in the short term – such as in the case of anthropogenic climate change.[3] This premise gives an insight into the almost insurmountable difficulty surrounding the struggle for effective global arrangements, in the form of binding international treaties, to tackle existing and emerging transboundary problems. Progress, nonetheless, happens. In his celebrated 1994 lecture at the Hague Academy of International Law, Bruno Simma noted how the ideological acceptance of the international community as a 'higher unity' triggered a gradual evolution of the interstate and bilateral character of public international law towards becoming a value-based order.[4] In line with the idea of collective action problems, Simma accurately highlighted the paradox of building community interests on a bilateral state-centric foundation of international law, and suggested the development of concrete 'principles, institutions and rules' to overcome it.[5] Doctrinal expressions like *jus cogens*, he observed, serve an important compensatory function to progressively fulfil community interests through international institutions.[6] The emergence and growth of the legal principle 'common concern of humankind' should be seen as progress along that trajectory. In response to the need to highlight the global interest in addressing challenges that surpass state-territorial domains, 'common concern of humankind' emerged as a problem signifier in the early 1990s,[7] which was also the United Nations decade of

[3] Thomas Cottier, 'The Principle of Common Concern of Humankind' in Cottier, *The Prospects of Common Concern of Humankind in International Law* (n 1) 7–9; Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups*, 17th printing (Harvard University Press, 1998); Paul G Harris, 'Collective Action on Climate Change: The Logic of Regime Failure' (2007) 47 *Natural Resources Journal* 195, 199–204; Elinor Ostrom, 'Analyzing Collective Action' (2010) 41 *Agricultural Economics* 155, 157–59; Inge Kaul, 'Global Public Goods: Explaining Their Underprovision' (2012) 15 *Journal of International Economic Law* 729, 736–43; Scott Barrett, 'Collective Action to Avoid Catastrophe: When Countries Succeed, When They Fail, and Why' (2016) 7 *Global Policy* 45.

[4] Bruno Simma, *From Bilateralism to Community Interest in International Law*, Recueil Des Cours: Collected Courses of the Hague Academy of International Law, vol 250 (Martinus Nijhoff Publishers, 1997) 234–35, 243–49.

[5] ibid 247–49.

[6] ibid 285–86.

[7] UNGA, 'Protection of Global Climate for Present and Future Generations of Mankind' (1988) A/RES/43/53; AA Cançado Trindade and David J Attard, 'I Meeting of the UNEP Group of Legal

international law.[8] Born alongside its more renowned sibling principle of sustainable development, the problems of climate change and biodiversity loss were its first fields of operation, although it is not, as we will later see, relegated exclusively to those regimes.

A. What is of 'Common Concern'?

To indicate the attributes that may earn a shared problem the label 'common concern', academics in the past have used expressions such as being truly fundamental, reflecting universal values or touching upon ethics of global significance.[9] While being emotionally evocative of the importance of underlying interests, these descriptions, either individually or all together, elude the formation of a concrete assessment metric – one that can serve the useful function of gatekeeping the boundary of common concern. Cottier et al were the first to propose a consistent normative content to be assigned to this principle.[10] Drawing analogies with the existing areas of recognised common concerns, it was argued that the essential starting point of framing a common concern is the 'existence of threat of a real transboundary problem, the resolution or prevention of which requires collective action and cooperation among two or more states'.[11] Extending it further, Cottier argued that the unique threshold for a common interest issue to become of common concern of humankind ought to lie in its likelihood of adversely affecting global peace, stability and welfare – the core functions of international law.[12] A consistent structural form and threshold then allows the assessment of existing and emerging shared problems, such as inequality, global monetary and financial instability, egregious violation of human rights, migration crisis and marine plastic pollution, through the lens of CCH.[13] It is noteworthy that the method of extending the application of CCH to a new, characteristically similar issue area through analogical reasoning has also been employed by the International Law Commission's (ILC) Special Rapporteur on the Protection of the Atmosphere, Shinya Murase. He

Experts to Examine the Implications of the "Common Concern of Mankind" Concept on Global Environmental Issues' (1991) 13 *Revista IIDH* 247. For a broad overview, see Cottier, 'The Principle of Common Concern of Humankind' (n 3) 11–16.

[8] UNGA, 'United Nations Decade of International Law' (1989) UNGA Resolution A/RES/44/23.

[9] Cottier, 'The Principle of Common Concern of Humankind' (n 3) 18–20; Friedrich Soltau, 'Common Concern of Humankind' in Cinnamon P Carlarne, Kevin R Gray and Richard G Tarasofsky (eds), *The Oxford Handbook of International Climate Change Law* (First edition, Oxford University Press, 2016) 207; Dinah Shelton, 'Common Concern of Humanity' (2009) 5 *Iustum Aequum Salutare* 33, 33–34.

[10] Cottier, 'The Principle of Common Concern of Humankind' (n 3) 25; Thomas Cottier et al, 'The Principle of Common Concern and Climate Change' (2014) 52 *Archiv des Völkerrechts* 293, 314–15.

[11] Cottier, 'The Principle of Common Concern of Humankind' (n 3) 37.

[12] ibid 39–41.

[13] Cottier, *The Prospects of Common Concern of Humankind in International Law* (n 1) chs 3–8.

used the approach to propose atmospheric degradation as a common concern of humankind. According to Murase, a deductive approach is justified to ensure the progressive development of international law in areas where 'the law has not yet been sufficiently developed in the practice of States', as long as it conforms to the emergent principles and rules of customary international law.[14]

We furnish two illustrations of how such an identification exercise may work out in distinct legal contexts. Firstly, within a formally recognised domain of CCH like climate change, its sub-issues also earn the same label to the extent they are connected to the main problem. This is the case, for example, of technology transfers.[15] Transfer of technology is a regulatory regime in its own right, some aspects of which function flawlessly. Other aspects, eg low-carbon technology transfer between developed and developing regions, face challenges. The recognition of climate change as a CCH would be applicable to those particular technology transfer challenges that problematise climate action.[16] Hence, the problem of inadequate transfer and diffusion of technologies necessary for adequate climate response deserves to be termed as a CCH. Secondly, key attributes of shared challenges formally recognised as a common concern, eg its gravity and urgency, and the indispensability of transboundary collaborative efforts, serve as comparative benchmarks to assess the potential of new problems to be inducted into the scope of CCH. Professor Cottier additionally proposed the notion of threat to global peace and security as a threshold indicator. These metrics identify the situations of grave and systematic breaches of human rights as producing negative externalities which potentially threaten international peace and security. One of the examples is massive refugee flows: they may range from violence-induced movements to crises caused by a dire economic situation that partly emanates from the persistent violation of economic and social rights, especially in cases of authoritarian regimes deriving their economic might from natural resource exploitation. Posing a threat to regional and international peace and security, such egregious human rights violations can be recognised as constituting a common concern calling for collective action.[17] Framing international human rights as common interests and community interests is hardly novel,[18] yet labelling them as a common concern calls for a new approach to the allocation of the states' rights and duties that is discussed in the next section.

[14] Shinya Murase, 'Second Report on the Protection of Atmosphere – 67th Session of the International Law Commission' (2015) A/CN4/681, para 34.

[15] Ahmad (n 2).

[16] ibid 76–89.

[17] Bogdanova (n 2) ch 5.

[18] Wolfgang Benedek, 'Humanization of International Law, Human Rights and the Common Interest' in Wolfgang Benedek (ed), *The Common Interest in International Law* (Intersentia, 2014); Samantha Besson, 'Community Interests in International Law: Whose Interests Are They and How Should We Best Identify Them?' in Eyal Benvenisti and Georg Nolte (ed), *Community Interests Across International Law* (Oxford University Press, 2018).

B. Normative Consequences Flowing from the CCH

Focusing on the inherent normative import of the term 'concern',[19] it was stated that the very normative dimension of designating a common concern translates into a call for a joint action,[20] which was proposed to be carried out by designating specific state obligations along three dimensions. These courses of action comprise international cooperation between states as well as inward and outward directed domestic actions undertaken within each involved state's jurisdictional boundary. While some of the suggested actions (eg cooperation) have limited independent existence in international law, the innovation of the doctrine lies in linking them as a normative consequence flowing from the CCH – something that is in its early stage of emergence in state practice.[21]

(i) Cooperation

Although international legal instruments are yet to formally endorse that a duty to cooperate emerges out of a recognised common concern, scholars broadly agree about such a normative linkage.[22] This is important because, at present, obligations to cooperate are not commonplace in international law.[23] They only exist in specific issue areas subject to prior state consent or as customary principles.[24] Combined with the principles of sovereign equality and independence, the status quo is that cooperation cannot be claimed as a right against other states to resolve all existing and emerging common concerns.[25] Due to the indispensability of cooperation in resolving common concerns of humankind, Cottier also holds that international recognition of a problem as a CCH is, *ipso facto*, an endorsement of the need for cooperation. The duty to cooperate can already be found in various legal regimes addressing common interests,[26] including the ones on

[19] Cottier, 'The Principle of Common Concern of Humankind' (n 3) 37–38.

[20] ibid.

[21] See section II.C below.

[22] See, among others, Mostafa K Tolba, 'The Implications of the "Common Concern of Mankind" Concept on Global Environmental Issues' (1991) 13 *Revista IIDH* 237, paras 16–17; Murase (n 14) para 37; Antônio Augusto and Cançado Trindade, *International Law for Humankind* (Brill Nijhoff, 2013) 347 https://brill.com/display/book/9789004255074/B9789004255074-s015.xml.

[23] Rüdiger Wolfrum, 'Cooperation, International Law Of' in *Max Planck Encyclopedia of Public International Law* (2010) para 39, https://opil-1ouplaw-1com-1p67dv9pt0089.han.sub.uni-goettingen.de/display/10.1093/law:epil/9780199231690/law-9780199231690-e1427?prd=MPIL; Jost Delbrück, 'Coexistence, Cooperation and Solidarity in International Law: The International Obligation to Cooperate – An Empty Shell or a Hard Law Principle of International Law? – A Critical Look at a Much Debated Paradigm of Modern International Law' in Holger P Hestermeyer et al (eds), *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum* (Brill Nijhoff, 2012) vol 1, 13–15.

[24] Cottier, 'The Principle of Common Concern of Humankind' (n 3) 59–60.

[25] ibid; Rüdiger Wolfrum, *Solidarity and Community Interests: Driving Forces for the Interpretation and Development of International Law*, Recueil Des Cours: Collected Courses of the Hague Academy of International Law, vol 416 (Brill Nijhoff, 2021) 182–85.

[26] ibid 188–208.

common concerns. However, what remains problematic is that this obligation is understood in a process-oriented fashion and not in a results-oriented manner. To resolve this, Cottier proposes that the obligation to cooperate should be carried out transparently, in good faith, through consultations for the establishment of appropriate institutional and support mechanisms for effective resolution of the common concern.[27] Such efforts should also influence the adjacent legal regimes (eg climate and trade, or human rights and trade). Cooperation should comprise not only rulemaking and determination of tasks, but should also extend to timely implementation of the same.[28]

With regard to addressing the common concern of low-carbon technology diffusion, it was proposed that cooperation should focus on strengthening existing mechanisms under the Paris Agreement with a view to creating enabling environments for technology transfers. Such efforts should also incorporate supporting activities in the adjacent regimes, such as WTO law, where the notion is not formally recognised at present.[29] Ultimately, international cooperation to facilitate the diffusion of low-carbon technologies should recognise the importance of the issue, put in place both demand and supply side incentives and requirements, and operationalise technology transfer mechanisms that are already in place.

In the human rights domain, the duty to cooperate entails rights and duties imposed on both the state where grave and systematic human rights violations occur and other states. To elucidate this point, it should be recalled that grave human rights violations are engendered either by a lack of resources necessary for effective human rights protection or by a state's intentional action to deprive its citizens of human rights guarantees.[30] In the former case, the state in need of assistance should act in a transparent and cooperative manner in providing accurate information and requesting assistance from other states, while other states acting in good faith should cooperate in resolving the crisis.[31] The historical record bears witness to instances of international cooperation of this sort: for example, in situations of natural disasters, states cooperate to provide humanitarian aid. The duty to cooperate, as a normative implication of the CCH, has the potential to reinforce existing practice by giving it the sense of a legal obligation. In case of a state's intentional action aimed at depriving its citizens of the human rights guaranteed under international law, the duty to cooperate elevated by the CCH to the level of an international obligation would require such a state to provide information and cooperate with other states willing to investigate the ongoing human rights crisis.

[27] Cottier, 'The Principle of Common Concern of Humankind' (n 3) 60–61.

[28] ibid 62.

[29] Thomas Cottier, 'The Principle of Common Concern of Humankind and the WTO' in *Elgar Encyclopedia of Environmental Law* (Edward Elgar Publishing, 2023) 146; Ahmad (n 2) 140–44.

[30] Emilie M Hafner-Burton, 'A Social Science of Human Rights' (2014) 51 *Journal of Peace Research* 273; Daniel Bodansky, 'What's in a Concept? Global Public Goods, International Law, and Legitimacy' (2012) 23 *European Journal of International Law* 651.

[31] Bogdanova (n 2) 300.

Non-compliance with this obligation to cooperate legitimises unilateral recourse to coercive measures.

(ii) Homework

The homework dimension of the proposed normative consequences of CCH connects the principle to making real-life impacts on people and communities affected by the shared problem. Expanding the current understanding of the scope of the CCH, Cottier advances homework as an obligation of a state to take adequate steps within its jurisdiction to address the common challenge, within the limits of available resources and capability, and in keeping with the principles of equity and distributional fairness.[32] In addition to implementing international obligations, homework measures are envisaged by Cottier to also cover autonomous measures, which may have an indirect extraterritorial effect beyond the border.[33] Given the utility of international trade policy measures to offer effective economic benefits or alternatively impose costs on partners ('carrot and stick' approach), trade policy measures feature as a prominent toolset of choice to further the shared objectives of common concern.[34] The practice of recourse to trade policy in pursuance of other objectives is not new. States in a position to do so have always used their economic might to leverage the achievement of unilateral policy objectives. The CCH doctrine is poised to further structure such recourses, approving those that advance common interests while rejecting protectionist ones.

Homework in the climate domain involves appropriate mitigation and adaptation policies in line with the long-term Paris Agreement goals. With particular regard to low-carbon technology diffusion, it is important for both developed and developing countries to adopt domestic measures that incentivise and encourage the transfer of technology in a complementary fashion.[35] Having effective forums for cooperation on low-carbon technology transfer facilitates that process. Furthermore, low-carbon technology transfer must be coupled with unilateral climate-motivated economic policy measures (eg border adjustment of carbon footprints) to alleviate any unreasonable costs on low and middle-income countries abroad.[36]

International human rights law is a non-reciprocal legal regime characterised by the absence of forces inducing compliance. According to Oona Hathaway, it is 'an area of international law in which countries have little incentive to police non-compliance with treaties or norms'.[37] This, combined with the weak enforcement

[32] Cottier, 'The Principle of Common Concern of Humankind' (n 3) 63.
[33] ibid 64–65.
[34] ibid 65–68.
[35] Ahmad (n 2) 129–31, 146–47.
[36] ibid 4.
[37] Oona A Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111 *Yale Law Journal* 1935.

mechanisms, is emblematic of the domain of human rights.[38] It is against this background that states often ratify human rights treaties without a strong desire or incentive to implement them domestically.[39] Building upon the cornerstone principle of international law – *pacta sunt servanda* – the CCH-derived homework responsibility can enhance the obligation on the part of states to prevent, avoid and remedy systemic violations of human rights as a matter of international law.

(iii) Securing Compliance Unilaterally

The final normative proposition of the doctrine involves the securing of compliance. Once again, stemming from the fact that inadequate compliance and free-riding tend to become the norm rather than the exception when it comes to other-regarding shared issues like climate change, it is proposed that recognition of a CCH logically would require all states to adopt appropriate countermeasures to preclude free-riding and non-compliance.[40] Cottier finds existing rights to act available to states under international law as insufficient, because states' willingness to exert such a right on common interest is dictated by politico-economic calculations, as well as by the ability to act.[41] Hence, it is foreseen that the principle of CCH should further facilitate the legal foundations of a responsibility to act, through the use of other-regarding extraterritorial measures, in pursuance of the concern.[42] Furthermore, it should also be noted that the obligation to act through countermeasures (including sanctions) is further structured by the doctrine. Recourse to such a measure would only be taken when necessary, and executed with prior information, proportionately and in a transparent manner.[43] Measures taken should also be subject to judicial review.[44]

The use of unilateral economic coercion to improve the performance of climate actions in general or low-carbon technology transfers in particular is problematic. Practically, sanctioning states unwilling to transfer low-carbon technologies to developing countries is difficult to implement, as large economies capable of imposing such sanctions are themselves the biggest source of low-carbon technologies. Alternatively, it is possible to think about sanctioning

[38] Bogdanova (n 2) ch 3.

[39] For motivations behind ratification of human rights treaties, see Oona A Hathaway, 'Why Do Countries Commit to Human Rights Treaties?' (2007) 51 *Journal of Conflict Resolution* 588; for empirical studies analysing the effect of human rights treaties on protection of human rights, see Bogdanova (n 2) 197–200.

[40] Cottier, 'The Principle of Common Concern of Humankind' (n 3) 69–70.

[41] ibid 72–73.

[42] ibid 75–76.

[43] ibid 76–77.

[44] ibid 77.

economies that are wilfully and unreasonably slow in adopting low-carbon technologies. Such an approach may even become feasible in regimes such as the WTO law, where states are allowed to adopt measures they consider necessary in the backdrop of an 'emergency in international relations'.[45] The challenge is that the existing law grants nearly unrestricted policy freedom in this regard, without any requirement for the sanctions to be proportional, or to respect the principle of common but differentiated responsibility.[46] The likely relevance of the doctrine of CCH in this regard will be to add further structure and limitations to the exercise of security-motivated trade sanctions in the climate context.[47]

The relatively widespread acknowledgement of the need to enhance human rights protection has not led to changes in the interpretation and application of the secondary rules of international law, such as rules on state responsibility. In other words, the dichotomy between an inspirational attitude towards human rights protection and the right to resort to third-party countermeasures persists.[48] Hence, individual states willing to respond to situations of grave human rights violations, for example by imposing unilateral economic sanctions, might find it difficult to justify these actions as permissible countermeasures.[49] To a significant extent, the same conclusion applies to the *lex specialis* regime established by WTO Agreements that explicitly carve out the applicability of the general rules on state responsibility and do not explicitly endorse the protection of human rights as an exception. The proposed CCH framework suggests that in situations of grave and systematic human rights violations that meet the threshold of being recognised as a common concern, individual states might act unilaterally if the state on whose territory these violations occur neither engages in international cooperation nor resolves the situation.[50] Seen this way, CCH puts forward a *de lege ferenda* proposition on how to distinguish between legal and illegal recourse to unilateral measures in response to human rights violations occurring abroad.

[45] See, among others, Art XXI(b)(iii) of the General Agreement on Tariffs and Trade 1994 (Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 UNTS 299; 33 ILM 1197 (1994)); Ahmad (n 2) 265–67.

[46] Ahmad (n 2) 250–55.

[47] ibid 271–73.

[48] While the Draft Articles on Responsibility of States for Internationally Wrongful Acts do not explicitly endorse the right of non-injured states to rely upon countermeasures, the legality of third-party countermeasures (countermeasures in general interest) remains debatable. Martin Dawidowicz, *Third-Party Countermeasures in International Law* (Cambridge University Press, 2017); Martin Dawidowicz, 'Third-Party Countermeasures: A Progressive Development of International Law?' (2016) *Questions of International Law*; Martin Dawidowicz, 'Public Law Enforcement without Public Law Safeguards? An Analysis of State Practice on Third-Party Countermeasures and Their Relationship to the UN Security Council' (2007) 77 *British Yearbook of International Law* 333.

[49] Bogdanova (n 2) ch 4.

[50] ibid 302–05.

C. Subsequent Progress of the CCH

The CCH continues to thrive in the international arena as an emerging legal principle. Its evolution up till 2020 is well documented in the work of Professor Cottier.[51] It is somewhat counterintuitive that, since then, notwithstanding the crisis of the rules-based international order, states have continued to call upon the notion in established regimes like climate change. Decisions adopted by the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement (CMA) have repeatedly referred to the CCH in the preamble of the Agreement and its connection to human rights guarantees. Work at the CMA has also transformed CCH into strict reporting obligations for state parties regarding, inter alia, market-based mitigation cooperation.[52] The notion has continued to be re-endorsed elsewhere too. In the legal regime on biodiversity conservation, the 2022 Kunming–Montreal Biodiversity Framework reiterated that 'reversing the loss of biological diversity, for the benefit of all living beings, is a common concern of humankind' and invited its implementation to be guided by the Rio Principles.[53]

The return of the CCH into the ILC guidelines for the protection of the global atmosphere,[54] where previous wide criticism led to the term 'pressing concern' being used,[55] is a strong testimony to the broad acceptance of CCH as a legal expression by the states and a shared interest in its continued use and growth. It

[51] Cottier, 'The Principle of Common Concern of Humankind' (n 3) 11–24.

[52] For example, the initial reporting obligation under Art 6, para 2 of the Paris Agreement requires a party to describe how each cooperative approach will reflect the 11th preambular paragraph of the Agreement, which recognises climate change as a common concern of humankind and requires parties to promote and consider human rights obligations. See para 18(h)(iii)(ii) of the Annex in UNFCCC, 'Guidance on Cooperative Approaches Referred to in Article 6, Paragraph 2, of the Paris Agreement: Annex' (UNFCCC 2021) FCCC/PA/CMA/2021/L.18 https://unfccc.int/sites/default/files/resource/cma2021_L18Epdf. Similar reporting obligation also exist under Art 6, para 4 of the Paris Agreement.

[53] UNEP, 'Decision 15/4: Kunming-Montreal Global Biodiversity Framework (GBF)', *Report of the Conference of the Parties to the Convention on Biological Diversity on the Second Part of Its Fifteenth Meeting, CBD/COP/15/17* (2023) Annex, para 7(k), www.cbd.int/doc/c/f98d/390c/d25842dd39bd8dc3d7d2ae14/cop-15-17-en.pdf.

[54] International Law Commission, 'Draft Guidelines on the Protection of the Atmosphere 2021', *Report of the International Law Commission: Seventy-Second Session, A/76/10* (United Nations 2021) paras 39ff, https://legal.un.org/ilc/reports/2021/english/a_76_10_advance.pdf. The preamble to the guidelines hold that 'atmospheric pollution and atmospheric degradation are a common concern of humankind'.

[55] Initially, Special Rapporteur Murase's proposal to incorporate common concern as a substantive guideline was criticised and rejected by the ILC members. See Cottier, 'The Principle of Common Concern of Humankind' (n 3) 21–23. As a result, the 'draft guideline 3 on the common concern of humankind [was] moved to the preambular section of the draft guidelines. The Drafting Committee recommended that the expression "common concern of humankind" should be changed to "pressing concern of the international community as a whole", and it was included in the preamble in that form.' Shinya Murase, 'Third Report on the Protection of Atmosphere – 68th Session of the International Law Commission' (2016) A/CN4/692, para 3. At the time, most ILC delegates (including China, Finland [on behalf of Nordic countries], France, Israel, Japan, Republic of Korea, Singapore, Spain, Sri Lanka) supported the change. Only a handful (Federated States of Micronesia, Germany, Portugal) preferred the original expression ibid 5, nn 8–9.

is also true that there are no comparable legal expressions available to the international community that can serve the purpose of highlighting the pressing need to work together on a specific challenge. Moreover, the use of different languages only deprives clarity in understanding states' roles regarding a common interest problem. Most importantly, after the return of CCH in the Paris Agreement, states' views on the relevance and utility of the notion changed overwhelmingly.[56] In the context of the Commission's mandate regarding the 'progressive codification of international law', the inclusion of CCH in a new area of shared interest not only cements its status as an emerging principle of global law, but also attaches great importance to the work of specifying its normative scope.[57] This is also where Professor Thomas Cottier's contribution lies.

During the negotiation phase of the recent Biodiversity Beyond National Jurisdiction (BBNJ)[58] Agreement, efforts were made, inter alia, by the International Union for Conservation of Nature (IUCN) to have CCH included as a general principle therein.[59] This evidences the growing interest among state and non-state stakeholders to adopt CCH as a legal principle. However, those efforts were not successful on this occasion. Given the close relationship between the BBNJ Agreement and the Law of the Sea Convention, as well as the recognition of the deep seabed area as a common heritage of mankind in the latter instrument,[60] the parties chose to side with the common heritage approach in the former.[61] Scholars have already pointed this out as a missed opportunity.[62]

Back in the climate change legal domain, CCH has also started to seep into formal legal claims and reasonings. In *Verein Klimaseniorinnen*,[63] the European Court of Human Rights has picked up on the repeated legal recognition of climate

[56] Germany, the Netherlands, Portugal, Finland, Japan and Antigua & Barbuda proposed the re-inclusion of the expression. UNGA, 'Protection of the Atmosphere: Comments and Observations Received from Governments and International Organizations' (International Law Commission, 72nd Session 2020) A/CN4/735.

[57] On behalf of the Nordic countries, Finland noted that 'Insofar as the omission of a reference to the protection of the atmosphere as "a common concern of humankind" was related to a lack of clarity as to the precise legal implications of the concept, the Nordic countries would consider the draft commentaries a worthy opportunity for the Commission to contribute to its clarification.' ibid 14–15.

[58] Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (BBNJ Agreement) 2023.

[59] The IUCN argued that protection of biodiversity is already recognised as a common concern in IUCN, 'IUCN Briefing for BBNJ Negotiators: Principles and Approaches, Part I, Article V' www.iucn.org/sites/default/files/2022-07/iucn-briefing-principles-final.pdf IUCN.

[60] United Nations Convention on the Law of Sea 1982 (1833 UNTS 397) Art 136. It holds that 'The Area and its resources are the common heritage of mankind'.

[61] BBNJ Agreement, Art 7(b).

[62] Jingchang Li and Wangwang Xing, 'A Critical Appraisal of the BBNJ Agreement Not to Recognise the High Seas Decline as a Common Concern of Humankind' (2024) 163 *Marine Policy* 106131; Sarah Lothian, 'Forget Me Not: Revisiting the Common Concern of Humankind Concept in the BBNJ Context' (2021) 38 *Environment and Planning Law Journal* 189.

[63] *Verein Klimaseniorinnen Schweiz and Others v Switzerland* [2024] European Court of Human Rights Application No 53600/20.

change as a 'common concern of humankind' and its connection with intergenerational equity.[64] Drawing upon it, the court was able to strengthen the linkage between human rights and climate change,[65] and to enhance the legal standing of associations to strengthen the rights of future generations before the court.[66] The CCH is also expected to make an impact in the legal reasonings of the upcoming climate change advisory opinions from key international courts and tribunals. For example, in its written statement submitted to the International Court of Justice in relation to the advisory opinion on climate obligations of states, Switzerland relied on CCH to provide a wider meaning to the state's obligation to prevent harm, as well as to urge concerted action by all states.[67]

In the human rights field, CCH has not yet been explicitly endorsed. That said, recent developments point to the potential gap-filling function that the CCH doctrine can serve. In particular, the idea of utilising the CCH as an instrument legitimising the use of unilateral economic sanctions in situations of grave and persistent human rights violations has gained some interest and traction.[68] This should not come as a surprise: the recent scholarly debate increasingly discusses the interrelations between unilateral economic sanctions and the human rights obligations of states that impose such measures.[69] In this ongoing discussion, economic sanctions are instrumentalised either as an instrument to promote human rights and their enforcement, or as policies that violate human rights obligations of the states imposing them.[70] In a way, this discussion is part of a perennial overarching debate on the per se legality or illegality of unilateral economic sanctions. The latter, as well as the former, debates suffer from the same deficiency – there are hardly any deliberations on the rules or principles that might legitimise the use of unilateral economic sanctions. In this context, the CCH and its normative implications that apply as a logical sequence of steps provide a much-needed guidance on the permissible use of unilateral economic sanctions.

[64] ibid 104, 133ff.

[65] ibid 451.

[66] ibid 489 and 499.

[67] Swiss Confederation, 'Obligations of States in Respect of Climate Change: Written Statement by the Swiss Confederation' (18 March 2024) paras 20, 81. Copy held by the authors.

[68] Two reviews of the book *Unilateral Sanctions in International Law and the Enforcement of Human Rights: The Impact of the Principle of Common Concern of Humankind* by I Bogdanova paid particular attention to the part of the book wherein the role of CCH framework in legitimising unilateral economic sanctions is discussed. Alexandra Hofer, 'Iryna Bogdanova: Unilateral Sanctions in International Law and the Enforcement of Human Rights: The Impact of the Principle of Common Concern of Humankind' (2023) 83(3) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 545; Christina Seewald, 'Iryna Bogdanova (ed): Unilateral Sanctions in International Law and the Enforcement of Human Rights: The Impact of the Principle of Common Concern of Humankind' in P Czech et al (ed), *European Yearbook on Human Rights* (Intersentia, 2023) 685–88.

[69] Jean-Marc Thouvenin, 'International Economic Sanctions and Fundamental Rights: Friend or Foe?' in Norman Weiss and Jean-Marc Thouvenin (eds), *The Influence of Human Rights on International Law* (Springer, 2015); Iryna Bogdanova, 'Human Rights and Unilateral Economic Sanctions: A New Perspective on a Twisted Relationship' in Czech et al (n 68).

[70] Bogdanova, ibid.

III. Common Concern and Sovereignty: A Contested Relationship

A. A Nuanced Portrayal of Sovereignty in the CCH Doctrine

The doctrine of common concern of humankind is premised upon a nuanced understanding of national sovereignty. On the surface, its claim for strict state obligations flowing automatically in specific, objectively determinable circumstances and events (ie common concerns) may seem to go against the fundamental precepts of sovereignty, self-determination and liberty. However, Cottier dispels this misunderstanding with several arguments. First and foremost, he argues that the CCH does not do away with the importance of consent as it does not compel any state to subscribe to it.[71] Furthermore, tracing the emergence of sovereignty as a concept through history, Cottier shows that its roots lie in a state's legally assigned function of ensuring peace, security and welfare of those in its charge.[72] When citizens' welfare is inextricably linked to the availability of specific global public goods, sovereignty must be understood in such cooperative terms that make production of those goods feasible.[73] Modern notions of sovereignty call for a duty-oriented conceptualisation, endorsing states' responsibility to address common concerns as a part of discharging their role as a sovereign.[74] Hence, there are no conflicts between sovereignty, self-determination and addressing common concerns along the above-outlined avenues. This responsibility-oriented, cooperative understanding of sovereignty is also reflected in Cottier's work on another emerging principle, ie the 'responsibility to protect' (R2P).[75]

While sovereignty as a concept at the centre of present-day international law and relations is hardly ever questioned, its precise content and the limits imposed on it by international law remain a contentious issue. Framing sovereignty as a legally circumscribed notion containing core responsibilities, effective discharge of which is essential to the reflexive legitimation of sovereignty itself, is what Koskenniemi termed a 'legal approach'.[76] This approach is the foundation of many solidarist international legal arguments that suggest the use of equitable principles

[71] Cottier, 'The Principle of Common Concern of Humankind' (n 3) 55.

[72] ibid 56–57. Among others, Cottier draws upon the works of Jean Bodin, who proposes welfare as the defining responsibility of a sovereign. As we will see later, Koskenniemi also refers to Bodin as an example of legal approach to sovereignty. See Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument: Reissue with a New Epilogue* (Cambridge University Press, 2005).

[73] ibid 58.

[74] ibid.

[75] Krista Nakavukaren Schefer and Thomas Cottier, 'Responsibility to Protect (R2P) and the Emerging Principle of Common Concern' in Peter Hilpold (ed), *The Responsibility to Protect (R2P)* (Brill Nijhoff, 2015) https://brill.com/view/book/edcoll/9789004230002/B9789004230002-s005.xml.

[76] Koskenniemi (n 72) 228–29. Among others, Koskenniemi gives examples of Bodin (sovereignty remains condition by the commands of the God and Nature), Kelsen, Hart and Verdross (state sovereignty and subjection to international law is one and the same thing), and equates the approach with the notion of 'international community'. ibid 229 and fns 15–17.

to balance conflicts of interests among competing sovereigns.[77] To prevent sovereignty from turning into a blank cheque of policy-making ('apologism', per Koskenniemi), the legal approach advocates for the assumption of a normative code, envisaged 'in terms of interdependence, common interests and shared progressive morality or legal logic'.[78] However, as Koskenniemi also points out, the challenge to a legal approach to sovereignty comes from the fact that states have little practical utility of a notion that cannot solely legitimise states' liberty to act and requires further normative validation itself. This leads to the opposing camp's view that law, including international law, must accommodate itself with (ie recognise the superiority of) the fact of sovereignty.[79] This approach fuels views such as the subjugation of international law to a state's will, the primacy of municipal law over international rules, the claim of domestic jurisdiction or that the functions of an international organisation are dependent on the mandate agreed by states.[80] Although Koskenniemi's account is from decades ago, it has a strong resonance with recent world affairs, to which we turn below.

B. Sovereignty Strikes Back

In many ways, recent developments in international affairs present themselves as the antithesis of the expectations placed on international relations by the doctrine of common concern of humankind. What can only be seen as a snowballing of parochialism fuelled by the self-serving actions of the powerful has magnified the distance between local and global interests over the past decade. This has played out along several routes – populism-triggered securitisation of economic rivalry, disregard of the rules-based global order and a concomitant weakening of multilateral institutions (eg the WTO, the UN Security Council). These developments are further exacerbated by what Tom Ginsburg terms as a turn towards an 'authoritarian international law'.[81] One of the distinctive features of this new approach to international law is that authoritarian regimes favour the absolutist notion of sovereignty and emphasise non-intervention/interference in internal affairs.[82]

[77] ibid 230–31.

[78] ibid 231 and fn 20. This aptly describes the founding basis of common concern and the supporting scholarly view. In a similar vein, Malcolm Shaw, in his recent contribution to the Hague Academy courses, underlined that 'the international community, essentially the community of States, has agreed to mitigate the absolute nature of territorial sovereignty to be able to confront and deal with challenges that transcend the boundaries of any one State': Malcolm Shaw, 'A House of Many Rooms: The Rise, Fall and Rise Again of Territorial Sovereignty?' (2021) Inaugural Lecture, Hague Academy of International Law.

[79] Koskenniemi (n 72) 231–32. 'To be a State is … a question of fact which the law can only recognize but cannot control' (232). Koskenniemi further draws upon Schmitt as example (226–27 and 231).

[80] ibid 232–33.

[81] Tom Ginsburg, 'Authoritarian International Law?' (2020) 114 *American Journal of International Law* 221.

[82] Ginsburg argues that authoritarian states are 'returning us to a world of Westphalian international law, primarily as a defensive measure': ibid 228.

What is more, authoritarian states are using existing norms and institutions – 'building on and repurposing some of the norms of the liberal era' – for purposes antithetical to these norms and institutions.[83] This is evident in the field of international human rights law, for the reason that authoritarian regimes are preoccupied with their survival, which could be achieved only through the oppression of any potential opposition domestically and through the lack of transparency.[84] Authoritarian regimes such as the People's Republic of China have been actively engaged in the work of international organisations responsible for monitoring and enforcing human rights globally. There is a growing body of literature on what instruments have been used to contest the perception of human rights as a matter of international concern, focusing on a narrowly defined approach to human rights as a matter of purely domestic concern that is shielded from international scrutiny by the notion of state sovereignty.[85] These changes also affect domestic human rights policies: according to Wayne Sandholtz, as the number of authoritarian regimes and their power grow, the effectiveness of international human rights law at the domestic level declines.[86] Put together, this can be seen as a resurgence of a fact-based outlook of sovereignty, as was described by Koskenniemi, asserting its precedence over the rules-based international order.

In the climate regime, the legal flexibility accorded to sovereigns under the Paris Agreement has led to a collective failure to live up to the Agreement's temperature reduction commitments.[87] Adverse consequences are already perceptible in the early onset of climate hazards and the imminent reaching of irreversible climate tipping points.[88] With regard to climate technology, economic and financial barriers continue to be the main hurdle in effective technology transfers to developing countries.[89] Such a deplorable pattern is reinforced by the trend of disproportionately low amounts of financial resources flowing into climate technology-related activities (eg renewable energy, electrification, green buildings, waste management)

[83] ibid.

[84] ibid.

[85] Yu-Jie Chen, '"Authoritarian International Law" in Action? Tribal Politics in the Human Rights Council' (2021) 54 *Vanderbilt Journal of Transnational Law* 1203.

[86] Wayne Sandholtz, 'Resurgent Authoritarianism, Rights, and Legal Change' in Nico Krisch and Ezgi Yildiz (eds), *The Many Paths of Change in International Law* (Oxford University Press, 2023).

[87] UNEP, *Emissions Gap Report 2023: Broken Record – Temperatures Hit New Highs, yet World Fails to Cut Emissions (Again)* (United Nations Environment Programme, 2023) 6–9, https://wedocs.unep.org/20.500.11822/43922. Just the USA and the EU were responsible for one-third of the global emissions between 1850 and 2021. The G20 countries together were responsible for 75% of emissions during the same period. In contrast, the least developed countries were responsible for only 4% of global emissions during that period (8).

[88] Intergovernmental Panel on Climate Change (IPCC) (ed), *Summary for Policymakers: Climate Change 2022 – Impacts, Adaptation and Vulnerability: Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2023) 9–11, www.cambridge.org/core/books/climate-change-2022-impacts-adaptation-and-vulnerability/summary-for-policymakers/016527EADEE2178406C4A7CE7DEAEACA.

[89] UNFCCC, 'Fourth Synthesis Report on Technology Needs Identified by Parties Not Included in Annex I to the Convention' (2020) Note by the Secretariat, FCCC/SBI/2020/INF.1, 20–22.

in developing countries.[90] At the same time, domestic policies in the major economies are fuelled by industrial policy motivations, driving the agenda along the avenues of unilateral protectionism.[91] Economic rivalry in climate-related industries, perceived security threats and persistent non-cooperation have put economic multilateralism in an existential mode – so much so that improving existing institutional mechanisms or establishing new ones to enhance the contribution of global economic policy to climate adaptation and mitigation seem like a far cry from reality.

The above-outlined conflict between the expected nature of sovereignty and its actual exercise in practice allows us to draw conclusions along two dimensions. Factually, the benefit-to-cost ratio for engaging in multilateralism is declining for most of its prominent players. Apart from the traditional causes of collective action problems (eg heterogeneity, free riding) and the inability of the multilateral system to keep new powers from emerging and destabilising the balance, the rise of nationalist sentiments among the population that view common interest and cooperation as nothing but a burden explain this decline.[92] The broader, philosophical, conclusion is to see a Hegelian dialectical pattern in conflicting views on sovereignty. Like previous historical cycles, such as the 'end of history' era,[93] what we are presented with is essentially an interaction between a *thesis* (ie the CCH) and an *antithesis* (ie the pushback from sovereigns) in progress. What remains to be seen is whether the *synthesis* will bring us towards a shared global order. We turn to this question next.

[90] IPCC (ed), *Innovation, Technology Development and Transfer: Climate Change 2022 – Mitigation of Climate Change: Working Group III Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2023) 1684–85. In the urban context of the Asia-Pacific, see Peter Storey and Peter DuPont, *Climate Finance for Urban Technologies: Climate Technology Progress Report 2023: Speed and Scale of Urban Systems Transformation* (2023) 55–56.

[91] fDi Intelligence, 'Industrial Policies Are Mostly Motivated by Protectionism, Not Geopolitics' (17 January 2024) www.fdiintelligence.com/content/news/industrial-policies-are-mostly-motivated-by-protectionism-not-geopolitics-83358; Global Trade Alert, 'The Green Goods Trade War Is in Full Swing' (Globel Trade Alert; St Gallen Endowment, 2024) 9, www.globaltradealert.org/reports/131; Reda Cherif and Fuad Hasanov, 'The Pitfalls of Protectionism: Import Substitution v Export-Oriented Industrial Policy' (IMF, 2024) Working Paper 2024/086, www.imf.org/en/Publications/WP/Issues/2024/04/26/The-Pitfalls-of-Protectionism-Import-Substitution-v-546349; Kimberly Clausing and Catherine Wolfram, 'Putting Progress over Protectionism in Climate Policy' (PIIE, 19 December 2023) www.piie.com/blogs/realtime-economics/putting-progress-over-protectionism-climate-policy; Timothy Meyer, 'Copernican Revolution or Green Protectionism?' in Geraldo Vidigal and Kathleen Claussen (eds), *The Sustainability Revolution in International Trade Agreements* (Oxford University Press, 2024).

[92] Christine Schwöbel-Patel, 'Multilateralism' in Jean d'Aspremont and John Haskell (eds), *Tipping Points in International Law: Commitment and Critique* (Cambridge University Press, 2021).

[93] Francis Fukuyama, 'The End of History?' [1989] *The National Interest* 3; Roger Kimball, 'Francis Fukuyama and the End of History' [1992] *The New Criterion*, https://newcriterion.com/article/francis-fukuyama-and-the-end-of-history/.

IV. Contestation, International Order and Common Concern

Contestation remains an essential part of the evolution of a norm into a legal rule. For the purpose of this contribution, we apply the notion of a norm as an emerging pattern of state practice[94] whose scope as an applicable legal rule is not yet certain. Contestation tells the story of a legal rule's origin. However, once a norm is adorned with the legal form, its validity from a legal perspective depends on evidence consistency rather than contestability. This is why, compared to international relations studies, legal scholarship is less concerned with the understanding of contestations. Scholars of the former discipline are more accustomed to making structured analyses of the process of contestation in the context of norm life cycles.

Outlining a theory of contestation, Antje Wiener views the phenomenon as a 'meta-organising principle of global governance' and a necessary phenomenon for fundamental global norms to remain legitimate.[95] Contentions take place in four typical contexts: (i) regimes; (ii) international organisations; (iii) protest movements; and (iv) epistemic communities.[96] In each context, one of four modes – arbitration, deliberation, contention and justification – assumes a dominating role.[97] Wiener finds that norms operate in a tiered fashion. Sitting at the meta-level are fundamental type 1 norms (eg sustainability), which are of high moral importance but are less specific in content. Agreed at the highest level of governance, the type 1 norms require further flanking measures and support from adjacent norms to be implemented.[98] This is supplied by the organisational principles, or type 2 norms (such as common but differentiated responsibility), which are established through political practice at the interstate level (meso-level).[99] Lastly, type 3 norms are highly specific, with little or no room for negotiation. These are directives and regulatory measures that apply at the lowest (micro-)levels.[100] The degree of contestation increases as the norms go higher up the levels. Outlining a cyclical structure in the process of contestations validating norms, Wiener shows how such norms are not only validated formally, through negotiated settlements among high-level participants, but also socially recognised by groups and culturally validated by individuals.[101]

[94] Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 *International Organization* 887, 891–93.

[95] Antje Wiener, 'A Theory of Contestation – A Concise Summary of Its Argument and Concepts' (2017) 49 *Polity* 109, 114.

[96] ibid 113.

[97] ibid.

[98] ibid 119.

[99] ibid.

[100] ibid.

[101] ibid 117, 121.

Using this framework, the doctrine of CCH can be seen as an evolving organising principle (type 2) that informs several overarching fundamental norms (type 1), ie peace and security, sovereignty, as well as sustainability, demanding specific balances and interrelations among the latter. Furthermore, normative consequences of common concern – obligations of cooperation, homework and engaging unilateral measures – call for further implementation through substantive regulation at the meso- and micro-levels (types 2 and 3). The framework is useful in elucidating the particularly challenging nature of the forward progress of the CCH doctrine, as it shows that CCH seeks to influence the issues where shared global interests falling under the aforementioned fundamental norms overlap. As it proposes to limit the application of sovereign freedom to the interests of global peace, security and sustainability, formal contentions arise through deliberative processes in international regimes, adjudicative processes and epistemic communities. The framework also reveals the existing disconnect between the CCH and social movements in daily life, addressing which can serve as important reinforcement, especially to prompt the nation-state sovereigns in the right direction. Lastly, the framework outlines the dialectical progress of CCH towards validation. While the withdrawal from multilateralism and the rise in unilateral redress are a portrayal of the reaction the doctrine currently faces in multilateral regimes such as the WTO, rising legal and judicial recognition of the principle,[102] as well as growing epistemic support, strengthened by the devoted and relentless works by experts such as Professor Cottier, counters those forces. The outcome of this process will potentially be determined by the manner in which such contestations find validation in social and cultural terms. This, in turn, indicates the importance of highlighting as well as strengthening the homework and unilateral dimensions of the doctrine.

Therefore, the overarching conclusion is that in the ongoing journey of the CCH to come full circle by gaining broader acceptance and legal normativity, contestation does not lead to its demise. In the same vein, Sandholtz rightly argues that a rejection of a legal norm does not per se lead to its death or dismissal.[103] In the ongoing attempts to deny the shared interest norms, Sandholtz does not see anything novel, holding that 'if current challenges to international norms represent in part a reassertion of sovereignty, they portend not the emergence of new values but a re-emphasis on values that have been central to international law all along'.[104] Seeing the process of contestation as a 'dynamic marketplace of rules', where actors make bids and counter-bids,[105] the view expressed by Sandholtz also corresponds with those of Wiener and Cottier. This is particularly aligned to the

[102] See section II.C above.

[103] Wayne Sandholtz, 'Is Winter Coming? Norm Challenges and Norm Resilience' in Heike Krieger and Andrea Liese (eds), *Tracing Value Change in the International Legal Order: Perspectives from Legal and Political Science* (Oxford University Press, 2023) 51–52.

[104] ibid 50.

[105] ibid 55.

system of claims and responses elaborated by Cottier, which draws attention to the process of inducting a new principle into the body of international rules. The marketplace metaphor aptly portrays the ebb and flow of a dynamic and ever-continuing process.

V. Outlook: The Continued Relevance of CCH

Looking forward, the doctrine of CCH remains particularly relevant in present times, as it spearheads the fight to curb the resurgence of an international order shaped by an agglomeration of authoritarian and populist sovereigns. It remains capable of filling the shortcomings of the existing body of rules addressing shared challenges and delivering meaningful solutions, the lack of which gave rise to some of the dissatisfaction with the current system to start with. In that process, the ongoing contestations provide learning opportunities to revise our expectations, set new targets and contribute further to the resilience of CCH as an emerging legal principle. In this connection, it is noteworthy that Sandholtz proposes institutionalisation as a strategy to improve norm resilience.[106] At the international level, institutionalisation is pursued by embedding a particular norm in a broader framework. At the domestic level, wider incorporation of the norm helps. Institutionalisation also opens the opportunity for the norm to be socially and culturally validated.

In the climate change regime, the process of further institutionalisation of CCH as a grounding principle is well underway. Looking forward, a few important tasks remain to be undertaken in this legal setting. First, CCH should continue to be incorporated in the domestic and international legal processes as a key hook connecting enhanced, adequate and timely climate response measures to state obligations. Second, as unilateral economic measures taken in the service of climate goals will continue to grow in the foreseeable future, it is important to ensure that CCH is not picked up as an excuse to engage in disguised protectionism. Emphasis on prior cooperation, the exercise of good faith and states' abidance by the principles of proportionality, equity and differentiated responsibilities, as suggested by the doctrine, will be key. Lastly, continued epistemic engagement with the doctrine, especially claiming for its integration into climate policy measures at the domestic level and climate-adjacent legal regimes at the international level (eg the WTO), will remain crucial to opening up the avenues for social and cultural validity of the norm.

The institutionalisation of the CCH in the field of international human rights has not gained the same traction as have developments in the climate change regime. This unfortunate outcome happens at a time when human rights and their

[106] ibid 58–60.

effective protection through enforcement of state obligations have fallen victim to other major developments in international law. Two examples mentioned before in this chapter illustrate this: first, attempts to narrow down the nature of human rights to the benefit of an absolutist notion of sovereignty; and second, attempts to de-legitimise the use of unilateral economic sanctions, including the ones imposed against repressive regimes, on grounds of their alleged incompatibility with human rights.

The CCH doctrine, by embedding an idea of common interest and community norms into formal legal frameworks with respective rights and duties, can be seen as a legal instrument aiming at the de-politicisation of human rights. Furthermore, the idea of entangling human rights protection and international economic law might be of relevance in light of recent developments. If the views of Professor Tom Ginsburg on the nature of international law dominated by authoritarian states hold true, we would observe a growing relevance of international economic law and a significant decline in human rights law and its enforcement.[107] If this assumption stands, then it is high time to entangle the protection of human rights with international economic law, including through the encouragement of international cooperation, domestic actions and unilateral responses as the measures of last resort, as is proposed by the CCH.

Instead of a final word, we leave the reader with this prescient quote from Professor Cottier:

> While recognised in environmental law, [CCH] has a long way to go in other areas … A fully fledged principle of CCH may eventually emerge in customary law as an amalgamation of all these efforts. Courts of law may shape it one way or the other. It may evolve as a legal principle of multilevel governance equally applying within regional integration and federal and subfederal levels in addressing shared pressing problems. The general principle, once recognised, will then apply by default. But even before that state is reached, the blueprint of CCH inspires and gives directions, showing the way forward. It expounds what at the end of the day should be achieved in order to redress fundamental deficiencies in addressing collective action problems and the lack of reciprocal interests of states in areas of vital importance to humanity and future generations.[108]

[107] Ginsburg (n 81).
[108] Cottier, 'The Principle of Common Concern of Humankind' (n 3) 83.