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Greening Permanent Sovereignty through the Common Concern in the Climate Change Regime: Awake Custodial Sovereignty!

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Abstract

The preamble of the United Nations Framework Convention on Climate Change (UNFCCC), on the one hand, designates climate change and its consequences as the common concern of humankind and, on the other hand, affirms that states have the sovereign right to exploit their own resources. An important consequence of the common concern is that it *globalises* certain natural resources, which may be in conflict with the sovereign right of states concerning their natural resources. The UNFCCC is silent on the manner in which this potential conflict should be dealt with. It is accordingly the primary objective of this essay to reconcile the aforementioned notions pursuant to the needs of the international community in the era of climate change. Thus, an analysis of the legal content and consequences of permanent sovereignty and the notion of the common concern provide an understanding of how the common concern moulds the sovereign rights of states over their natural resources in the current phase of globalisation. The author proposes that common concern results in the development of custodial obligations for states, which lead to the emergence of custodial sovereignty.

A. Introduction

The preamble of the United Nations Framework Convention on Climate Change (UNFCCC) affirms that the "change in the Earth's climate and its adverse effects" are the common concern of humankind CCH.[1] According to Boyle et al., the phrase *common concern* indicates a legal status which is particularly different from permanent sovereignty, and its main consequence

1 See also UN GAR 43/53 of 6 December 1988.

is that it gives the international community a "legitimate interest in resources of global significance and a common responsibility to assist in their sustainable development".[2] However, the preamble of the UNFCCC affirms that states have the sovereign right to exploit their own resources. This reflects the notion of permanent sovereignty in international law, which entails the right of states freely to dispose of their natural resources.[3] The notion of common concern globalises certain natural resources and accordingly may be in conflict with the notion of permanent sovereignty, since the right of states over their natural resources must be exercised within the confines of the aforementioned global responsibilities. The UNFCCC, however, does not provide any clarity concerning the relationship between common concern and permanent sovereignty.

How should common concern and permanent sovereignty in the international climate change regime be reconciled? It is the primary aim of this brief essay to address this question.[4] It is this author's point of departure that the inclusion of the notion of the "common concern of humankind" in the UNFCCC invites reconciliation between permanent sovereignty and the global needs of the international community in relation to climate change. The author accordingly briefly reflects on the notion of permanent sovereignty. Furthermore, the author discusses the potential legal consequences of the common concern and subsequently determines how the common concern moulds permanent sovereignty in accordance with the needs of the international community in the current phase of globalisation. Accordingly it is the view of the author that the emergence of common concern in the context of the paramount importance of sustainable development in international environmental law further develops the content of the duties component of the right of states freely to dispose of their natural resources. This affirms that permanent sovereignty does not merely entail rights, but also global obligations for states, and accordingly imposes constraints on the exercise of permanent sovereignty. The author argues that common concern necessitates a custodial element. This reconfiguration of permanent sovereignty ensures the *greening* thereof in order to accommodate the pursuit of sustainable development through the exercise of sovereignty over natural resources. This

2 Birnie et al. (2009:128).

3 For an extensive analysis see Schrijver (1997) and Hossain & Chowdhury (1984).

4 I have dealt with this issue in general terms in a previous publication which constitutes the basis for my arguments in this publication. I shall therefore not repeat my previous arguments in detail. See Scholtz (2008:323).

marks a further development, since the needs of the international community require global cooperation in relation to climate change, and permanent sovereignty needs to respond accordingly. The article concludes with final remarks.

B. The Marriage between Permanent Sovereignty and Common Concern

I. Permanent Sovereignty is not Permanent

The so-called economic side of political sovereignty[5] has been included in several Multilateral Environmental Agreements, soft law documents and international declarations.[6] However, the origins of this notion can be traced back to the New International Economic Order,[7] where it was used by developing states as an important mechanism to overcome economic disparities and to curtail colonialist interference in the economic affairs of newly independent states.Article 2 of the Charter of Economic Rights and Duties of States encapsulates the core content of permanent sovereignty as it reads that "Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities".

The principle of sovereignty over natural resources has, however, evolved since its genesis during the post-war area. The rights-based focus of permanent sovereignty gradually changed to make way for the recognition that duties emanate from permanent sovereignty.[8] The development of interna-

5 Perrez (2000:97). See, however, Brehme (1967:8 note 9).

6 Examples include: Articles 3 and 15 of the Convention on Biological Diversity (1997); common Article 1 of the 1966 International Covenant on Civil and Political Rights and the 1966 International Covenant on Economic, Social and Cultural Rights; Principle 2 of the Rio Declaration; Para. 1.1 of the ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development (2002).

7 Para. 4(e) of the Declaration on the Establishment of a New International Economic Order UN GAR 3201-S.VI of 1 May 1974 and Article 2 of the Charter of Economic Rights and Duties of States, UN GAR 3281-XXIX of 12 December 1974. See for a discussion of the New International Economic Order: Bedjaoui (1979); Makarczyk (1988) and Hossain (1980).

8 Resolution 1803, for example, requires that permanent sovereignty must be exercised in the interest of the national development and well-being of the people. UN GAR 1803 (XVII) 14 December 1962.

tional environmental law and the prominence of sustainable development[9] have had a profound impact on the interpretation of permanent sovereignty.[10] For example, good neighbourliness imposes restrictions on the manner in which states may exercise their sovereign rights over their natural resources.[11] Furthermore, the interdependence[12] of states has resulted in the increasing emergence of international legal regimes for the cooperative management of natural resources pursuant to sustainable development.[13]

II. Common Concern: Chrysalis of Change

The need for concerted global action based on the common concern of humankind has become an important aspect of the management of resources[14] and accordingly has a further influence on the content of permanent sovereignty.[15] The designation of causes and/or responses as a common concern results in various interesting consequences.[16] Firstly, the common concern affirms the importance of fair and equitable burden-sharing.[17] Thus, legal measures concerning the common concern are characterised by differential treatment provisions.[18] The climate change regime provides perhaps one of the best examples of a differential treatment regime that relates

9 Sustainable development is viewed as the single most important concept in international environmental law in the "sense that the whole international environmental law has to be developed further under an overall sustainable development umbrella". Beyerlin (1996:112).

10 This is also recognised in the preamble of the United Nations Framework Convention on Climate Change (UNFCCC), which affirms that permanent sovereignty must be exercised pursuant to environmental and development policies and should not cause damage to other States.

11 The Stockholm Declaration of the United Nations Conference on the Human Environment of 1972, Article 21 (hereinafter The Stockholm Declaration).

12 See, however, Greig (2002).

13 Schachter (1977).

14 See Perrez (2000).

15 Scholtz (2008:323).

16 See Biermann (1996:431). See also Timoshenko (1995).

17 In accordance with The Hague Recommendations on International Environmental Law "costs should be shared equitably among states, taking into account historic responsibilities and present technical and financial capabilities". Para. 3 of The Hague Recommendations on International Environmental Law of 16 Augustus 1991, in: Bilderbeek (1992:194-202).

18 For an analysis of differential treatment, see Rajamani (2006).

to the common concern, since the common but differentiated responsibilities and respective capabilities principle is a core principle of the international climate change regime.[19]

It must also be borne in mind that *humankind* includes all members of the human species as a whole (present and future generations) and in this manner affirms intergenerational and intragenerational equity. Thus, the existence of the common concern seems to imply that permanent sovereignty should be exercised for the benefit of humankind, which consists of current and future generations.[20] This implies a departure from a state-centred exercise of sovereignty pursuant to a narrow national self-interest towards a more universalist approach, which takes cognisance of the common interest of the international community in relation to common concerns. Common concern opens a gateway for the importation of cosmopolitan[21] ideals in which the pursuit of global well-being plays an important role. It furthermore serves as an affirmation that other participants[22] in the international arena have an important role to play in relation to the common concern of these actors. Thus, CCH may serve as a catalyst for the further development of traditional legal subjectivity in international law[23] and give rise to legal obligations and

19 Article 3(1) of the UNFCCC reads that "The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof". The Kyoto protocol of 1997 under the UNFCCC reflects the Common but Differentiated Responsibilities and Respective Capabilities principle. In terms of Art. 3, Annex I parties (developed countries) are obliged to reduce their greenhouses gas emissions to at least five per cent below 1990 levels by 2008–2012, while developing countries are not under such an obligation. Furthermore, Article 10 structures certain obligations of the parties according to CBDR. Article 10(c), for instance, instructs developed countries to "take all practicable steps to promote, facilitate and finance the transfer of, or access to, environmentally sound technologies, know-how, practices and processes … in particular to developing countries.".

20 See in this regard, Trindade (2010:327–352).

21 See Pierik & Werner (2010).

22 Eminent scholars, such as Higgins have criticised the usage of the term *subjects* of international law and rather prefer other terms, such as *participants*. See Higgins (1995:39). See further Schreuer (1993:447).

23 According to Brunnée, *common interest* is a generic term. In some instances *common interest* may result in an international law rule that entails certain duties. In these instances "[w]e are faced with the phenomenon of a common interest so compelling that it alone formulates the rule and coincides with the rule's content." This means

rights that apply not only to states, but also to non-state actors. Non-state actors have an important role to fulfil concerning the pursuit of the common concern. The emergence of non-state actors, in particular environmental non-governmental organisations (NGOs), must be viewed in the context of the critique that exists that states are ill-equipped to meet the challenges posed by global environmental degradation, such as climate change.[24] This statement does not equate the primary and indispensable role of states in the international arena with that of other participants.[25] It is, however, indicative of an increasingly important participation of other non-state actors pursuant to the common concern in international environmental law.[26] This also means that the orthodox positivist doctrine of international legal personality,[27] which recognised only states as subjects of international law, will undergo further changes[28] in order to accommodate the proliferation of non-state actors. Thus, the common concern of humankind imposes a further qualification on permanent sovereignty in the sense that its exercise should be steered by the interests of humankind and further that not merely state cooperation is required in an age of interdependence, but that other non-state actors also have an important (albeit a different or complementary) role to play in pursuit of the well-being of humankind.

The complexity in relation to the reconciliation of the common concern with the principle of permanent sovereignty is illustrative of the tension between the international law doctrine preoccupied with a state-centred sovereignty and the need for changes toward a more universalist international community responsive to the challenges of globalisation.[29]

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that CCM is a facet of *common interest*. *Common interest* therefore serves as a driving force in the development of rules. Brunnée (1989).

24 Camilleri & Falk (1992:192).

25 This also does not mean that non-state actors should deserve the same legal recognition as states since "the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community". *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports (1949), 175.

26 See Yamin (2001:149).

27 See Cutler (2001).

28 This refers to the increasing acceptance of the legal recognition of other entities, such as international governmental organisations. See Klabbers (2003:353).

29 For an extensive discussion, see Bederman (2008).

III. Reconfiguration of Permanent Sovereignty towards Custodianship

What does the acceptance of CCH mean for permanent sovereignty? The UNFCCC recognises both concepts, without providing any answers in relation to the potential conflict between the concepts. The *concern* element does not carry with it any proprietary meaning, but relates to the causes as well as the responses[30] to global concerns. CCH may not as such have any direct proprietary meaning in relation to resources, but it nonetheless has an impact on territorial sovereignty. The common concern exists in relation to the consequences of climate change. The consequences of climate change are the result of the greenhouse gas emissions that occur in states and the way in which states regulate or omit to regulate the latter in terms of their territorial sovereignty. In the author's opinion, the atmosphere may be viewed as a global environmental resource, since it does not fit in any of the other categories, such as *shared resources*[31] or *global commons*,[32] where the *common heritage of humankind* applies.[33] The fact that CCH creates a legitimate interest[34] in relation to the actions (or omissions) of states in their own territories concerning global environmental resources may be difficult to reconcile with the right of states and peoples freely to dispose of their natural resources. Does the acceptance of the common concern mean that permanent sovereignty as a component of state sovereignty is redundant? The point of departure of the Meeting of the Group of Legal Experts to Examine the Concept of the Common Concern of Mankind in Relation to Global Environmental Issues was that *common concern* does not imply a

30 The CBD refers to the conservation of biological diversity as a common concern.

31 *Shared resources* is more relevant in situations of bilateral or regional transboundary pollution. Biermann (1995:9–10).

32 See, however, Vogler (1995:2ff.). The areas to which the common heritage of humankind is applicable are not subject to appropriation. This means that common heritage areas are owned by no one and states cannot make territorial claims to these areas. Joyner (1986). Global environmental resources may, however, be found in the territories of states.

33 Scholtz (2008:336). In my opinion, a global environmental resource is a renewable natural resource of which a part or the whole of the resource is located in the territory of a state, but which is needed and enjoyed by the whole of humankind. I have borrowed this term from Glennon (1990:34). The legal status of the atmosphere in international law is unclear. See Boyle (1991:7–13). It should also be borne in mind that the atmosphere should be distinguished from the territorial airspace of a state. The atmosphere refers to the layer of air above the territory of a state.

34 Birnie et al. (2009:128).

departure from state sovereignty, since states still possess permanent sovereignty over natural resources.[35] The author agrees with this assumption. States still have a right freely to dispose of their natural resources. Developing countries are in need of economic growth in order to alleviate poverty. Developing and developed states still have different environmental agendas. The developing world is plagued by *environmental problems of poverty* and the developed world by environmental problems deriving from the *excess of affluence*.[36] Recalling permanent sovereignty or rendering it obsolete will mean that the developing world will be unable to address its environmental problems. It may also leave the developing world vulnerable to 'eco-imperialist' motives of the more powerful developed world.[37] This means that permanent sovereignty still has an important role to play in accordance with its envisaged goal as a component to pursue development. However, in order to address its *environmental problems of poverty*, developing states must follow a path of development that is sustainable. This means that the importance of sustainable development in international environmental law must be taken into account when one interprets permanent sovereignty and its relationship with the common concern. It is therefore imperative to 'green' the economic side of sovereignty rather than to declare it obsolete. The question would accordingly rather be how the common concern changes[38] the right of states freely to dispose of their natural resources in order to respond to the challenges of global environmental degradation, such as climate change. This approach pursues the strengthening of international (environmental) law since it reconfigures permanent sovereignty pursuant to the overall objectives of sustainable development in international environmental law.

It must be borne in mind that the sovereign rights of states over natural resources have never been absolute.[39] This is recognised in the preamble of

35 Report of the Meeting of the Group of Legal Experts to Examine the Concept of the Common Concern of Mankind in Relation to Global Environmental Issues. See Horn (2004:237).

36 See Ntambirweki (1991:907).

37 Scholtz (2008:328).

38 This is in line with the idea that sovereignty as such is a dynamic concept which "can have a different meaning in different historical periods although certain essential characteristics remain". Schrijver (1999:70).

39 Permanent sovereignty has to be exercised in the interest of the people and subject to general international law. See UN GAR Resolution 1803 (XVII) 14 December of 1962. Article 21 of the Stockholm declaration imposes the principle of good neigh-

the UNFCCC, which affirms that permanent sovereignty must be exercised pursuant to environmental and development policies and should not cause damage to other states. It is accordingly the author's opinion that the common concern further moulds the interpretation of permanent sovereignty towards the duties[40] which this notion imposes on states in order to pursue sustainable development. But what does this mean for permanent sovereignty? The prominence of sustainable development and the development of international environmental law clearly have influenced the interpretation of permanent sovereignty towards an affirmation of the environmental duties of this notion. CCM, however, induces a further development in relation to permanent sovereignty since it relates to the territorial nature thereof. The fact that CCM creates a legitimate interest in the territorial acts of a state in relation to its global environmental resources cannot be easily reconciled with some of the elements[41] of sovereignty, such as territorial integrity and territorial sovereignty,[42] which allow for an exclusive claim over state territory. In general international law it is the primary objective of territorial jurisdiction to avoid conflicts of extraterritorial jurisdiction pursuant to the promotion of sovereign equality and non-intervention. The existence of CCM requires both an affirmation and qualification of permanent sovereignty. It necessitates the right of states freely to dispose of their natural resources, but also invokes the affirmation of the legitimate interest of other states in relation to global environmental resources and as such the custodianship of states over global environmental resources in their territories.

The author has previously coined the notion of custodial sovereignty in order to provide an answer to this messy question.[43] In accordance with this approach, a state is the custodian of its global environmental resources. Other states have an expectation that the relevant state will protect these resources

bourliness as a restriction on the manner in which States may exercise their sovereign rights over their natural resources.

40 This is in line with the thinking of Van Staden & Vollaard (2002). This is akin to the line of thought of the ICISS (2001). It must be borne in mind that this report is primarily concerned with the issue of military humanitarian intervention in cases of atrocities such as the large-scale loss of life or large-scale ethnic cleansing. The idea that sovereignty entails responsibility is, however, similar to the foundation of custodial responsibility.

41 See Steinberger, (2000:513). The updated version in the latest electronic format of the encyclopedia is still being developed.

42 Shaw (2008:489ff.).

43 Scholtz (2008:323).

for the whole of humankind. The custodial state has the right to dispose freely of its global environmental resources, but the latter right is restricted by the expectations and interests of other states. Thus, the custodial state has a duty to pursue sustainable development in its exercise of the right. In this manner the reconfiguration of permanent sovereignty acknowledges the primary right of custodial states over their natural resources. This right is, however, not absolute since it is balanced by custodial duties. This reinterpretation of permanent sovereignty respects the territorial integrity of states pursuant to sovereign equality and non-intervention, but takes cognisance of the realities of a single biosphere in a globalised world. Furthermore, other states are burdened with the duty to support the custodial state to fulfil its obligations in a cooperative manner. Two fundamental elements constitute the bedrock of the notion of custodial sovereignty. The first element concerns the common (global) responsibility of all states for the protection of global environmental resources. The second element concerns the differentiated responsibilities of states' contributions to the protection of these resources. Thus, differential treatment provisions are vital for the custodial model.[44] The common but differentiated responsibilities and capabilities principle in the UNFCCC and Kyoto Protocol therefore gives concrete expression to the elements of custodial sovereignty.[45]

C. Concluding Remarks

The reconciliation of common concern and permanent sovereignty introduces the imposition of a custodial element, which 'greens' permanent sovereignty since it ensures that permanent sovereignty may be exercised pursuant to sustainable development. It accordingly takes into account developments in relation to factual realities in a global and interdependent world, as well as the development of international law and the prominence of sustainable development. The impacts of climate change are oblivious to state borders and require global cooperation. The obsession of permanent

44 Cullet (1999:551). See furthermore Rajamani (2006) and French (2000:46).

45 Article 3(1) includes this principle as one of the fundamental principles of the international climate change regime. The international climate change regime is considered to be the "clearest attempt to transform, activate and operationalize common but differentiated responsibility from a legal concept into a policy instrument". See remarks by Joyner (2002:358).

sovereignty with territorial integrity leads one to question the relevance of this notion in a globalised world confronted by global environmental degradation, in particular climate change. Sovereignty does not accord with the factual reality of a single biosphere oblivious to state borders. This question is even more acute when one recalls the historical context of the development of permanent sovereignty. The latter concept constituted an important principle in the call for a New International Economic Order, which focused on the economic development and independence of decolonised states. It is commonplace that the goals of the NIEO have not been fulfilled and that equity and economic freedom have not been achieved in international law. It therefore also ensures that permanent sovereignty does not become an outdated relic of a bygone era which focused on the pursuit of a New International Economic Order in a cold-war context. It reconfigures permanent sovereignty in accordance with the demands and needs of the international community. Thus, it provides for a reflection of the sustainable development side of sovereignty in order to ensure that sovereignty reflects "not obstacles … but responsibility and opportunities to secure human values".[46]

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46 Henkin (2000:14).

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